

INTERNATIONAL COMMISSION OF JURISTS

WORLD CONFERENCE ON HUMAN RIGHTS

VIENNA, AUSTRIA, 18 JUNE 1993

ICJ WORKSHOP ON A PROPOSAL FOR UNIVERSAL JUSTICE:

A PERMANENT INTERNATIONAL PENAL COURT

SUMMING UP THE ICJ WORKSHOP IN VIENNA

The Hon Justice M D Kirby AC CMG

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**ICJ DISCUSSION PAPER: PROPOSED PENAL COURT**

This workshop was convened by the International Commission of Jurists (ICJ) as a contribution to the World Conference on Human Rights. It has taken place at the mid-point of the conference. It is fitting that the ICJ, as one of the oldest of the non-governmental organisations (NGOs) dedicated to human rights and the rule of law, should take a lead on this topic. It is understandable that the ICJ with its world-wide membership of judges, practising lawyers, legal academics and others, should focus its attention on an important gap which exists in the international institutions necessary to ensure respect for the rule of law. I refer to the lack of a permanent International Penal Court.

It has been an important focus of the ICJ's efforts at this conference to concentrate attention on the need for a permanent International Penal Court. To that end, the ICJ has produced a discussion paper. That discussion paper has concluded that an International Penal Court should be established as a full-time permanent, impartial and independent body, associated with the United Nations. Such a court

should have highly qualified, independent and impartial judges, appointed from all regions of the world. It should be vested with jurisdiction in relevant crimes against international law including genocide, apartheid, systematic violations of human rights, war crimes and other international criminal activity. It should ensure due process and fair trial as provided for (amongst other sources) by the *International Covenant on Civil and Political Rights*. It should contain a provision for the prosecution of offences by persons independent of the court. It should accept complaints from many sources and not be confined to jurisdiction conferred on it or admitted by particular States.

This was the proposal which was laid before the workshop. The debate upon it has been instructive. That debate will be taken into account as the ICJ refines its proposal for consideration by the international community.

#### WORK OF THE INTERNATIONAL LAW COMMISSION

The workshop opened with an exposition by a Commissioner of the ICJ and member of its Executive Committee, Professor Christian Tomuschat (Germany). He is also a past-President of the International Law Commission (ILC). As the ICJ Discussion Paper makes clear, the ILC has for some years been preparing a report on the possibility of an International Criminal Court within the context of a draft code of international offences against the peace and security of mankind. Professor Tomuschat outlined the work of the ILC and its attempts to codify the principles which found their early expression at Nuremberg in the work of the International Military Tribunal in Europe in its prosecution of the World War II Nazi war criminals. There were similar prosecutions of Japanese war criminals conducted in Asia. The idea behind the activities of the International Military Tribunal was that individuals were personally responsible and accountable for waging wars of aggression and for committing crimes against humanity. The draft code which has been prepared by the ILC is still under that body's review. But in connection with the code, the issue is starkly presented as to which organs of the international community will enforce the

rules once they have been adopted. So far, the General Assembly of the United Nations has not been able to give a clear answer to that question.

In 1992, the ILC special rapporteur (Mr Thiam) devoted his tenth report exclusively to international criminal jurisdiction. That issue was debated during the ILC's 1992 session. A working group was formed to examine the subject further. The report of that working group confirmed that establishment of an International Penal Court was a possible option. It set forth a number of recommendations. A draft statute for an International Penal Court was presented by Mr Thiam in March 1993. That statute is being considered by the ILC in Geneva at the time of this conference in Vienna. It is expected, as Professor Tomuschat reported, that the whole work of the ILC on its project concerning an International Penal Court will be concluded by 1994.

