

WORKSHOP ON
INTERNATIONAL MECHANISMS FOR PEACE & JUSTICE
21 December 2006, Ahmedabad

REPORT

A workshop titled “International Mechanisms for Peace & Justice” was held on 21 December 2006 at Ahmedabad, Gujarat. This workshop was organized by ICC-India campaign, a project of Women’s Research & Action Group (WRAG), Mumbai in collaboration with PRASHANT – a centre for human rights, justice and peace, Social Action Forum Against Repression (SAFAR) and SAHR WARU. The objectives of the workshop were to forge links with individuals and human rights group working for justice and accountability for mass crimes, to disseminate information on the International Criminal Court (ICC) as a mechanism to counter a climate of impunity, and to explore its specific relevance for the human rights situation in India, and specifically in Gujarat. The workshop also aimed at discussing the Communal Violence Bill as a current legal initiative to mass crimes within India, and to examine its provisions in the light of international legal standards. The workshop had over 45 participants, consisting of human rights activists, lawyers and representatives of non-governmental organizations working on human rights issues. The workshop was conducted in Hindi.

Father Cedric Prakash, Director of PRASHANT and the receiver of Minorities Rights Award 2006 awarded by National Commission for Minorities, commenced the workshop by welcoming all participants and setting out the objectives behind holding the workshop. He stated that the problem of accountability for mass crimes, especially of a communal nature, that was being faced in Gujarat, was not a problem unique to the state, and that similar situations existed in other parts of the country and the world. It was important to examine the possibilities that international mechanisms offered in terms of promoting peace, justice and communal harmony, he said. He also emphasized on the responsibilities of all individuals to work on achieving peace and justice locally and globally, and the workshop as a step towards that goal.

Session 1: History and Fundamentals of ICC

Saumya Uma, Coordinator of ICC-India campaign, began her presentation with the screening of a 90 second film on the need for ICC. The spot film, produced by NGO Coalition for International Criminal Court, showed situations of impunity for serious crimes around the world and the need for an international mechanism to counter the same. In her presentation, Saumya highlighted the need for ICC as follows: a) to end impunity; b) to have true and lasting peace; c) to make individuals accountable, irrespective of their political clout or official position; d) to act as a court of last resort when national judicial systems fail to provide justice; and e) to deter future perpetrators of mass crimes. She traced the history related to the formation of the ICC, from the time of Second World War, the creation of Nuremberg and Tokyo Tribunals in the 1940s, the conclusion of Universal Declaration for Human Rights and the Genocide Convention in 1948, the Cold War that commenced and was in existence for some decades, the creation of tribunals for former Yugoslavia and Rwanda in 1993 and 1995 respectively, and the subsequent effort at creation of a permanent ICC culminating in the Rome Conference and adoption of the Rome Statute creating the ICC.

Saumya further dispelled certain common myths related to the ICC by highlighting the following: a) the ICC will try only individuals, not states; b) it is not a human rights court and cannot / will not prosecute for all human rights violations but only four major ones – war crimes, crimes against humanity, genocide and aggression (when defined); c) that it was not a court of appeal over the Supreme Court of any country; d) it would try individuals only for crimes committed prospectively and not for past crimes, committed before 1 July 2002 when the ICC Statute came into force. She further explained principles related to the ICC such as individual responsibility, complementarity, non-retroactivity, command responsibility, inherent jurisdiction of the court, non-recognition of immunities, limitations and amnesties, and the exclusion of death penalty. She explained the definitions and criteria for war crimes, crimes against humanity and genocide, the trigger mechanisms for taking situations to the ICC and who can be prosecuted by the ICC.

The presentation was followed by discussion when the following issues were addressed: a) Is the ICC an organ of the United Nations? b) the difference between ICC and International Court of Justice; c) Who funds the ICC and whether certain wealthy countries had the scope and opportunity to control the administration of justice through their financial

contributions; d) what are the enforcement mechanisms of the ICC? e) how would “unwillingness to prosecute” be determined? f) could victims highlight issues of violations and what was their role in approaching the ICC?

