

SOUTH ZONE WORKSHOP ON INTERNATIONAL CRIMINAL COURT & INDIA

REPORT

A South Zone Workshop on 'International Criminal Court & India' was held on 30 and 31 January 2006, Bangalore. This event was organized by ICC-India campaign, a project of Women's Research & Action Group, Mumbai in collaboration with People's Watch - Tamil Nadu. South India Cell for Human Rights Education and Monitoring (SICHREM) facilitated the organizing of the event as a local host. Over 75 persons participated in this two day workshop, including law students, lawyers, human rights activists, academicians and media persons.

Session 1: Introduction to the International Justice System

- **Historical Development of the ICC:** *Madhuri Xalxo*, V Year student, NALSAR School of Law, Hyderabad
- **State Sovereignty and International Accountability:** *Sitaram Kakarala*, Senior Fellow, Centre for Study of Culture and Society, Bangalore
- **Chair:** *Vahida Nainar*, Chair, Women's Initiative for Gender Justice & Advisor, ICC-India

In her presentation, Madhuri Xalxo traced the historical development in international law of the concept of individual criminal responsibility from the seventeenth century onwards. She highlighted the codification of laws of war in the nineteenth and twentieth centuries, intended at imposing obligations and duties upon States, rather than criminal liability for individuals. The Nuremberg and Tokyo trials that took place in the late 1940s, their drawbacks and contribution to growth of international jurisprudence in relation to prosecution of individual perpetrators for grave crimes, and the context that necessitated the creation of a permanent international tribunal to prosecute individuals for the most serious crimes under international law were also elaborated upon. Ms. Madhuri ended her presentation with an outline of the post-World War II developments that led to the creation of the International Criminal Court.

Sitaram Kakarala stated that the departure that ICC marks in international criminal law was in constitutionalising international rule of law. He elaborated on the shift in the concept of state sovereignty from absolutist to a negotiated sovereignty, influenced by the development of the notion of a territorial state, and motivated by enlightened self-interest. He highlighted two models of sovereignty: a) shared sovereignty and b) limited trade off. He stated that the implications of these developments were the use of ethical standards to test policies and laws. He concluded his presentation by reading together Article 2 para 7 and Article 55 (c) of the U.N. Charter, and concluding that it was not possible any longer for states to say that a violation of human rights within a state's territory was a domestic matter.

The discussion that followed ensued around the following issues: the requirement of a new definition / notion of sovereignty in the context of the U.S. declaration of war

against terrorism; the limitations of ICC is its inability to deal with policies of economic globalization that impacted a large number of people; implications of the ICC's investigation and prosecution of a situation on state sovereignty; the legitimacy of ICC to pierce the veil of sovereignty; the concept of people's sovereignty and states' violation of the same through their denial to give their citizens access to international mechanisms for legal redress.

Session 2: International Criminal Court

- **Fundamentals Of The ICC:** *Saumya Uma*, Coordinator, ICC-India
- **Visual Tour Of ICC & Recent Updates:** *Anita Abraham*, advocate
- Chair: *Henri Tiphagne*, Executive Director, People's Watch – Tamil Nadu

Elaborating on fundamentals of the ICC, Saumya Uma highlighted the advantages of the ICC over ad-hoc tribunals, and the principles incorporated in the ICC statute including individual criminal responsibility, complementarity, non-retroactivity, command responsibility, prohibition of superior orders as a defence, no immunity and no death penalty. She also explained on whom the ICC can prosecute, mechanisms through which a case can be taken up by the ICC and the crimes that are within the mandate of the ICC – genocide, crimes against humanity, war crimes and the crime of aggression (when defined).

Anita Abraham, with the help of a power point presentation, discussed the significant events that led to the creation of the ICC and its present officials including judges, prosecutors, members of the registry and the Victim Trust Fund. This was followed by an update of the situations that are presently being prosecuted by the ICC – northern Uganda, Democratic Republic of Congo, Darfur (Sudan) and the Central African Republic, where the speaker elaborated on the extent and gravity of crimes committed, the inability to prosecute perpetrators in these situations within the domestic legal systems and the manner in which such situations were referred to the ICC.

In the discussion that followed, issues discussed included the definition of state unwillingness to prosecute and who would determine such willingness, the non-inclusion of crimes of terrorism and economic crimes within the purview of the ICC, whether amnesties granted as a part of processes of transitional justice within a country would be perceived as 'unwillingness to prosecute', the effectiveness of the functioning of the ICC in the absence of cooperation of states, whether corporate negligence by a multi-national company would amount to crimes against humanity and the composition of states that have ratified the ICC statute.