The President of the ICJ, Dr Joaquín Ruiz-Giménez (Spain) urged upon this workshop the need to complete the "unfinished symphony" of human rights. To do this it would be necessary to take a quantum leap of the human imagination. Until an effective institution was provided, the protection of fundamental human rights would not be ensured. Thus, it was when the European Court of Human Rights was established in Strasbourg that important practical gains for human rights were achieved throughout Europe. So it will be in the case of crimes against peace and humanity. These cannot be remedied at all, or at least effectively, in national courts. There is thus a need for an international instrument to address this Achilles heel of international law. According to Dr Giménez, an international conference on human rights should consider, in particular, the rights of victims. It should convert the "bla bla bla" of Vienna into positive action. The need is urgent. The crowning event of the Vienna conference would be acceptance of the urgent necessity of constituting an International Penal Court. Care would have to be taken to avoid politicising the court. Only judges of the highest integrity and calibre should be appointed. This impassioned call for action was ended by an appeal not to be satisfied with an *ad hoc* tribunal of the kind proposed to deal with the crimes in the former states of

Yugoslavia. Only a permanent international tribunal which would give real effectiveness to international law in this area

#### AD HOC TRIBUNALS & DOUBLE STANDARDS.

The Secretary General of the ICJ (Mr Adama Dieng) formally presented the ICJ's Discussion Paper to the workshop. He referred to the numerous favourable references which had been made to it during the Ministerial speeches to the Vienna conference. Amongst those references was that of the Australian Minister for Foreign Affairs (Senator Gareth Evans QC). In the course of his address, on 15 June, he said

*"The other matter with which we will need to deal concerns proposals for an International Human Rights Court. A feature of the post-Cold War period has been a growing call for a mechanism to try individuals for breaches of international humanitarian law and other international crimes. The establishment of an ad hoc tribunal to deal with such breaches in the former Yugoslavia is well advanced. The renewed vigour of the International Law Commission's work towards drafting a statute for an International Criminal Court is particularly gratifying as a means of addressing this general issue. I have also noted with great interest the proposal by the International Commission of Jurists in favour of the establishment of a permanent International Penal Court to prosecute those responsible for gross violations of human rights and humanitarian law. What these proposals have in common is a desire to make those who are guilty accountable to the international community."*

There were other Ministerial observations of a similar kind. But Mr Dieng made a telling point. It was that European interest in this process has largely been revived by the events in the former Yugoslavia. Who would have thought that Europe would have been presented with such a crisis? We can daily see on our television screens the evidence of such terrible cruelty and departures from international law. Yet the questions may legitimately be asked: where was European concern when an even more terrible more genocide took place in Cambodia in 1975-1978? Where was the concern about breaches of international law in Somalia or Angola or Tibet or East

Timor or in the other places where suffering humanity has been exposed to grave breaches of humanitarian law without any effective redress? A recognition of the double standards of the world community will help demonstrate the undesirability of *ad hoc* solutions which focus on the particular concerns in Yugoslavia. There is, of course, a need to redress and respond to the wrongs in Yugoslavia. But there is an equal need to respond to other like offences against human rights in every land and wherever they occur.

#### **PRACTICAL QUESTIONS: GATHERING EVIDENCE, CIRCUIT, PRISONS & GENDER**

Dr Rudolf Machacek (Honorary Member of the ICJ, Austria) made an important intervention. He recognised the legitimacy of the call for an international and permanent institution. But he urged that lawyers, governments and NGOs should commence work immediately towards collection of the evidence that would be needed to bring criminals to justice when eventually the necessary institutions are established. Dossiers should be collected. Photographs should be taken and kept. Depositions of victims should be recorded. A strategy should be adopted of collecting the evidence which would be available when eventually the international institution is put in place.

Mr Petitit (France) urged the importance of NGOs lobbying governments to secure their support for the establishment of an International Penal Court. It must be expected that some governments will react with concern and suspicion. Autocrats and oppressors cannot be expected willingly to cooperate in the establishment of courts to which they might be rendered subject. Mr Petitit too supported the strategy of gathering evidence which could be used to present cases, the careful preparation of which would be essential. He also emphasised the need to educate human beings in fundamental human rights and not to confine all efforts to faith in the sanction of courts and tribunals. Particular attention should be given to targeting special groups in

every country whose activities are important for respect for human rights, notably the army and the police.

Justice Dorab Patel (ICJ Commissioner, Pakistan) explored the possibility that an International Penal Court would be obliged to travel on circuit. He mentioned the desirability of having the court sit in or near the places of human rights offences so that justice could be seen to be done for the victims of human rights who seek vindication and the punishment of their wrong-doers if they are found guilty. He mentioned the special problem of the imprisonment of persons convicted of international crimes. This problem emerged with the post-War prisoners kept at Spandau prison in Berlin. Humanitarian considerations might suggest that the prisoners should normally be kept near their families. But this could sometimes present security problems. The vulnerability of such prisoners would need to be weighed

Ms Jennifer Green (New York) urged that particular consideration should be given to the gender dimension of international crimes against humanity. She mentioned the issues of wrongs against women and in particular rape and enforced prostitution in times of war.

