

**REPORT OF DISCUSSION-MEETING ON**  
**IMPUNITY & THE INTERNATIONAL CRIMINAL COURT**  
(held on 19 November 2005, New Delhi)

A discussion-meeting on ‘Impunity & the International Criminal Court’ was held on 19 November 2005 in New Delhi. This event was jointly organized by ICC-India, project of Women’s Research & Action Group and Human Rights & Law Unit of Indian Social Institute, New Delhi, in association with People’s Watch – Tamilnadu. *ICC-India* is a premier project started in 2000 for carrying out an awareness and advocacy campaign in India on the issue of International Criminal Court. It is an activity of Justice and Accountability Matters (JAM), a programme of Women’s Research and Action Group (WRAG), Mumbai. *The Indian Social Institute*, founded in 1951, is a centre for research, publication, social advocacy, training and action for social and economic development. *People’s Watch - Tamilnadu* is a pioneering organization in human rights engaged in monitoring human rights violations, documentation, research and training.

The objectives of this discussion-meeting were a) to comprehend the concept of impunity and its implications for human rights generally; b) to view international and domestic approaches and responses to the issue of impunity; and c) to understand the concept, principles and functioning of the ICC against the backdrop of international responses to impunity for grave human rights violations. The participants for this event included human rights activists, lawyers, law students and media persons.

Session 1:

- **Understanding Impunity:** *Ashok Agrwaal*, Advocate, Supreme Court
  - **Prosecuting the State – Approaches & Impediments:** *Ravi Nair*, Executive Director, South Asian Human Rights Documentation Centre
- Facilitator: *Madhu Mehra*, Executive Director, Partners for Law in Development

Ms. Madhu Mehra welcomed the participants and introduced the speakers for the session. Advocate Ashok Agrwaal commenced his presentation by discussing the meaning of ‘impunity’. He counter-posed ‘impunity’ with ‘rule of law’ in the context of states. He said that states were systems of consolidating power, and that power tended to become more and more absolute – with rule of law being an accountability principle that would mitigate this tendency of the state. He said that a major manifestation of impunity was when persons did not get punished for or were not made accountable to the crimes they commit. He explained how impunity existed in everyday life.

Advocate Ashok Agrwaal explained the meaning of impunity through the example of enforced disappearances in Punjab that took place between 1984 and 1994, and the illegal / secret cremations of the bodies of 1000s of persons killed by the Punjab police during this time. He said that in Amritsar district of Punjab alone, more than 2000 persons had been “disappeared”. Mr. Jaswant Singh Khalra, an activist who studied the cremation records and charged the state for extra-judicial killings, was himself “disappeared” subsequently, he said. Advocate Agrwaal explained how the Supreme Court and the National Human Rights Commission had themselves promoted impunity for the

perpetrators (Punjab police) through their inaction and inadequate action at several stages of the case. He further added other situations of impunity for grave human rights violations, such as the Telengana movement of Andhra Pradesh and the Naxalbari movement of West Bengal that were brutally crushed by the state.

The speaker also highlighted, with immense concern, the recent trend of the judiciary in awarding compensation to the victim, as a substitute for holding the perpetrators guilty. He said that money was being used to gag the victims and stifle their demand for justice. While money was intended for reparation and restitution, it was now being used to promote impunity, he said. Citing the landmark judgment of the Supreme Court in Sebastian Hongray's case, the speaker said that in cases of grave violations by members of armed forces in situations of insurgency, such as in north eastern states, the Supreme Court was more inclined to award exemplary damages but failed to punish errant army officers. This promoted large-scale impunity, he said.

Ravi Nair, in his presentation, read out the definition of impunity, as coined by the Human Rights Committee. He said that in India, there was a general acceptance of non-accountability and that a climate of impunity existed. He further explained two categories of immunity – official and diplomatic. He said that both the concepts were introduced into Indian law by the Government of India Act 1935 that was enacted by the British to protect themselves from prosecution. He lamented the fact that the same provisions had been incorporated into the provisions of the Indian Constitution, including Article 301, in the post-independence era. The Constituent Assembly debates prior to inclusion of Article 301 in the Indian Constitution centered around an argument of requiring sanction for prosecution of government officials, in order to prevent the state from getting demoralized into a dictatorship. Mr. Nair cited provisions in various legislations, including Armed Forces Special Powers Act, that allow immunity for human rights violations committed by government officials and require state sanction for prosecution of the errant official. In a recent case, Judge Sodhi had said that torture was not an official duty of the perpetrator, and hence no government sanction for prosecution was required. He said that when a national committee engaged in work relating to the review of the Indian Constitution some years ago, South Asian Human Rights Documentation Centre had made a representation before the sub-committee on fundamental rights, that no government sanction should be required for prosecution of a government official in custodial offences if prima facie case could be made out in an inquiry before a Sessions judge. This recommendation has not been accepted.