Session 3: Film Screening - 'If Hope Were Enough'

Discussion facilitated by *Vahida Nainar*

The film centred around justice and accountability issues related to mass crimes against women, the historic neglect of prosecution for gender crimes and the integration of a gender perspective in the ICC statute. Discussion that followed focused on issues including why the film did not cover aggression which was a recent phenomenon

resulting in mass crimes, whether the ICC has comprehensively integrated a gender perspective, the “comfort women” phenomenon and the international campaign for ensuring accountability for sexual slavery in the context of World War II, and the need and methods for preventive level work on violence against women.

Session 4: Human Rights Advances in the ICC

- **Child Rights:** *Anita Abraham*
- **Gender, Victims & Witnesses:** *Vahida Nainar*
- **Aspects Of Fair Trials:** *Saumya Uma*
- Chair: *Prof. Hasan Mansur*

The first speaker, Ms. Vahida Nainar, talked about the unprecedented integration of gender in the ICC statute, in the crimes, procedural and evidentiary rules as well as in the structure and functioning of the ICC. She highlighted the paradigm shift from the earlier understanding of rape as an inevitable consequence of war and women as the booty to be appropriated by the victorious, to inclusion of gender crimes into the ICC statute as crimes worthy of prosecution. She also dealt with procedural rules that are intended at shielding victims from damaging or intrusive attacks on their credibility, and evidentiary rules that created new standards related to prosecution of gender crimes. The requirement for expertise on gender and sexual violence among the court’s personnel, and a general clause preventing the ICC from interpreting any provision in the statute in a gender discriminatory way were also highlighted. In talking about aspects related to victims and witnesses, provisions related to participation of victims, protection of their interests as well as reparations to victims and the Victims Trust Fund were elaborated upon.

Speaking on fair trial standards incorporated in the ICC statute, Ms. Saumya Uma said that all existing fair trial standards under international law had been incorporated. How the ICC differed from other international instruments was the comprehensive manner in which rights of victims were recognized for the first time, and the consequent balancing of interests of the accused and the victim at each stage. She enumerated fair trial principles that were stated in the statute relating to pre-trial, trial and post-trial phases. She highlighted a provision relating to the right to compensation if there was a miscarriage of justice – a provision that was absent under Indian law. She explained the importance of ICC provisions related to fair trial principles as a standard-setting mechanism, against which domestic laws and law reform proposals including Malimath committee report and repressive laws such as Prevention of Terrorism Act and Armed Forces (Special Powers) Act could be tested.

Anita Abraham, talking on the integration of child rights issues into the ICC statute, focused on child-specific crimes including recruitment of children under 15 years of age into the army as a war crime and crime against humanity and trafficking of children. The Optional Protocol to Child Rights Convention has increased the age of conscription to 18 years, she noted. She said that a child below the age of 18 could not be prosecuted by the ICC. She also elaborated on procedural and evidentiary rules that protected child victims from intrusive questioning, and furthered their interests, including counseling, medical and psychological assistance. She briefly compared these standards to the

existing Indian law, where no uniform definition of child exists, and many child-friendly rules of procedure and evidence are absent.

In the discussion that followed, the reasons behind gender neutrality of the definition of rape in the ICC statute, the need for a strict burden of proof, the need to balance between procedural and evidentiary safeguards and the right to speedy trial, rationale behind right to silence as a fair trial guarantee, ways to ensure implementation of ICC standards after state ratification and the move to ensure fair representation of women judges in the ICC were discussed.

Session 5: India and The ICC

- **Government Responses and Engagement with Parliamentarians:** *Saumya Uma*
- Chair: *Prof. Hasan Mansur*, PUCL – Karnataka

Saumya Uma outlined the engagement of Indian government with the ICC from the pre-1998 phase when the ICC statute was being formulated till date, highlighting the bilateral immunity agreement (BIA) signed by the United States with India in 2002 that undermined the ICC. Various concerns of the Indian government with regard to the ICC were enumerated and elaborated upon. ICC-India's work with Indian Parliamentarians over the last one year was also discussed, highlighting two consultative meetings that were held during 2005, attended by Parliamentarians across parties and from both Houses of legislature. She elaborated on the significance and need for such an exercise even if Indian accession to the ICC treaty is not likely in the immediate future.

