

Workshop on

INTERNATIONAL LAW, INTERNATIONAL CRIMINAL COURT & INDIA

10 January 2007, Jodhpur

REPORT

A workshop titled 'International Law, International Criminal Court & India' was held on 10 January 2007 in Jodhpur, Rajasthan. This one-day workshop was organized by the Faculty of Law, National Law University, Jodhpur, in association with ICC-India campaign. The aim of this workshop was to discuss the role and contemporary relevance of the ICC. Participants included more than 50 students and faculty members. Introducing the theme and purpose of the Workshop Sri V Seshaiyah Shashtri, Assistant Professor, Faculty of Law and coordinator of the workshop, stated the broad objectives of the workshop as follows:

- Exploring and understanding the linkages between international humanitarian law (IHL) and international criminal law (ICL)
- Understanding and evaluating the development of International Criminal Court (ICC)
- Discussing the position of India with respect to the ICC

Inauguration & Inaugural address

Hon'ble Vice Chancellor Prof. A.K.Koul inaugurated the workshop through 'unveiling the posters' brought out by the ICC-India that highlighted various aspects of the ICC, such as definitions of war crimes, crimes against humanity and genocide, structure of the court, trigger mechanisms, rights of victims, rights of the accused, and myths and realities with regard to the ICC. In his inaugural address, Prof. Koul placed on record his appreciations for the initiative being taken to advance such a meaningful academic endeavor, bringing out the linkages between the principles of IHL and ICC. Prof A K Koul highlighted the events that preceded the establishment of the ICC during the 20th century. Referring to the significant role played by the Government of India all the while he stated that it is important to understand the reasons and concerns underlying India's reservations to accede to the ICC. He also traced the historical developments related to international humanitarian law, elaborating on the Geneva Conventions, the Additional Protocols, contributions of Sir Henry Dunant, the situations after the First and Second World Wars, the outcome of the Nuremberg and Tokyo Tribunals set up after the Second World War, and the dissenting opinion of Justice Radhabinod Pal, highlighting the importance of understanding history from the perspectives of the conqueror and the vanquished. He referred to various stages of development of the ICC, and highlighted the following issues for discussion and debate during the workshop:

- Jurisdiction of the ICC – the fact that complaint made against anyone anywhere can be taken up by the ICC through a referral by the Security Council;
- Chapter VII powers of the UN Security Council (for maintenance of international peace and security) and its powers of referral to the ICC;
- Non-inclusion of other important crimes, such as terrorism and trafficking in narcotics in the ICC Statute;
- the need for external institutions to supervise the criminal justice administration in countries such as India that have a well-established, efficient judicial system;
- the impact of ICC on sovereignty of countries; and
- necessity and adequacy of a campaign to raise awareness on the ICC in India.

First Working Session: Development of International Humanitarian Law (IHL) & its Linkages with International Criminal Law, and the importance of the jurisprudence enunciated by the two International Criminal Ad-hoc Tribunals

V S Shastri, Assistant Professor, Faculty of Law and coordinator of the workshop, highlighted the importance of examining the essence of IHL as (i) a branch of human rights philosophy; (ii) a set of safeguards for human rights. Briefly tracing the essence of the values of humanity in the Hindu scriptures wherein values of *dharma* have been emphasized to be the highest values even in times of war, he stated that the emphasis of the ancient IHL was on the duties of the king. Hence, it was not a question of who went into war first; rather, the concern was in relation to the protection of the human rights of people involved. Exploring the linkages between IHL and international criminal law, Prof. Shastri talked about situations under which a crime becomes international, and explained the distinction between implementation and enforcement of legal obligations. He referred to the punishments that were awarded in the criminal trials subsequent to World War I and the consequent realization of the international community and its decision not to allow the vanquished to hold the criminal trials. Conceding to the point of view that the Allied powers were in a dominant position at the end of World War II, wherein they could conclude the London Agreement and hold the trials, he stated that questions on the fairness of the entire criminal trial never lost its significance. Against this backdrop, Prof. Shastri raised the following issues:

- Can law be segregated from politics?
- Is it possible to perceive law without a political context?
- Is not international law always subjected to a political context and political realities?
- How can international political pressures be overcome in the aspect of administration of justice by the ICC?

Prof. Shastri also elaborated on the jurisprudential contribution of International Criminal Tribunals for former Yugoslavia and Rwanda (ICTY & ICTR). He reiterated that the contribution of the two ad-hoc tribunals cannot be understood without looking into the conflict and the political problems in the two countries. He also raised important discussion on whether the jurisprudence brought out by the two ad-hoc criminal tribunals in terms of protection of victims can be seen and examined without referring to the political nature of the conflict, generating a debate on the inter-linkages between events, law and politics.