Session 2: Mass Crimes Against Women: Screening of Film “If Hope Were Enough”

In the second session, a documentary film titled “If Hope Were Enough”, produced by Women’s Caucus for Gender Justice and Witness, was screened. The film captures the historic importance of how women have come together to impact the structure and substance of the International Criminal Court in order to have it be a mechanism at an international level to address violations of women's human rights. Through the voices of women survivors of historic and on-going violence in both armed-conflict situations and peacetime, the video documents the inspiring struggle towards justice and the end of impunity for violence against women. The film covers situations such as the “comfort women” phenomenon during World War II and the sustained campaign by former “comfort women” for accountability of Japan for sexual slavery, the struggle for justice in former Yugoslavia and Rwanda, impunity for the targeted attacks against indigenous people in Chiapas - Mexico, gender-based persecution in Afghanistan and Bangladesh and the ordeal of rape victims under national laws. The film also highlights, side by side, the developments related to crimes against women in international law, including the Vienna Conference 1993, the Beijing Conference 1995, jurisprudence of the tribunals for former Yugoslavia and Rwanda, as well as the Rome Statute creating the ICC.

In the discussion that followed, co-facilitated by **Sheeba George**, Director, SAHR WARU and **Saumya Uma**, Sheeba started with a summary of the film in Hindi for the benefit of participants who could not understand or read English. She then expressed her personal anguish at viewing the film on mass crimes against women, relating her experiences and perspectives in working on sexual and gender-based violence targeted at Muslim women during the Gujarat carnage 2002 and the struggle for justice and accountability for the crimes. She also spoke briefly about the role of Women’s Caucus for Gender Justice during the negotiations for the ICC Statute, which Saumya later elaborated. Sheeba pointed out that though the Indian government had not ratified the ICC Treaty, it had ratified CEDAW, and had obligations under it, including promoting justice for gender-based crimes committed during internal conflict. She talked about the extraordinary report on Gujarat, submitted to the CEDAW committee through a citizens’ initiative, the questions posed by the CEDAW committee to the Indian government in response to the report, and the efforts at making the government answerable to the committee for the events in Gujarat and impact on women. Sheeba also highlighted the fact that India had not yet ratified the Optional Protocols to CEDAW and International Convention on Civil and Political Rights (ICCPR), thereby obstructing the right of individuals to approach treaty-based committees for violation of rights set out under the respective conventions. She said that nearly five years after the Gujarat carnage, many women victims have become invisible but the demand for justice continues. She opined that one way in which the ICC was relevant to the struggle for justice in Gujarat was the concept of “reparations” which entailed restoring dignity to the victims and survivors of the violence.

Saumya elaborated on the role of Women’s Caucus for Gender Justice during the negotiations for the ICC Treaty, stating that the historic gender-integration into the ICC statute was a culmination of experiences of women from all parts of the world, in their domestic struggles against impunity as well as legal obstacles in ensuring justice. She also elaborated on Japan’s military sexual slavery during World War II, the total absence of recognition of the crimes and a lack of will to prosecute individuals for the same in the Tokyo Tribunal, the subsequent breaking of silence by survivors of the sexual slavery, and their demand for acknowledgment, responsibility and compensation from the Japanese government, and the government’s initial response of accepting “moral but not legal responsibility”. Saumya further elaborated on the gender integration in the ICC Statute, focusing on the recognition of new crimes against women, introduction of procedural and evidentiary standards that did not weigh against women victims, and gender integration into the structure of the ICC and its units. She also highlighted provisions related to victims’ rights, including the right to participation, protection and reparations. She concluded by stating that while ensuring that India became a state party to the ICC was a long-term objective of the ICC-India campaign, the campaign was looking at ways in which standards related to women’s rights and victims’ rights set by the ICC could be relevant for law reform initiatives within India, so that the domestic legal machinery could be strengthened.

