

Re: Report of Meeting on International Criminal Court & India, held at the Office of India Centre for Human Rights and Law, Mumbai, on 22nd May 2000

The creation of the International Criminal Court (ICC) is a watershed in the history of international humanitarian law. However, in India, little is known about the issue. The said meeting was organized in order to understand the concept of ICC, its powers and manner of functioning (once it comes into operation) and its possible implications for India, including its potential in the struggle for human rights within India.

Two persons addressed the meeting – Ms. Usha Ramanathan, a legal researcher from New Delhi, and Ms. Vahida Nainar, who works with Women’s Caucus for Gender Justice, New York and is also closely associated with Women’s Research and Action Group (WRAG), Mumbai. Both the speakers have been actively involved with the process of ICC. The meeting was attended by about 25-30 persons consisting of advocates, criminologists, and activists working on various human rights issues such as women’s rights, housing rights, minority rights, rights against police atrocities and campaign against globalisation.

Ms. Usha Ramanathan gave an overview of the ICC. She said that the ICC is a significant shift from other international conventions that exist at present. The international conventions generally function as standard-setting instruments, and implementation of the same is through submission of reports by states. Whereas the ICC is a supra national body which would go beyond standard-setting, and have real teeth in prosecuting individuals who perpetuate heinous crimes. In this manner, the “softness” of international law is minimized to some extent. She also talked about the difference between ICJ (International Court of Justice) and ICC. The issue of ex post facto crimes was discussed, and it was highlighted that the Statute creating the ICC lists a set of crimes and applies the same to commission of offences occurring subsequently.

She addressed a major concern of people with regard to state sovereignty. It was explained that since the ICC will not be prosecuting states, but only individuals, there was no possibility of states being dragged into litigation at the international level for alleged crimes. Hence states did not have to surrender their sovereignty in any way, and the ICC does not make any inroads into state sovereignty.

She said that the philosophy of creation of ICC is based on ending impunity. It is meant to prosecute persons who commit heinous crimes, and thereafter either hide behind state identity or who wield such political power so as to prevent prosecution against them at the national level. The ICC is not intended to stop all crimes, but to provide a certain degree of deterrence, so that the message sought to be conveyed is that no person will be beyond the clutches of law – national or international - for the crimes committed. Ms. Usha also noted that the Statute that created ICC has made a significant contribution towards international criminal jurisprudence: for the first time, there has been an enormous focus on protection and promotion of victims’ and witnesses’ interests; crimes against women which have been an age-old war strategy have been finally recognized in

the Statute; the ICC will have power only to order life imprisonment and not death penalty.

She also emphasized on the fact that the primary responsibility for prosecution will lie with individual states, and the same was not supplanted by ICC. The ICC will have jurisdiction only in two limited circumstances - when the state was either *unable* or *unwilling* to prosecute a person. There has already been a precedent set of India's inability to set the legal system into motion – the Bhopal Gas tragedy.

Ms. Usha further discussed the position of the Indian government. She said that the government is totally opposed to ICC, and is a major opposer along with the US. At the Rome Conference, India's positive contribution to the process was insignificant. Its participation in the Preparatory Commission meetings subsequent to the Rome Conference has been minimal. Since Indians may get hauled up at the ICC once the same becomes functional, it is important for India to participate actively. At this point, India does not realize the significance of an institution such as the ICC.

Ms. Vahida Nainar said that the relevance of ICC became obvious to her with the lack of political will to enforce the recommendations made in the Sri Krishna Commission report. In situations such as these, the existence of an institution such as the ICC could have been helpful in ending political inertia within India. Ms. Vahida strongly felt that ICC was a pressurizing tool for the government to improve its own legal system, and to ensure efficient prosecution within the national system, in order to avoid the jurisdiction of the ICC.