Mr. Ravi Nair further explained the impact of laws that promote impunity at the ground level, where individuals, families and communities are broken and their will to demand accountability is destroyed. In case after case in the Kashmir, north eastern states and part of Andhra Pradesh, public officials have been able to crush dissent and victims and their families refuse to approach the judiciary for justice, he said. He highlighted the fact that although compensation for violation of human rights is required as a remedy under the international treaties that the Indian government has ratified (such as CERD and ICCPR), such a remedy is not provided for under Indian law. Further, Mr. Nair stated that police have many ways of protecting their own interests, apart from intimidating

witnesses and victims. For example, when a police officer from Punjab – Ajit Singh Sandhu – committed suicide, the Punjab police struck a deal with the Indian government to prevent demoralization of the police force, using the power of Presidential pardon. He stated that the latest conviction in Khalra's case was intended at stopping international scrutiny and was yet another artificial buffer created by the state, similar to the creation of National Human Rights Commission itself. He concluded by saying that the battle against impunity needs to be fought by us with renewed vigour as otherwise, rule of law would remain a concept on paper.

Ms. Madhu Mehra thanked the speakers and added that some decades ago, the word "disappearance" did not exist and hence there were no words to describe the crime. Even now, many crimes are not acknowledged by the Indian statute books, she said, including crimes against women. The statute creating the International Criminal Court is a progressive document as it names many of these crimes for which we have no words under Indian law, she said.

The session was then opened for discussion, where issues discussed included: a) the usefulness of the Right to Information Act in ensuring state accountability for grave human rights violations; b) the significance of the judgment in Sebastian Hongray's case in acknowledging state accountability for a crime committed by its agencies; c) state-authorized impunity through "shoot at sight" orders and the definition of "government servant"; d) whether the role of civil society in Gujarat perpetuates impunity; e) experiences from Kashmir and north eastern states where the officials are trigger-happy and the families do not have any expectation of justice once the body of the victim is returned to them; f) the middle class attitude in India where persons are convinced that human rights violations by the state are inevitable to ensure national security and the need to seriously address such an attitude; g) dangerous trends of fast-track courts and speedy justice that violate due process of law, in the name of providing speedy justice; and h) the trend set by the drafting of Communal Crimes Bill, the provisions of which have been taken from POTA, TADA and other such draconian laws, and the consequences of such provisions in promoting impunity.

Session 2:

- **Responses of International Law to Impunity:** *Dr. Usha Ramanathan*, Law Researcher and Honorary Fellow, Centre for the Study of Developing Societies
- **International Criminal Court:** *Dr. M.P.Raju*, Advocate, Supreme Court

Facilitator: *Pouruchisti Wadia*, Assistant Coordinator, ICC-India

After Ms. Pouruchisti Wadia introduced the speakers of the next session, Dr. Usha Ramanathan started her presentation by commenting that "impunity" was a very important concept, and that there was no other comparable word to describe the concept, hence cautioning against over-simplification of words and concepts to make it relevant to laypersons. She said that one response of international law to impunity is through the concept of transitional justice. She explained that the pre-condition for transitional justice, there needed to be a transition and an attempt to cut away from the past. The concept of transitional justice entailed resolving very serious differences that cropped up

before the transition occurred as a result of the involvement of both sides in the perpetration of violence, and hence choices get made to stop the perpetration of violence. In truth and reconciliation commissions (TRC), the perpetrator gets recognized and the crime is acknowledged. However, the automatic progression from acknowledgement of the crime to imposition of punishment does not necessarily happen, that being a decision of the state. The focus here is on helping victims and their families to come to terms with the past, she said.

Dr. Usha said that in the South African situation, assurance against prosecution was required for perpetrators to come before the commission and acknowledge the crimes they committed. In Argentina, there was some attempt at prosecuting the perpetrators, she noted. Dr. Usha described the dilemma before the South African commission when victims and their families were rehabilitated and paid minimum wages for a certain number of years, and the issue was debated as to whether the victims required medial and not minimum wages in order to live with dignity. In transitional justice, the focus was on restoring dignity to the victim, she said. Dr. Usha commented on the cavalier nature with which compensation gets standardized in legal systems, as a result of which victims' dignity is actually auctioned off. This was reflected in the annual reports of National Human Rights Commission, she said.