Session 3: Impunity for Mass Crimes in India

The chairperson of this session, **Sophia Khan**, Director, SAFAR, commenced the session by opining that India had a long history of impunity for mass crimes. She highlighted the importance of situating the Gujarat carnage within the

context of the prevailing climate of impunity and the trend of targeted attacks against particular groups including religious minorities. Holding the masterminds who orchestrated such crimes accountable was extremely challenging, she noted, observing that the ICC was useful in the ways in which it made a dent on impunity for crimes committed by leaders and persons with political clout.

The first presentation by **Advocate Mihir Desai**, co-founder of India Centre for Human Rights and Law, Mumbai commenced with an observation that while all of us knew who had orchestrated the carnage in Gujarat in 2002, and who had given instructions to the police not to help victims at the time of attacks, there were difficulties in proving this in courts of law. Similarly in the Best Bakery verdict, 9 out of 17 accused had been convicted, the law had failed to touch Battu Shrivastav and Madhu Shrivastav, he pointed out. He highlighted the fact that at the time of Partition, 6-7 lakhs of persons – Hindus and Muslims – were murdered, tortured and assaulted on both sides of the borders. However, there was no process by which any perpetrator was made accountable for the crimes committed. Mihir also talked about the 1984 anti-Sikh attacks in Delhi, the anti-Muslim attacks in Mumbai in 1992 after the demolition of Babri Masjid, other instances of communal violence as well as attacks against dalits, to illustrate the fact that the authors of the violence – the masterminds who orchestrate the same – are not held liable. Mihir then discussed whether this prevailing climate of impunity was because of a lack of law or a lack of enforcement of existing law. He opined that while the Indian laws were not strong or comprehensive enough to deal with perpetrators of mass crimes, especially belonging to the higher echelons of power, the existing laws were also poorly implemented, resulting in acquittals of actual perpetrators of crimes. He discussed the provisions in Indian Penal Code that were available to make perpetrators who did not participate in a crime but had planned the same accountable – provisions of abetment to commit a crime (Sections 107-108), criminal conspiracy (Sections 120A & 120B) and general explanation related to acts done by several persons in furtherance of common intention (Section 34). While pointing out the problems in using these provisions, particularly in proving “meeting of minds” as is required for criminal conspiracy, he said that the concept of vicarious liability that was applicable under civil law was missing under Indian criminal law. The ICC provided a principle akin to this by way of “command or superior responsibility” by which a superior or commander is held accountable for acts done or not done by persons under his / her command provided he / she either knew or should have known that such persons were committing or about to commit such crimes. This principle was helpful in holding masterminds of mass crimes accountable, he said.

Advocate Govind Parmar, who works with the Human Rights Cell of Behavioral Science Centre, presented his views next, on the issue of challenges in ensuring state accountability in courts of law. He related his experiences to the trials related to the Gujarat carnage that his centre had been following up since 2002. He pointed out the following features that obstructed the cause of justice:

- a. all First Information Reports (FIRs) had a particular pattern to it, with the first paragraph explaining the Sabarmati Express train fire on 27 February 2002 and stating that subsequent attacks by Hindus were a response to the same;
- b. FIRs omitted names of accused persons even though victims had named the accused;
- c. crimes committed by several perpetrators were clubbed together under one FIR, making it impossible to understand the role of each perpetrator;
- d. doctors issued injury certificates that were inaccurate and incomplete;
- e. dying declarations had no names of perpetrators even though victims named the perpetrators in many cases;
- f. charge sheets have been prepared in a biased manner and make it seem as if Muslims provoked and Hindus responded to the provocation by attacking the Muslims;
- g. charge sheets do not clearly explain the role of each perpetrator, leading to their exoneration;
- h. when some victims gave names of political leaders in their FIRs, the Investigating Officers subsequently threatened the victims and changed the FIRs;
- i. counter-cases have been filed by the police against many victims in order to intimidate them and force them not to stand by their testimonies in courts of law;
- j. biased approach of Public Prosecutors in courts, where they work very hard to ensure that the bail application of a Muslim accused gets rejected, while ensuring that a Hindu accused obtains bail at the outset of the trial; similarly their time and attention is focused on ensuring maximum punishment for accused persons who are Muslims and for acquittal of those who are Hindus;
- k. bias of judges in courts of law.
- l. Intimidation of victims and witnesses at all stages, from the time of lodging FIR

