

Seminar on
THE INTERNATIONAL CRIMINAL COURT:
RELEVANCE AND CHALLENGES FOR INDIA

30 September – 1 October 2007, NALSAR, Hyderabad

REPORT

The Centre for Culture, Law and Society, NALSAR University of Law, Hyderabad (CCLS), in collaboration with ICC-India: the Indian campaign on International Criminal Court, conducted a seminar on 30 September and 1 October 2007 at the University campus. The resource persons for the seminar were **Adv. Saumya Uma** (Co-ordinator, ICC-India), **Ms. Vahida Nainar** (Ex-Adjunct Professor of Law, CUNY School of Law, New York and advisor, ICC-India), and **Adv. Arvind Narrain** (Founding Member, Alternative Law Forum, Bangalore). The objectives of the workshop were to understand the concept, principles and functioning of the ICC, to understand its implications and relevance for human rights both in the global and Indian contexts, and to attempt applying ICC standards to domestic law reform campaigns. The seminar met with overwhelming response, with more than 100 students participating in the same.

Session 1: MASS CRIMES: THE INTERNATIONAL & INDIAN CONTEXTS

The International Context of Mass Crimes, Impunity and Rule of Law: Ms. Vahida Nainar

Ms. Vahida Nainar started the first session of the seminar by explaining what ‘mass crimes’ were and why and how the international community had felt the need to address these mass crimes. While explaining these aspects Ms. Nainar emphasized that the primary philosophy behind the urge for understanding and analyzing situations of mass crimes was that mass crimes were a set of crimes, so grave in nature, that no country or no civilization should allow the same to go unpunished. She then went on to explain the different categories which existed within this terminology of mass crimes namely Crimes Against Humanity, War Crimes and Genocide. Ms. Nainar stated that even though the international community had coined these categories, these, however, are all understood within the context of mass crimes because the impact of these have always been on a mass scale affecting the ethical notions of humanity at large. She added that in the recent past the international civil society and governments of various countries have acknowledged the need to address situations of mass crimes. This acknowledgement, she said, stems from the fact that in the recent past many such crimes have gone unpunished.

Ms. Nainar briefly presented the history of different situations of mass crimes witnessed over the last century starting with the Genocide in Armenia that occurred from 1915 – 1917 till the recent genocide in Darfur. She also shared with the participants profiles of the important political figures who have been responsible for these mass crimes. The action initiated (if any) against these perpetrators either by the incumbent national governments of these leaders or by the international community was also highlighted. Ms. Nainar then dealt with the reasons behind why most incidents of mass crimes went unpunished. She opined that key hindrances in the way of rendering justice to victims / survivors of these mass crimes were amnesties given to state and non-state actors, lack of political will (both at the national and international level) to bring the perpetrators to book, lack of courage in the governments of these countries to acknowledge the wrong doings for fear of backlash and finally perpetual denial by the governments in these countries of mass crimes ever having occurred under their leadership. Ms Vahida added that even in instances where the governments have accepted wrong doings, the acceptance has happened many years after the occurrence. She said that it is to tackle these issues that human rights groups and representatives of the civil society have been persuading governments of countries around the

world to support ICC as this permanent court can go a long way in ending impunity for crimes against humanity, genocide and war crimes.

Global Justice in the Era of the War against Terror: Arvind Narrain

Mr. Narrain's presentation focused on issues concerning global justice in the era of the war against terror. The speaker commenced with a reference to the recent Glasgow Bombings and the Haneef and Sabeel case in the context of the war against terror. He then highlighted to the participants instances of serious human rights violations against detainees in Guantanamo Bay, and how the Bush administration prevented judicial scrutiny of the detentions through the garb of the Military Tribunals Act. In particular, he analyzed provisions of the Military Tribunals Act and how they violated international standards of human rights through the following features: the legal innovation of 'infinite detention', the construction of the enemy as less than human, the emergence of a jurisprudence of suspicion, the creation of a parallel jurisdiction, collapsing the distinction between police remand and judicial remand and perversion of the meaning of trial through admission of evidence that is a result of coercion, admission of classified evidence and admission of hearsay evidence.

Mr. Narrain then focused on the issue of Saddam Hussein, first highlighting the horrific human rights abuses perpetrated by him during his rule as the president of Iraq, and then critiquing the trial of Saddam Hussain, highlighting deficiencies in the same in the eyes of international human rights standards. In particular, he pointed out that the choice of crime for which Saddam Hussein was prosecuted was for the judicial execution of 148 Shias for a failed assassination against Hussein, and a separate trial for the Kurdish genocide. He pointed out that the use of chemical and biological weapons by Iraq, that had a devastating effect on Iranian soldiers, in its war against Iran were not tried, possibly in order that US and UK support to Iraq in the war would never be exposed. Mr. Narrain highlighted other deficiencies in the trial through the enactment of The Statute establishing the Iraqi Special Tribunal, including non-independence of the judiciary, absence of security to defence lawyers, violation of fair trial guarantees such as presumption of innocence, right to be informed of charges against the defendant and right to adequate time to prepare the defence.