Mr Halidou Ouedrago (ICJ) recalled the particular needs of African people for effective redress against those who were guilty of crimes against their human rights. He referred to the defects in the procedures presently available under the *African Charter of Human and Peoples' Rights*.

One Palestinian intervention asked how an International Penal Court would gain jurisdiction over persons accused of crimes against international law. If those persons hid behind nation States, which resisted submission to the jurisdiction of the court and refused extradition, there would not be much that an International Penal Court could do. On the other hand, some participants suggested that the establishment of such a court, and the growth of its jurisdiction, would break down, over time, the

resistance to releasing persons accused of crimes for trial in the court. Until a court was in place, this could not be achieved. Furthermore, the fact that the court was in place would put leaders, police, security and military personnel on notice that they stood at risk, potentially, of prosecution for any war crimes which they committed. That might, of itself, help to restrain at least some of the abuses against international law.

Four important dimensions for countries which have suffered serious abuses of human rights gave particular colour and content to the discussion of the ICJ proposal at the workshop. These came from Sri Lanka, Mauritania, Chile and Indonesia (Mr Nasution - ICJ). A number of the speakers from these countries urged that the ICJ and the international community generally should involve the victims in the preparation of the charter for the International Penal Court. Special consideration should be given in the procedures of that court to permitting the voice of the victims to be heard in a proper and effective way.

Some interventions from the floor of the workshop questioned whether it was necessary to have an International Penal Court. They asked whether the money would not be better spent on improving the *curricula* in schools and in educating people to respect human rights. My answer to these suggestions is that these are not true alternatives. Both strategies are needed. Yet, alas, there are in the world opinionated, cruel and tyrannical oppressors of human rights. Such people will not necessarily bend to the instruction of teachers and information about human rights standards, however wise and humane. Just as in our home jurisdictions we try to inculcate respect for other human beings by education at home, at school and in the community, yet keep in reserve the criminal law, police power and the courts to bring to justice and punish offenders against the law, so it should be in the international community. For those who understand only the language of power it is necessary that an organ of power should be created effectively to bring international law to the world community. This is where the ICJ's proposal comes in.



Mr Nigel Rodley (UN) expressed personal views about the danger of *ad hoc* tribunals and the need to consider closely the permanent international institutions of a Penal Court and a Human Rights Court and how they could best be established and relate to each other.

There were many other contributions to the debate. It was well attended. The comments were well focussed. They were helped in that regard by the publication, and prior distribution, of a precise discussion paper which advanced its ideas not in woolly generalities but in a clear, tangible proposal which is capable of achievement.

### **THE UNFINISHED SYMPHONY OF HUMAN RIGHTS**

The President of the ICJ talked of the unfinished symphony of human rights. Earlier this day, unable to sleep for the effects of travel, I walked around the empty streets of Vienna. I came upon the Opera House in the centre of the city. A hundred years ago exactly that master spirit of humanity, Gustav Mahler, was the principal conductor here. In his mind he was conceiving all the while the immortal music which is now played in concert halls in the four corners of the globe.

I walked to the rear of Mahler's Opera House. I found the conductor's entrance. Hesitantly, I put my hand on the doorknob which once the great composer and conductor grasped. I then realised how essential it is that we should all make our contributions to the completion of this unfinished symphony - one greater even than Gustav Mahler conceived. A symphony of human rights, of the rule of law and of people protected by independent judges and lawyers.

This is a symphony to which the ICJ is dedicated. It is for the completion of this activity that this workshop has been summoned together. We have not solved the problems of the International Penal Court; for to do so is beyond our powers. But we have lifted our voices and called for an effective mechanism to redress breaches of

international law, to protect the victims of human rights abuses and to call to account those who do great wrongs to their fellow human beings.

In doing this, we have played a useful part. May our voices be heard in the assembly of the nations and find reflection in the actions of the international community which come out of this Vienna conference!.