The few convictions that took place were on *dalits* and *adivasis*, while the main political leaders who planned the violence were not being accountable. He opined that the entire investigation into the carnage has been biased and manipulated such that, a re-investigation is necessary in the interests of justice. He stated that in the present circumstances, in which all organs of the state were prejudiced against Muslims – including police, prosecutors, medical personnel and judges, justice was extremely difficult to achieve, if not impossible. While many victims feel that it was a losing battle, some still want to fight for justice and not to be told to forget about justice for the sake of peace. He concluded by stating that it was important to extend support to anti-impunity campaigns such as the ICC-India campaign, in the light of challenges in making high-level perpetrators accountable for the Gujarat carnage 2002.

Following this, **Advocate Arvind Narrain** of Alternative Law Forum, Bangalore, talked about the relevance of ICC for India in the light of the previous two presentations. Arvind reiterated the point made by the other two speakers with regard to the difficulties in holding perpetrators who were political leaders accountable. He cited the example of the 1984 anti-Sikh riots in which the police stood back for three days and did nothing while Sikhs were attacked and killed in Delhi, and Rajiv Gandhi's famous quote justifying the attacks: "when a big tree falls, the ground is bound to shake". Firstly, Indian law's response to the situation of impunity was Section 197 of the Criminal Procedure Code, which requires prior sanction for prosecution of government officials. Arvind opined that this provision had impunity embedded in it. Secondly, Arvind noted that while the Indian Penal Code had several chapters relating to offences against the body, offences against property and offences against the state, as pointed out by K.G.Kannabiran, a prominent human rights lawyer, the Code contained no chapter on "Offences by the State". The law carried with it an assumption that the state and its agencies would not commit crimes – an assumption that has proved itself wrong time and again. Thirdly, the Indian Penal Code dealt with crimes against individuals and not crimes directed at a group of people – in common parlance – mass crimes. The concepts of genocide and crimes against humanity, stated in the ICC Statute, were important, he said, to indicate what crimes against individuals (such as murders, torture, sexual assaults and destruction of religious places) amounted to, when committed in a widespread or systematic manner against a civilian population, or when the attacks were accompanied by an intent to destroy a particular group of people. The jurisprudence of the tribunals for former Yugoslavia and Rwanda, through cases such as Krstic and Akayesu, provided a wider framework to understand a purposeful destruction of culture and identity of a group. With the absence of these crimes in Indian criminal law, a crime of murder, whether committed against one individual or a group of individuals, would only amount to murder and nothing more, he said. Fourthly, Arvind stated that Indian criminal law had certain missing crimes, such as that of enforced disappearances. He elaborated on the mass cremations case of Punjab and the virtually impossible task of holding police personnel responsible for "disappearing" suspected militants in the absence of a criminal law that explicitly stated enforced disappearances to be a crime. Arvind pointed out that even in procedural law, the ICC statute was several steps ahead, and that the ICC standards were important and relevant to law reform initiatives within India, one of which was the Communal Violence Bill.

Discussion that followed focused on the following issues: a) Does the Right to Information Act have a role to play in ensuring state accountability for mass crimes? b) What were the changes that need to be made to Indian law to make it stronger? c) was it at all possible to break state structure that breeds impunity? d) what were the Indian government's concerns about the ICC? e) did the ICC offer any immunity for perpetrators, such as political leaders? In responding to the issues, the speakers stated that law plays a small but significant role in social change, and that every struggle could not be won through laws alone as we needed to be conscious of the limitations of law. It was further pointed out that prior sanctions for prosecutions were required for hate speech (S. 153A, 153B of IPC) which was the first instance of the requirement of prior sanctions for individuals and entities. While Supreme Court had made judgments earlier stating that there was no need for sanction for crimes committed outside the discharge of duties, and it was earlier possible to take sanction after commencing prosecution, a recent judgment of the Supreme Court stated that it was necessary to take sanction prior to commencement of proceedings. It was also discussed that as practicing lawyers, many of us were working for rights of accused. However, when we talked about mass crimes, we were on the side of victims. We had to ensure that law reform initiatives we made had a balance between the two sets of rights.

