

The Presbyterian Church (U.S.A.) has recognized in the past the necessity of holding responsible those who have

perpetrated gross war crimes or crimes against humanity.

The General Assembly of the Presbyterian Church (U.S.A.) has called for the strengthening of international institutions required for the cause of peace and justice, the development of nonviolent instruments for dealing with international issues, including calls for the establishment of international judicial mechanisms.

The "Rome Statute of the International Criminal Court" was approved at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 1998, for the purpose of creating an international tribunal for the prosecution of international crimes, including genocide, crimes of war, crimes against humanity, and crimes of aggression.

The Rome treaty holds the promise of helping to establish international mechanisms for the administration of justice, for those crimes long acknowledged to be contrary to the interests of peace and justice.

The necessity to adequately address issues involving international justice in its multiple aspects-- punishment for perpetrators of international crimes, the restorative needs of victims, and the redemptive actions necessary for the rebuilding of community-remains one of the unresolved challenges of the world community.

Any significant advance in the international rule of law deserves the support and participation of the United States.

A. Human Rights: A Mechanism for Justice

Neostnata Sivac and Jadranka Cigeh were beaten and raped by Serbian soldiers. The place, a detention camp near their hometown of Prijedor, in the former Yugoslavia. These events, like thousands of others, reflected the practice of ethnic cleansing that occurred during the tragic conflict in the former Yugoslavia. World outcry condemned such behavior as a crime of war. While the women struggle with their personal tragedies, the world flirts skittishly with the processes of justice. Rape has always been *part* of war. Now, can it be dealt with as a war crime?

Building the rule of law and the mechanisms for justice, hopefully, may someday mean not only justice for victims like Sivac and Cigelj, but also a climate where the rights and dignity of others are respected so that such crimes will not occur. A long and important first step was taken in the summer of 1998 in Rome when a diplomatic conference adopted a statute establishing an international criminal court.

B. *The Human Rights Justice Challenge*

A human rights revolution was sparked with the adoption by the United Nations General Assembly of the Genocide Convention (December 9, 1948), and the Universal Declaration of Human Rights (UDHR) (December 10, 1948). The UDHR set forth the rights, guarantees, and freedoms to which everyone is entitled in the context of a social and international order in which they can be fully realized. Genocide, in an impassioned response to the atrocities of World War II, was defined as "acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group . . ." such acts to include killing, causing serious mental or bodily harm to members, inflicting conditions of life calculated to bring about destruction, forcible transfer of children, or prevention of birth.

At that time, the UN called for the establishment of an International Criminal Tribunal as part of the International Court of Justice. A draft treaty was prepared in 1951 by the International Law Commission, but cold war politics ended that effort, such a step would have strengthened the rule of law in dealing with major international crimes.

Since 1948, the United Nations has given incredible leadership in the systematic codification of human rights law, reflected in dozens of major conventions. These have established international moral norms and standards for the guarantee and protection of human rights. Official and nonofficial monitoring processes are functioning. Yet, achieving adherence to these standards is another matter. Effective international judicial mechanisms are not in place to deal with those responsible for massive violations of rights, such as those involved in genocide, crimes of war, or crimes against humanity.



The world community is thus challenged to complete a judicial framework for the universal protection of human rights with authority to deal with human rights violators, be they states, individuals, or groups.

A major achievement toward that end was accomplished July 17, 1998. A treaty formally (known as the "Rome Statute of the International Criminal Court," (ICC) was adopted in Rome by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, which brought together 160 countries. The court builds on a considerable body of international law, the experiences of the Nuremberg and Tokyo War Crimes Trials, and the two existing tribunals set up by the UN Security Council covering crimes committed in Bosnia and Rwanda.

The contemporary effort to draft a treaty for a criminal court was renewed by the United Nations General Assembly early in the decade. A series of preparatory conferences, beginning in 1995, produced the basic document. Tire preparatory meetings and the conference itself engaged in debates on a number of issues. The Rome conference was designed to resolve major outstanding issues and adopt the document making it open for signature and ratification.

### *C. A Look at Precedents*

There has been a long historic effort to create an international judicial system. A Permanent Court of International Justice (World Court) was established in 1920. It was displaced by the creation in 1945 of the International Court of Justice (ICJ), which became part of the new United Nations system. The ICJ's jurisdiction is limited to legal disputes concerning treaties, questions of international law, evidence of a breach of international obligation, and reparation for such a breach. Neither the Permanent Court of International Justice nor its successor, the International Court of Justice, were given jurisdiction over criminal matters.

Following World War II, Germans and Japanese leaders were prosecuted during the Nuremberg and Tokyo War Crimes trials. These were trials conducted by victor countries against the leaders of the vanquished enemies. While setting precedents and establishing important legal principles for the trial of war criminals and perpetrators of atrocities, these did not lead to a permanent criminal judicial system.