Second Working Session: Development of Rome Statute on ICC and establishment of ICC

Prof. Gurjeet Singh, Hon'ble Vice Chancellor, Rajiv Gandhi National Law University, Patiala, made a presentation on the historical development of the Rome Statute. He referred to the development of ICC as a step towards international peace, security and justice. Explaining the rationale behind the development of ICC, he stated that the need to establish a court was essentially in view of the need to prosecute and punish persons responsible for crimes such as genocide, war crimes and crimes against humanity, and to ensure that horrors of World War II should not be repeated. In examining the need for the establishment of ICC, Prof. Singh traced the chronological developments throughout the 20th century till date. Further, he stated how, when and by how many countries the ICC Statute was adopted, and elaborated on the fundamental features of the ICC. These include:

- definition of crimes that ICC can prosecute;
- trigger mechanisms by which situations can be referred to the ICC;
- jurisdiction of the ICC;

- structure of the court;
- the distinction between ICC and ICJ (International Court of Justice);
- common myths and realities related to the ICC; and
- Official Indian concerns with regard to the ICC.

Narrating his views on as to why Saddam Hussain could not be tried before the ICC, Prof. Gurjeet Singh discussed the principle of non-retroactivity that is embedded in the ICC statute. He pointed out that the ICC was not a substitute for national courts, and would prosecute individuals only in exceptional circumstances, when national judicial systems were unable to or unwilling to prosecute. He also explained the importance of the Office of the Prosecutor of the ICC.

Third Working Session: International Criminal Law: A Third World Perspective

In the Post Lunch Session, *Alexander Samuel*, Assistant Lecturer, National Law University, Jodhpur, presented a third world perspective on international criminal law (ICL). He contended that international law was a western hegemonic project. The ICL regime has ended up being uneven and imbalanced, and works against the interests of the countries of the Global South. He illustrated this contention by discussing the following aspects:

- Selectivity of ICL – selectivity in defining crimes, in spelling out acts of some as eligible for prosecution and not that of others, and in prosecuting some leaders and not the others with regard to the same situation (e.g. Saddam Hussein and not George Bush). He questioned the purpose of putting one person on trial for mass killings and mass crimes, and wondered if that would really serve the purpose of a collective memory. Mr. Samuel relied heavily on Justice Radhabinod Pal’s dissenting judgment in the Tokyo trials held after World War II.
- Dichotomy in human rights - between civil and political rights, on one hand, and socio-economic and cultural rights on the other hand. India, being a newly independent nation of 60 years, it could not afford civil and political rights, he said. Mr. Samuel stated that more people died of poverty than of genocide, and hence ICC was a front put up for diverting from the real issue which, according to him, was poverty.
- Alternative approach to respond to mass crimes: retributive versus restorative justice – truth and reconciliation commissions could be a viable alternative to a criminal trial, as prosecution leads to diminished chances of reconciliation and leads to chain reaction of violence. In this context, the South African Truth and Reconciliation Commission was discussed.
- Cultural relativism and international criminal law – European values are being thrust upon the world community as universal values, when distinct Asian values exist – such as Asian code of honour, code of conduct of warriors, concepts of *dharma* and *ahimsa*. Mr. Samuel gave the example of the advisory opinion of the ICJ in the Legality of Nuclear Weapons’ case, where Justice Weeramantry, being an Asian judge, gave a dissenting opinion as to how the concept of *ahimsa* (non-violence) should have primacy over the right of self-defence.
- Creeping powers of international institutions and the weakening of powers of the Global South – that most countries of the Global South had only 50-60 years of independence, and that this independence was being taken away by international institutions. He gave the examples of how the World Bank, WTO, IMF etc have taken the rights of developing countries.

Mr. Samuel also highlighted the following drawbacks in the ICC Statute: a) failure to define aggression – serves the interest of powerful countries; b) “complementarity” as stated in the ICC Statute may not, in actuality, imply that ICC trials are complementary to national trials; c) concept of inherent jurisdiction that is stated in the ICC Statute would lead to an international and national race to the court house, and

complementarity will be compromised; d) Bilateral Immunity Agreements concluded by the United States using Article 98 of the Statute; e) Security Council power to defer ICC trials; f) trials will be held far from the location of victims and witnesses.