Session 4: Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill

In the afternoon session chaired by **Advocate Mihir Desai**, the focus was on Communal Violence (CV) Bill as an example of Indian legal response to impunity for mass crimes within India. The session began with **Saumya Uma** highlighting the chronology of events leading to the CV Bill from the time of the Common Minimum Programme of the UPA government issued in May 2004. She further highlighted the salient features and provisions of the Bill. She

also explained to the participants the present status of the Bill – that the Parliamentary Standing Committee on Home Affairs had given its recommendations to the government, and that the government would now work on the Bill and was likely to present it during the Budget session of the Parliament.

Mihir Desai highlighted some of the drawbacks with the Bill, namely: a) the requirement of prior sanction for prosecution of public officials defeats the purpose of the Bill; b) the concept of command / superior responsibility is not incorporated, so it will be difficult to make the “big fish” accountable; c) the law will come into effect when notified by each state government, hence it would depend on the political will of the state government, which is undesirable; d) one school of thought says that the violence should be broad enough to include not only communal violence but also violence targeted at groups with other identities; He said that the issue one had to consider was firstly, do we need a special law to deal with communal violence; and secondly, if we do, do we want to reject this Bill or bring modifications to it? He opined that there was a need for such a bill, for the following reasons: a) the bill gives legitimacy to the fact that communal violence is a big problem in India that requires a legal response; b) there is no present law on right to rehabilitation and compensation, and this Bill deals with it, even though in an inadequate manner; c) since there is no concept of command responsibility in Indian law, a specialized law may take us a step closer to holding masterminds of mass crimes accountable; d) though India ratified the Genocide Convention several decades ago, there has been no implementing legislation; this Bill may take care of the issue partially; e) sexual violence committed in the context of communal violence requires a special treatment.

Saumya Uma then highlighted some of the other drawbacks of the Bill.

- According to her, a fundamental problem with the Bill was that it stated in the Preamble that the Bill was intended at empowering the state. Communal violence in India in the past 6 decades has happened not because state was weak and had no power, but because the state machinery was either not used or was used in a mala fide manner (in bad faith). Rather than empowering the citizens, further accumulation of power in the state was a problematic premise to base the Bill upon, she said.
- The second issue was that commission after commission had deplored the role of police and state machinery in neglecting its duty to control communal violence and assist victims, and in some cases, actively participating in the violence. Yet, the Bill treats state officials as neutral parties who are not likely to commit any offence, with no focus whatsoever on state accountability. It makes a mockery of the findings of enquiry commissions through a clause that gives immunity to public officials unless it is proven that the act was not done in good faith.
- Thirdly, the Bill sets out no new crimes, which is one of the biggest drawbacks. Going by existing crimes in law is not adequate to deal with issues such as enforced disappearances, torture, persecution and sexual assaults. The Gujarat experience has brought to the fore that there is no provision with comparable gravity under which forced nudity, parading naked, insertion of objects into a woman’s body can be brought to book under existing law. Crimes against humanity and genocide – some of the most serious crimes in international law – have found no place in the Bill.
- Fourthly, the Bill provides for no independent agency for carrying out the investigation. Against the backdrop of the Gujarat experience, independent investigation is the crux to ensuring justice and accountability. Transferring a trial out of a state will hold no significance unless investigation is done in a thorough and unbiased manner first. The Bill provides for an Investigating Officer appointed by the state government to conduct the investigation, a review committee to look into cases where the IO does not prepare charge sheet within three months from the date of FIR, and a constitution of a Special Investigation Team again by the state government.
- Fifthly, measures related to protection of victims and witnesses are extremely inadequate, focusing only on two aspects – withholding identity of the witness and holding the proceedings in a protected place. The ICC, for example, deals with protection of victims and witnesses in a much more comprehensive manner, and some pointers could be borrowed from such standards.
- Lastly, though the Bill was drafted against the backdrop of the Gujarat carnage, where sexual and gender-based violence against Muslim women and girls formed the backbone of the communal violence, sexual violence has been dealt with in a perfunctory manner, invisibilizing women’s experiences altogether.