This was followed by discussion on the following issues: whether there was any change in the mindset of people that the ICC-India campaign addressed in the phase prior to and post-2002, that Indian government's position on the ICC was in consonance with its position on other international conventions, such as on Optional Protocol to CAT and CEDAW, whether a BIA could be retracted from, whether alliances were possible with ratified countries, whether India could 'unsign' the BIA in the same manner in which the United States 'unsigned' the ICC treaty, composition of MPs who participated in consultative meetings with ICC-India campaign and their political affiliations, position of established human rights groups within the country on the ICC, the need to persistently engage with the national human rights commission and the challenge of changing mindsets of persons formulating laws and policies.

Session 6: Relevance of ICC to Human Rights in India

- **Impunity in India & the ICC** - *Arvind Narrain*, Alternative Law Forum, Bangalore
- **Dalit Rights & Anti-torture Campaigns** - *Henri Tiphagne*
- **The Law Reform Process** - *Saumya Uma*
- Chair: *Prof. Hasan Mansur*, PUCL – Karnataka

Arvind Narrain began his presentation by observing that in the Indian Penal Code, while chapters existed on the offences against the body, property and the state, no chapter existed for offences by the state. While the IPC was formulated by the British colonialists to serve their interests, we continue to use the same law after independence without incorporating a chapter to take into account responsibility of state officials for their commissions and omissions. He gave examples of the same, and said how the chain of command pointed out to the complicity of erstwhile Prime Minister Narasimha Rao and Chief Minister Kalyan Singh in the Babri Masjid demolition through their inaction.

Using the Gujarat carnage as an illustrative example, Arvind pointed out to the state complicity in the violence. Acts indicating such a complicity include bodies being taken from Godhra to Ahmedabad, announcements being made at the station, display of bodies at the Ahmedabad railway station, pujas being performed around the bodies in order to inflame the passion of a section of the people, making open statements to support the VHP call for a bandh, the presence of senior ministers, including Home Minister and Revenue Minister, in the Police Control Room, police inaction at the time of the carnage, failure of the state government to call the army during peak violence and the failure of the state government to set up relief camps and provide adequate rehabilitation measures to the victims. The Gujarat carnage was a story of state complicity, wherein over 4000 FIRs were lodged but many were omnibus, failing to name the perpetrators and certainly no FIR targeted the chain of command, he said. While the Gujarat carnage was a political failure, it was also a legal failure because the provisions of Indian Penal Code focus on individual acts of violations and do not conceptualise state agencies as the violators. Even if they are, due to S. 197 Criminal Procedure Code that requires prior sanction for prosecution of state officials, such officials enjoy impunity.

The Indian Penal Code was inadequate to deal with state complicity and mass crimes, he observed, while referring to ways in which the ICC statute helped counter impunity. The definition of genocide includes 5 prohibited acts that would amount to genocide if the genocidal intention – the intention to wholly or partly destroy a group or collectivity – exists. Thus, through this definition, it was possible to pin down responsibility on a person for wanting to destroy a group. The jurisprudence of international tribunals for former Yugoslavia (ICTY) and Rwanda (ICTR) contributed to how this genocidal intention could be inferred. In the ICTY decision in *Kristic*, it was said that destruction of the culture and religion of a group amounted to genocide. This understanding could be co-related with the destruction of over 235 mosques and *dargahs* in Gujarat, he said. He also said that the ICTR judgment in *Akayesu's* case stated that rape of Tutsi women indicated intent to destroy the Tutsi community and hence rape could be a tool for genocide. It was also said that moral culpability ought to be higher for genocidal rape than for rape.

He also made linkages between the crime of “enforced disappearances”, conceptualized in the ICC statute as a crime against humanity, and the Indian context, particularly in Punjab and Gujarat, where many bodies were not recovered and were destroyed or

secretly cremated in mass graves, with state registers indicating “missing”. There was no law on enforced disappearances in India, he observed.

Arvind emphasized the need to conceptualise “genocide” and “crimes against humanity” within Indian laws. Secondly, the irrelevance of official capacity for prosecution under the ICC takes into account state violations, while the Indian Penal Code by contrast, requires prior sanction for prosecution. The principle of command responsibility and the prohibition of obedience to superior orders as a defence are progressive provisions in the ICC statute, aimed at ensuring accountability of those who mastermind, plan and abet the attacks. By contrast, Indian laws obstruct accountability from Narendra Modi and Bal Thackeray for the Gujarat carnage and Bombay communal attacks respectively.