### *D. The Contemporary Challenge and Response*

In light of the tragedies in Bosnia and Rwanda, and the ad hoc tribunals that have been established to deal with those situations, attention has turned to the task abandoned during the cold war. The practice of ethnic cleansing that occurred (and continues to occur) during the tragic conflict in the former Yugoslavia and the genocidal slaughters in Rwanda led to a world outcry condemning such behavior as crimes of war.

Currently special International Criminal Tribunals on Yugoslavia and on Rwanda are at work, charged to prosecute persons responsible in the first instance, for the atrocities perpetrated during the half-decade conflict in the former Yugoslavia; and in the second, for the mass murder that occurred in the Rwanda turmoil. Just as the difficulties of these tribunals have been plain, their existence highlights the problem of ad hoc selectivity. Why only these two situations, and not say Zaire, Cambodia, or the Sudan? The need for a universally effective judicial system is evident to international observers.

The necessity to bring violators to justice raises political, legal, and moral questions. How can individuals suspected of specific crimes be identified, indicted, arrested, and, if necessary, extradited and brought to trial, in the absence of appropriate international policing mechanisms? How can national reluctance to submit individuals or concerns to international authority be overcome? Can individuals be tried in absentia? Can witnesses be protected? Can a system deal with both the punitive, restoration, and redemptive aspects of justice? Is the creation of hope for human rights and dignity morally responsible without credible effort to assure the fulfillment of those hopes? What are the obligations of governments regarding arrest, extradition, and punishment? Will the court be a tool of the Security Council, limited to cases approved by that less-than-democratic body? What will be the obligations of governments regarding arrest, extradition, and punishment? How inclusive will be the criminalization of certain kinds of weapons considered inhumane or weapons designed for mass human destruction? Will, for instance, the inclusion of chemical and biological weapons, but not nuclear weapons, affirm the power status quo, while placing the onus on non-nuclear powers? With questions such as these before the world community, especially as it observes and reflects upon the difficulties faced at the special tribunals focusing on crimes committed in the

former Yugoslavia and Rwanda, the challenge and need remain formidable.

### ***E. Challenges***

The challenges encountered in establishing a viable International Criminal Court have been multiple.

First, underlying virtually every concern was the basic issue of the nature and limits of state sovereignty. The UN Charter is based on the principle of the sovereign equality of all its member states, yet its members are obligated to abide by the principles of the Charter itself. The UN is obligated to take collective action against those whose own actions threaten peace and violate the principles of justice. Hence, there is a constant, unresolved tension between sovereignty and international responsibility.

Second, there was the fundamental challenge of reconciling the two basic different approaches to law prevalent in the world, common law and civil law, and adjustments to a variety of judicial systems and methods. The very process of dialogue and encounter has produced many creative ideas requiring imagination, the willingness to compromise and to dream

Third, there was the need to define the nature and meaning of justice that should be the court's focus: punishment of perpetrators; reparations, where possible, for victims; and the redemptive elements necessary to enable communities to move beyond tragedy and end the cycles of violence that occur when justice is denied.

Fourth, there were the multitude of mechanics, such as the number of judges, the process of selection and their terms, the rules of procedure and evidence, the processes of protection for witnesses as well as the accused, and so on.

Obviously, the achievement of justice under the rule of law will not come easily or without difficulty. Just as obviously, without justice, peace and any possibility of reconciliation are hard to achieve.

### **F. The International Treaty: Significant Aspects**

1. The Rome Statute provides for a court composed of eighteen judges chosen on the basis of qualification and moral standing-no two to be from any one state. They may be nominated by member states and elected by secret ballot by the Assembly of State Parties. The court will function with three chambers: pretrial, trial, and appeals. The Office of the Prosecutor will be a separate, independent organ of the court. A registry will be responsible for the nonjudicial aspects of the court's work. The court will be located in the Hague.

2. *The* court will have jurisdiction under three circumstances: when called upon by the UN Security Council; when requested by signatory states; or when independently initiated for cause by the prosecutor, subject to review by a judicial panel. The third option gives the court a degree of independence, while building in checks and balances. Under discussion is some form of a pretrial chamber, independent of states.

3. The UN Security Council has a constricted role in relation to the court. It can refer matters to the court. By formal resolution, subject to the veto, it can tell the court not to hear a case. The Security Council can ask for a deferral in a situation where the case relates to political/security matters before the Security Council.

4. *The* relationship between the ICC and national courts is one of complementarity. The ICC does not replace domestic courts. National courts have the responsibility, where appropriate, to exercise jurisdiction over identified crimes. The role of the ICC must be to assure that if a state is unable or unwilling to see that justice is done, the capacity to exercise justice still presents itself. A suggestion that a mere claim by a country to exercise national jurisdiction would preclude other action was rejected on the assumption that a state could thereby simply bury crimes of international concern.