The speaker observed that global justice, through institutions and standards as set by the ICC, have a wider scope and are a better safeguard against the blood lust of any nation, and that injustice would be done to victims of horrific crimes by limiting the very understanding of a crime to a mere violation of national law. He then concluded that both the Guantanamo Bay trials and Saddam Hussein trials indicate a dangerous trend in which the United States creates lawless law, with the objective of revenge and not justice, with a seemingly limitless sovereignty, and that these actions would set dangerous precedents for other repressive regimes to undertake similar exercises and violate established standards of international law as set by the ICC.

Impunity for Mass Crimes in India: Saumya Uma

Saumya Uma commenced her presentation by questioning the notion that India had a good human rights record since its Constitution is one of the best in the world, the judiciary is independent, Indian laws are considered comprehensive and India had functioning National and state human rights, minorities and women's commissions. She reminded the participants of the climate of impunity that has prevailed in India for mass crimes, by discussing the examples of Partition-related violence when justice was bartered for nation-building and peace with neighbouring states, Kashmir, North Eastern States and Punjab in the 1980s when political dissent was and continues to be crushed violently (as opposed to a peaceful negotiation) through draconian laws such as Armed Forces Special Powers Act (AFSPA), POTA, TADA, Disturbed Areas Act, unbridled powers to police and armed forces, resulting in impunity for enforced

disappearances, torture and extra-judicial killings. Situations of communal violence, such as the Nellie massacre of 1983, anti-Sikh attacks in Delhi in 1984, killings of 42 Muslim youth in Hashimpura, Meerut by PAC – a section of the police in 1987, communal violence in Mumbai in 1992-93, attacks against Christians in 1998-99 and the Gujarat carnage in which more than 2000 Muslims lost their lives in 2002 were a further reminder of how justice remains to be done in situations of mass crimes, she stated.

Saumya Uma highlighted various factors for impunity for mass crimes in India, including inadequate laws and procedures to prosecute for mass crimes, lack of impartial investigation and efficient prosecution, setting up of Commissions of Inquiry whose recommendations are not binding on state governments, scuttling of justice through perpetrators' political clout, lack of political will to prosecute perpetrators, enactment and use of repressive laws that give unfettered powers to the police and armed forces and a lack of witness protection measures. She concluded that in the light of the existing climate of impunity, standards set by the ICC were relevant to the Indian human rights situation.

SESSION 2: THE INTERNATIONAL CRIMINAL COURT

The International Criminal Court – History and Fundamentals: Vahida Nainar

The session started with a 90-second film produced by the NGO Coalition for International Criminal Court (CICC), illustrating various situations of genocide, war crimes and crimes against humanity and the need to support an independent permanent ICC. Vahida Nainar explained to the participants the historical background leading to the creation of the ICC, highlighting the Nuremberg and Tokyo Tribunals, and the more recent ad hoc tribunals for former Yugoslavia and Rwanda. She discussed the principles that governed the setting up and the functioning of the ICC that was created through the Rome Statute. Ms. Nainar explained the manner in which the first draft of the Rome Statute was prepared by the International Law Commission, and shared insights regarding the discussions that took place amongst the countries over the draft and the apprehensions that representatives of various countries had voiced. Ms. Nainar made special mention of the concerns of the United States and the steps taken by it to counter the sphere of influence of the ICC. She then highlighted the salient features of the ICC namely geographical representation, integration of gender perspective, integration of rights of victims and witnesses, inclusion of principles of fair trial and due process of law. She explained the principles of complementarity (by which the ICC would be able to try only those cases that national courts were unwilling or unable to), individual criminal responsibility, superior / command responsibility, provisions that gave no immunities, or periods of limitations, non-retroactivity of the statute and non-imposition of death penalty. She also explained the crimes that the ICC would try, namely war crimes, crimes against humanity, genocide and the crime of aggression (when defined).

India and the ICC: Arvind Narrain

Arvind Narrain focused his presentation on impunity for mass crimes in India and what the Indian law can learn from the ICC. He opined that the one element that distinguishes a mass crime from a murder or rape is the element of state complicity. By complicity, what one means is that the state does not necessarily directly participate but is involved and allows the crime to happen, he said. That is, the state plays a facilitating role by both direct acts of commission and acts of omission all of which ensure that the mass crime is committed.