She discussed the gender perspective within the ICC, noting that gender integration within the ICC was unprecedented. Sexual crimes committed against women as war strategies were recognized as war crimes and crimes against humanity. The move has been to identify gender-specific crimes, and persecution on the basis of gender, and to try persons committing the same. The Statute has a principle of non-discrimination, which is applicable to all stages of a trial, such as prosecution, investigation and cross-examination. Hence the ICC cannot require a higher degree of proof for sexual offences (such as the insistence of corroboration) as compared to other offences. The establishment of Victims and Witnesses Unit is significant, and participation of victims is allowed at every stage of the trial. There has been an integration of forward-looking principles, such as recognition of victims' and witnesses' interests and rights, including counseling, rehabilitation, protection and reparation. Structurally, the bench of 18 judges is required to be regionally and geographically represented and also requires representation from different legal systems. In addition, the ICC provides for a fair representation of male and female judges, and the requirement of an expert on gender-related crimes in the Prosecutor's office. These are historic provisions, which would facilitate participation of women in the ICC.

Ms. Vahida also related the struggle of Women's Caucus in getting the term "gender" integrated into the Statute. The Arab states and the Vatican wanted the same excluded from the Statute because of fear as to the potential it has to deal with what is done to

women around the world. Their present effort was focused on opposing the moves by the United States to weaken the court, opposing the raising of threshold of crimes against humanity, including definitions of crimes of enslavement, sexual slavery and excluding the concepts of “consent” and “sexual conduct” in the evidence relating to crimes of sexual violence.

She concluded by saying that while the ICC has its limitations, as any other institution does, it has the potential to make countries bring their own laws in conformity with international human rights standards. It has the potential to ensure all the crimes recognized at the international level are also recognized at the national level.

A lively and interesting discussion followed the presentation by the speakers. Several questions were asked with regard to the concept of ICC and its functioning. These included:

- How is the ICC different from ICJ? Are there any other institutions that exist at present to prosecute individuals in a similar manner?
- How will ICC be different from tribunals established in former Yugoslavia and Rwanda?
- What kind of crimes can the ICC prosecute?
- Is there likely to be representation from Asia / South Asia / India on the bench of judges?
- Where will the ICC be situated?
- Who are the signatories to ICC? How many signatories from the developing countries generally, and from the Asian region specifically?
- Would the principle of political / diplomatic immunity apply to persons charged of crimes by the ICC?
- What is the present stage in the process towards establishment of the ICC?
- Will the ICC act as an appellate court over the judgments passed by the Supreme Court of India?

The background material on the ICC, attached along with this report, provides the answers to most of these questions. Please refer to the same.

A major concern was raised with regard to the effectiveness of the enforcement mechanism. It was felt that since the very reason why a case goes to the ICC is due to state inability or unwillingness, the ICC’s dependence on the state for implementing its judgment could make the entire process futile. Effective implementation may ultimately depend on international and regional politics.

Another issue was whether the ICC had the potential for misuse by repressive states to prosecute persons leading struggles for independence or autonomy within a country. Leaders campaigning for rights to ethnic / religious / linguistic minorities could be hauled up by the ICC at the instance of the state or an individual closely connected with the state, after a sham trial is conducted at the national level. The ICC may not be able to look at a crime within the specific political and socio-legal context in which it is committed, and that a danger existed in internationalizing regional or national issues.

However, it was clarified that the context was left to the people in the regions and countries to provide, and will not be created by the ICC itself.

Some participants were also concerned about ICC's prosecution of crimes committed in areas where there was no identifiable state, such as in the Kurdish and Chechnyan communities. However, it was highlighted that one of the major functions of the ICC was to provide recourse in situations such as these, where a breakdown of legal machinery and state identity existed.

Some felt apprehensive about the autonomous functioning of the court once it became functional. This fear was allayed by highlighting the fact that the world community was standing very firmly against the US moves to reduce the independence of the court, which in itself indicated the will of the international community to ensure its autonomy.

Another concern felt was the fact that the ICC would be situated in the Hague, as a result of which accused persons as well as victims and witnesses would face difficulties with regard to documentation, travel expenses and language used during the trial. It was clarified that the expenses to conduct the trial would be borne by the court itself. Translators could off-set the problem with regard to language.

In conclusion, the participants felt that the ICC was a significant development in international human rights jurisprudence, and that in India, we needed further discussions on the issue in order to have a better understanding of its functioning and implications.

Some background material on the ICC was distributed at the meeting. A file containing the same is being attached to this email. The material may be freely translated / summarized / distributed.