5. States are obligated to cooperate and comply with the orders of the court, in matters related to official requests for arrest, surrender, and extradition of individuals indicted, and to cooperate in investigations, gathering of

evidence, etc.

6. Member and nonmember states will be required to cooperate with the ICC, including states where the crimes have been committed, states whose nationals are among the accused of participation in the crime, and states where extradition is requested.

7. The court will have jurisdiction over four categories of offenses. The first three are clearly defined, having, for the most part, been already defined in international law: genocide, crimes against humanity, and crimes of war (i.e., humanitarian violations during the conduct of war). The crime of aggression was included, but the definition of aggression will await another process.

8. The court will be an independent treaty body in relation to the United Nations, giving it autonomy. The supportive authority of the United Nations, however, is exemplified in the right of the Security Council to make referrals under Chapter 7 of the UN Charter.

9. The court will be financed by states party to the treaty, paying assessments on an agreed upon scale similar to that of the UN itself. The court may receive contributions from governments, nongovernmental bodies, international organizations, etc. United Nations funds may be used, subject to General Assembly review, for costs in relation to Security Council referrals.

10. The treaty's concern for and provisions regarding women caught in situations of conflict is groundbreaking. For the first time in international law, specific acts against women are enumerated as indictable crimes: rape (particularly as systematically pursued as military policy), sexual slavery, trafficking and forced prostitution, enforced sterilization, and forced pregnancy can be considered under acts of war and genocide. In addition, the treaty seeks to assure not only procedural sensitivity, but also protection for victims and witnesses involved in trials. Public exposure of rape victims during trials can be a process of double victimization.

11. The extensive rules governing investigation, trial, protection of the accused and the victims, witness protection, rules of evidence, penalties, appeal, and review, have been informed by much of the best in contemporary jurisprudence.

12. Circumstances of imprisonment will be determined by the court, in facilities available in the member countries, or in the host country, as arranged, to be conducted under existing international treaty standards for governing conditions of imprisonment. Victims may be granted relief through reparations, restitution of property, compensation for loss, rehabilitation, either directly from the accused through fines and forfeitures, or from a trust fund to be established.

13. Following the standard increasingly set by democracies that are opposed to the death penalty, the maximum penalty for someone convicted by the court would be life imprisonment. No one can be prosecuted for a crime committed before the statute enters into force, or for a crime that is not so identified under the statute.

14. Efforts to include the use of weapons of mass destruction, including nuclear weapons, as crimes of war or against humanity failed. While lesser uses of violence are covered--the most horrific ones were exempted.

#### *G. The Rome Action*

On the final vote for the Rome treaty, 120 countries approved, 21 abstained, 7 voted no. The United States, in the end, opposed the treaty, along with China--the object of U.S. human rights criticism for some time--Israel, and Mexico, and three other countries. Three other Security Council members, the United Kingdom, France, and Russia, were joined in support by most Western democracies, many emerging democracies, and countries from all regions of the world.

The treaty will enter into force following the ratification of sixty countries.

Now that the treaty has been agreed upon, a long struggle for ratification, acceptance, and implementation will

remain.

## ***H. United States Reluctant Opposition***

The United States participated in the preparatory process and in the Rome Conference. While supporting in principle the concept of an ICC, the United States sought to limit the capacities and jurisdiction of a future court. Its efforts seem to have been primarily directed at limiting its jurisdiction rather than in creating a court with teeth.

In the months before the Rome Conference, and with some irony, the United States had authorized the unilateral arrest and trial of Pol Pot (who died before that could be implemented) and other leaders of the Khmer Rouge.

Voices from the Pentagon and Congress had stimulated fears that United States military personnel might be held accountable for crimes committed elsewhere. During this time period, the massacre by United States troops at Mi Lai was brought to mind as the United States honored the officers who halted the progress of that event

At the conference, numerous efforts by the United States to, in effect, create a weak court, were turned aside by overwhelming majorities. The United States wanted to limit the courts jurisdiction and its right to try Americans. The United States argument had a strange, perhaps self-fulfilling logic. Not only afraid of a strong court, but arguing that a strong court could never succeed, the United States sought a weak court, one bound to be viewed as either ineffective or a tool of the powerful.

The overwhelming number of nations, including most of the allies of the United States, preferred a sponger, more independent court. Does that mean the rest of the world is against the United States? No! It means that, although the United States argues for a place of leadership and for the means to assure justice, it is reluctant to have independent institutions of accountability.

## **I. Conclusion**

While it is obvious that adoption of the treaty by the Rome conference represents an overdue achievement in the human advance to a civil global order, ratification will not be easy, nor will its ability to function be effective, once in force, without the cooperation of most countries, including the United States and the western democracies.