Arvind also commented on the Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill 2005, and its inadequacies in preventing or providing justice for victims of communal violence. In particular, by restricting the definition of communal violence to the existing crimes stated under the Indian Penal Code, the Bill had not taken on board the recent experiences of victims of communal violence. The provision requiring prior sanction for prosecution of state officials makes a mockery of the law and indicates a lack of seriousness on the part of the government in ensuring justice for victims. In conclusion, he said that the Indian government ought to adopt a process similar to that adopted by the South African Law Commission – which first makes a policy statement, invites comments and discussion papers, examines international legal standards before formulating a law.

Henri Tiphagne began his presentation on the relevance of ICC to dalit rights and campaign against torture, by stating that a change in mindset could not be brought about only through law, but that hope came from many people outside the parameters of law who were agents of change. The dalit issue was an example of a campaign where progress was made due to pressures from the outside, he said. He talked about the shadow report prepared by Ravi Nair to the CERD Committee on recognizing caste as race, and the dalit issue having been placed on the agenda of the U.N. Subcommission on Human Rights and the Special Rapporteur on Discrimination related to Descent-based work. The dalit campaign consisted of making use of an international convention for a domestic issue, he said, with the Racism Conference in Durban being a historical event contributing to the campaign. He cautioned, however, that only taking recourse to international conventions was not the solution but international legal standards ought to be used to strengthen the domestic legal machinery. Henri said that the definition of “crimes against humanity” in the ICC statute had enough space for attracting violations of dalit human rights, through the practice of untouchability and caste-based discrimination. This would strengthen the campaign on dalit human rights, he noted. The ICC statute was also a learning point on legal standards related to victims and witnesses, he said.

Henri also talked about the definition of “torture” as a crime against humanity in the ICC statute, and its successful attempt at throwing out purist attempts at restricting the definition of torture to state actors. “Torture” as a crime against humanity in the ICC

statute encompassed those acts perpetrated by state and non-state actors, and was more progressive than the definition in Convention Against Torture, he said. He said that the Indian government had made a reservation to International Covenant on Civil and Political Rights, saying that it would not concede to formulating a law providing for individual compensation for violation of civil and political rights. The ICC's provisions on victims' rights, including the right to reparations, would strengthen the argument for compensation to individuals, he said. He also said that the ICC provisions were useful in prosecuting for human rights violations in Human Rights courts at the district level.

In the discussion that followed, the activities of the Tamil Nadu Campaign Against Torture were elaborated upon, where women's organizations, Muslim organizations and political parties (except BJP and AIADMK) had forged links and collaborated their efforts. Issues discussed also included whether the ICC would include rights of physically and mentally challenged persons, reasons behind the ICC excluding death penalty from its statute, and the manner in which ICC has benefited the states that have become its members.

Session 7: Participants' Perspectives on the Relevance of ICC to their Work

(Facilitated by *Vahida Nainar*)

In the last session of the workshop, participants came up with several suggestions for the future workshops on ICC. These included:

- Having persons from marginalized groups, including physically challenged persons, as a part of resource pool will strengthen the ICC-India movement and also add to the strength of several such marginalised movements.
- The documents on ICC should be translated in other vernacular languages – for this purpose, need to collaborate with other organisations.
- The law students who constitute a majority in the workshop can be fully utilised for information dissemination on the ICC. They can organize small group discussions and workshops in their educational institutions. They can participate in workshops and also undertake ICC-related research.
- Collaboration between the law students and NGOs in organising such activities and in translations of information material.
- If partner organizations of ICC-India could accept law student interns for a brief period, it would help in dissemination of information. ICC-India secretariat ought to facilitate this process.
- Providing certificates in acknowledgement of their participation would benefit students.

- Need to contact Bar Councils and Bar Associations. For example, the federation of Bar Associations in Tamil Nadu took a position on the Malimath Committee report and contacted political parties with their demands.
- Need to establish one on one relationship with existing national campaigns, such as NAWO, NFDHHR etc.
- Need to reach out to victim groups
- Lastly, to widen the scope of dissemination of information on ICC, there should be large-scale grass root workshops; and for this purpose having resource person who speak also in vernacular language is important.
- Need to involve students from disciplines other than law (social work, sociology, political science) for assisting in information dissemination
- Writing letters to the editor on the ICC
- Training of trainers (TOT) on ICC
- Need for the ICC-India campaign to find a niche where students can contribute
- Film on the ICC against the backdrop of the Indian context