Arvind Narrain responded to the Bill by stating that the Bill did not match grassroot realities and experiences, and that it was important for the engagement of the Bill with what was happening at the ground level and the challenges faced in the same. He referred to the report of International Initiative for Justice in Gujarat, “Threatened Existence”

which clearly demonstrates that when all the crimes against individuals are put together in the communal context, they amount to genocide and / or crimes against humanity. He opined that the Bill has failed to transform social reality into legal terms by excluding notions such as genocide and crimes against humanity. Arvind accused the government of drafting a Bill with the specific intention of exonerating itself and its agencies, as even in the scheduled list of offences, one provision which could have held the government officials accountable was the crime of abetment (Section 107 IPC) and this precise provision has not been included. This could not be a matter of oversight as the drafters have some of the best brains and were able to make a detailed and comprehensive list of prohibited acts under the SC / ST (Prevention of Atrocities) Act 1989. Arvind further stated that we, as lay persons, lawyers and social activists, were forced to respond to drafts of a Bill, without understanding why the drafters have drafted the provisions in a particular way and why they excluded certain points. He opined that it would be desirable for the Law Commission of India take pointers from the South African Law Commission, which first set out some points for discussion and invited responses, and then proceeded to a discussion paper explaining the position that has evolved by consensus on each issue, thereafter culminating in a draft Bill.

Discussion that followed focused on the following issues: a) through the Bill, if state powers were to be further strengthened, this was extremely serious, especially in the context of Gujarat, where combing operations and preventive detentions were targeted at Muslim populations and such powers were being exercised in a communal manner even without such a Bill; b) was the huge delay in trials being addressed by this Bill, as the problem for victims and witnesses was to get on with their day-to-day struggles - livelihood, food, shelter, health and education for their children – which was difficult when the trial dragged on for years together; c) once an act was criminalized, it automatically increases the powers of the police. Where were the checks and balances to make the police accountable for the power they wielded? d) Was it possible to remedy some of the issues through the rules that would be framed subsequently? Or was the scope of maneuvering very low in the Bill, as the rules could not contradict what was specifically stated in the Bill? e) The provisions to prevent communal violence were quite futile as the notification to apply this law would come in only after a situation of communal violence sets in. Existing provisions in Criminal Procedure Code to prevent communal violence are not being used due to a lack of political will. f) There is inadequate emphasis on empowering citizens' initiatives and non-governmental organizations, which could be problematic.

Session 5: Plan of Action & the Way Forward

This final session was co-facilitated by **Sheeba George, Sophia Khan, Saumya Uma & Aditya Swarup**. On the CV Bill, the participants arrived at a consensus that the Bill needed to be stalled when introduced in the Parliament. A big signature campaign needed to be carried out. For this, a crisp one page point-wise critique of the Bill, that incorporates various critiques, needed to be prepared. This could be translated into Hindi and Gujarati and circulated to groups in Gujarat for their signatures, and sent to appropriate persons. The petition could be made available online too. Saumya accepted responsibility for coordinating with groups and individuals in Delhi who were working on a critique, and getting the same sent to key organizations in Gujarat who were present at this event, for generating public opposition to the Bill. The possibility of supporting a list of non-negotiables and non-acceptables was also discussed.

In response to questions about the ICC-India campaign, **Aditya Swarup**, student, NASLAR university, Hyderabad, made a short presentation about the campaign and its areas of focus. He talked about the students' campaign within India which had commenced, and about the plan to bring out an e-newsletter. Feedback received on the workshop during this session was fairly positive, and included suggestions such as a) the need for more such workshops in other parts of Gujarat; b) the need for translation into Gujarati some information material and posters on ICC; c) the need to extend solidarity to the campaign since it was essentially a campaign against impunity; and d) to remain involved in domestic law reform initiatives including the use of ICC standards.

Prepared by ICC- India, 10 January 07

For feedback and responses, please write to iccindiacampaign@gmail.com