Fourth Working Session: ICC: The Position of and Implications for India

Saumya Uma, Coordinator of ICC-India and Co-Director of Women's Research & Action Group, began her presentation with a personal narrative of her skepticism about the ICC in 1998, her lengthy arguments with friends about why India should *not* sign on to the ICC, and the turning point which made her perceive the ICC is a positive light. The turning point for her was the non-implementation of the recommendations of Srikrishna Commission report dealing with communal violence in Mumbai in 1992-93. She highlighted various situations of mass crimes in India, such as Nellie massacres (1983), enforced disappearances in Punjab (1980s), anti-Sikh attacks in Delhi (1984), Hashimpura killings (1987), communal violence in Mumbai (1992-93), Gujarat carnage (2002), continued mass crimes in Kashmir and North Eastern states, and the absence of justice and accountability for these. She pointed out the inadequacy of Indian laws and procedures to respond to crimes such as these, and how the ICC statute may provide impetus for reform of Indian laws and strengthening of the domestic justice delivery mechanisms.

While there was a paucity of time to respond to many specific arguments, Saumya's responses to the larger issues that were discussed earlier were as follows:

- A scepticism prevails about international law and mechanisms. But if international law and legal institutions are so uneven and imbalanced as they are made out to be, why has the Indian government become a member of the United Nations, ratified U.N. Conventions, sends periodic reports to treaty-based bodies, and why is it lobbying for a permanent seat in the Security Council? This is part of its pragmatic approach of engaging with international institutions and mechanisms, and hoping to tilt the balance. The same pragmatic approach is required in its engagement with the ICC as well.
- No purpose will be served in the government highlighting the drawbacks of the ICC Statute, unless India engages with the ICC in a constructive manner – namely by gaining support from other developing countries for amendment of the provisions of the ICC Statute during the Review Conference scheduled for 2009, in accordance with the concerns of developing countries.
- It is a myth to think that the ICC is supported only by European countries. African and South American countries have become state parties too. Asian countries too have engaged with the ICC during the negotiations leading to the final draft of the ICC Statute. However, representation from Asian countries is poor in the ICC at present. If Asian countries continue to be suspicious of the ICC as an instrument of Western domination and hegemony, and continue to stay away from it, there is every possibility that the ICC will become less representative and responsive of the concerns and experiences of these countries.
- There is a growing conviction that the two sets of rights - civil and political rights, and socio-economic and cultural rights, are inter-connected and inter-dependent, and not mutually exclusive as one had earlier thought. The argument that developing countries cannot “afford” civil and political rights is intended at escaping accountability for mass violations of human rights, including enforced disappearances, the widespread practice of torture and extra-judicial killings.
- While we can engage in the dialectics of law and international geo-political dynamics, it was important to perceive the criminal justice administration through the lens of a victim as well.

Victims want an acknowledgment of the wrongs done to them, and justice, whether from national and / or international avenues. What right do we have to place obstacles in their pursuit for justice, especially when the domestic legal system is unable to respond effectively to such situations?

Concluding Session

In the concluding session of the workshop, all the three speakers responded to the queries of the participants. Issues for discussion, initiated by the participants included:

- How can ICC lead to international peace, security and justice?
- Would a national prosecution necessarily be less effective than prosecution in an international court / tribunal? If so, under what circumstances?
- Unwillingness to prosecute as a ground for ICC to take cognizance of a situation – who decides unwillingness, and by what yardstick? Is there an element of arbitrariness built into this provision?
- What provisions exist in the ICC Statute to ensure a better treatment and acknowledgment of rights of victims than the existing provisions in Indian law?
- How can we say that the ICC has an overwhelming support, when economically, militarily strong and populous countries such as China, India, United States, Russia and Japan have stayed out of the ICC?
- Why has the ICC not dealt with gross violations in Afghanistan and Iraq by American and other forces?
- The principle of non-retroactivity in relation to the ICC Statute and Protection of Human Rights Act
- Need for an Asian regional human rights mechanism – court / commission, especially for South Asia
- State sovereignty and accountability for mass crimes
- Need for a preventive mechanism in addition to mechanisms for retribution / restoration of justice
- Retributive justice versus restorative justice – can convicting one or two perpetrators of genocide / crimes against humanity / war crimes result in peace for the community, or do we need to look to transitional justice as an alternative?
- Does the Indian Penal Code require a chapter on offences by state agencies?
- Command / superior responsibility and its impact on Indian armed forces
- Indian law is weak in responding to mass crimes, so let us put our house in order rather than accepting a hegemonistic international order. A better approach is to strengthen Indian law using international legal standards

The program was concluded with the summarization and presentation of Vote of Thanks by the coordinator of the workshop.

Prepared by ICC-India, 25 January 2007 with inputs from students / faculty of NLU, Jodhpur

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