Dr. Usha said that time and again, criminal law has proved to be incapable of achieving what it was meant for – making justice accessible to victims and empowering them against the violators. Fast track courts and speedy trials that bypass due process of law are a dangerous trend that perpetuate state impunity and control of individuals by the state, she said. In the International Criminal Court too, delay was inevitable, as is reflected in the number of months taken to move towards commencement of prosecution in the 3 situations being studied by the ICC. However, delay should not be allowed to become a destroyer of the system, she said. Dr. Usha also distinguished between law-making processes within domestic legal systems and the law-making process related to the ICC. The difference laid in who made the law and who was expected to use it, she said. She added that in the case of domestic law, hierarchies of law-making ensured that power-holders were protected, while the ICC changed the level of answerability and countered exactly the protection given to power-holders. She said that the latter arose in the context of bloodshed all over the world and the absolute impunity that existed internationally for crimes of the most serious nature. The role of NGOs and civil society in influencing the formulation of the Rome Statute creating the ICC was very significant, she said. She also said that the Criminal Tribunals under international law have a better rate of success than domestic tribunals that India has had. The speaker further explained concepts of individual criminal responsibility, command responsibility and collective responsibility, saying that the ICC dealt with individual criminal responsibility for mass crimes. She added that Indian criminal law has not adequately dealt with responsibility for mass crimes and hence it was important to study the crimes that are stated in the ICC and to bring those within the Indian statute books.

She also dealt with the concept of amnesty, and related it to the Punjab situation where the police held the civilians to ransom by refusing to investigate cases unless they were

given a blanket amnesty. She said that this was not the only way in which amnesty operated and that there was no uniform position on the issue internationally among human rights groups. The ICC does not acknowledge amnesties and sees it as a means of shielding the perpetrators, she added. In the context of India, she elaborated on the efforts and initiative of Concerned Citizens Committee of Andhra Pradesh in bringing the People's War Group and the state to the negotiating table, in the interests of peace and resolution. She said that there was a need for innovative methods such as these in responding to large-scale impunity.

Dr. M.P.Raju, in his presentation on the ICC, elaborated the context in which he became interested and aware of the ICC. He related his personal experience of dealing with impunity in the case of rape of a Dalit girl by an upper caste man, where the victim and her family were threatened into submission and gave up their fight for justice and accountability. He said that in the ICC, crimes against women and children were acknowledged, many of which are not crimes under Indian law as yet. In addition to the struggle against impunity, this was yet another reason for supporting initiatives such as the ICC, he said. Dr. Raju traced the concept of "crimes against humanity" to the concept of "hostis humani generi" (enemy of humanity as a whole). This concept was used for the crimes of slavery and piracy many decades before the conception of ICC, he said. He argued in favour of making inroads into absolute sovereignty of the state in the human rights realm in the interests of countering impunity.

Dr. Usha further highlighted the issues of complementarity, inherent jurisdiction, individual criminal responsibility, crimes under the ICC, and the role of Security Council in relation to the ICC. She clarified that the ICC not meant to substitute national legal systems; however, it tries to break through the cloak of impunity that state & state-like powers have accumulated that perpetuate impunity.

The presentations were followed by a discussion on the following issues: a) When 1 dalit per village was killed over thousands of villages, did that count as a mass crime and could provisions of the ICC be attracted? b) whether the Gujarat carnage would be considered a crime under the ICC and could the perpetrators be prosecuted under it? c) role of the United States and India, and the signing of bilateral immunity agreement between the two countries that undermines the ICC; d) how would the ICC ensure state cooperation when it ignored the offer of the state to ensure accountability within its domestic legal system, such as in the case of Darfur? e) universal jurisdiction and the shrinking of such jurisdiction in Belgium due to pressure exerted by the United States; f) would the ICC deal with enonomic arm-twisting as happens in the case of negotiations in the WTO and for implementation of law; g) the rewards and importance of engaging with the process of the ICC without looking only with the beginning and end of the process; h) use of the principle of command responsibility in situations where the perpetrator cannot be identified as in the experiences from north eastern states; i) the role of the Indian state in the ICC negotiations process and the legal filibustering that the state was involved in; j) the need for reduction of embargoes and focusing on punishing individuals rather than the people as a whole.

**Conclusion:** *Bikram Batra*, Advocate

In the concluding session, Advocate Bikram Batra summed up the presentations and discussions made during the meeting. He said that the event was intended at facilitating a discussion on impunity rather than promoting the ICC campaign in India. A meeting to facilitate a more elaborate discussion on the ICC could follow, he added. He opined that it was important to keep the politics of intervention in the ICC in mind, and how the prosecution system in the ICC was likely to develop in future. He wondered if the ICC would prosecute perpetrators from Colombia where the United States played a major role. He cautioned that the ICC was not a magic wand or a court of appeal, but that the institution had symbolic importance. Mr. Batra concluded by emphasizing that even if the ICC prosecuted and convicted individuals in only a few situations from countries that powerful states had no interest in, the value of such convictions in combating impunity was immense.