He highlighted the issue of state complicity in Nellie massacre in Assam (1983), anti-Sikh violence in Delhi (1984), Babri Masjid demolition and the killings that followed (1992) and the Gujarat carnage (2002). He then elaborated on the response of Indian law to the issue of state complicity in such mass crimes. In substantive terms, Indian law remains unable to conceptualize the mass crime within the

inadequate framework of the Indian Penal Code (IPC) which is better suited to deal with individual crimes, he said. Taken a step further, Indian law refuses to entertain the possibility of the state being accountable for offences it might commit. This is made explicit in Sec 197 of the Criminal Procedure Code (Cr P.C) which lays down that the sanction of the Government (Central or State) is necessary before the prosecution of a public servant for acts committed in the discharge of his duty. Mr. Narrain thereby stated emphatically that Indian law entrenches impunity in law for its officials for offences it might commit against its citizens.

Secondly, Arvind Narrain 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. He opined that the jurisprudence of the tribunals for former Yugoslavia and Rwanda, through cases such as *Kristic* 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 Narrain also pointed out the difficulty in holding political superiors / masterminds responsible for mass crimes under Indian law, and the usefulness of concepts such as command / superior responsibility as stated in the ICC Statute. He further 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. He concluded that the Communal Violence Bill, however, in its present form, was another means of perpetuating state impunity for mass crimes.

Responses of the Indian Government to the ICC Statute: Ms. Saumya Uma

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, and the closer collaboration between the two countries in the recent past with the signing of the nuclear deal. Various concerns of the Indian government with regard to the ICC were enumerated and elaborated upon, including the issue of sovereignty, objection to inherent jurisdiction of the ICC (by which the ICC would itself decide if it had the power to deal with a case), fear of politically-motivated prosecutions, fear about the independence of the Prosecutor, powers of referral and deferral of the Security Council, non-inclusion of the first use of nuclear weapons and non-inclusion of terrorism as an ICC crime. Further, on the issue of complementarity, India viewed that the ICC should be invoked only in situations of “inability to prosecute”, that is, in “failed states” or where national judicial processes had collapsed, and not in situations of political unwillingness to prosecute. She stated that the unspoken apprehension for the

government was fear that the situations of certain North Eastern states and Kashmir could come under the scanner of the ICC since impunity for crimes against humanity was prevalent in these regions.

ICC-India's work with Indian Parliamentarians in the past, highlighting two consultative meetings that were held during 2005, attended by Parliamentarians across parties and from both Houses of legislature, were also discussed. In addition, ICC-India's experiences at a dialogue with the National Human Rights Commission, National Commission for Minorities and National Commission for Women were also shared. Saumya emphasized the importance of continued interaction with the government even if Indian accession to the ICC treaty was not likely in the immediate future.

Day 2: COMBATING IMPUNITY FOR MASS CRIMES IN INDIA: CAMPAIGNS & STRATEGIES

Lessons Learnt from Gujarat and Beyond: Arvind Narrain

In his presentation, Arvind Narrain focused on the Gujarat carnage. He stated that post the burning of a bogey of the Sabarmathi Express in Godhra violence was unleashed against the Muslim community in Gujarat. For five days from Feb 28 to March 4 2002, there was systematic and targeted violence against the Muslim community. There were over 2000 Muslims killed, Muslim women were raped, property belonging to Muslims was destroyed and 235 dargahs/mosques were destroyed, he said. There was an attempt at destroying the very basis of physical, biological, cultural and psychological life of the Muslim community in Gujarat. He highlighted specifically aspects of state complicity, such as:

- Dispatching the bodies from Godhra to Ahmedabad by train and ensuring that the display of bodies and performance of *pujas* would inflame the situation
- Supporting the call for *bandh* by the Vishwa Hindu Parishad (VHP)
- Police inaction at the highest levels even as murder, rape and arson continued
- Presence of senior ministers in the Police Control Room during the killings (National Human Rights Commission calls for an explanation and the state government provides no response)
- Failure to call in the army
- Registering of omnibus First Information Reports (FIRs) which do not narrate the truth of what happened in Gujarat. (The FIRs were vague with no details as to accused and no details as to the crimes committed. and do not even mention the killings , rape etc relying instead on vague descriptions of violence)
- Failure to set up camps and discriminatory relief and rehabilitation

Post this mass crime there were over 4000 FIRs registered all over Gujarat. However, now, most of them stand closed for lack of evidence. While it must be noted that most cases do not register serious offences like murder and rape, the few cases which do, do not in any way pinpoint the criminal responsibility of the state government or its officials for the intentional destruction of the very basis of life of the Muslim community in Gujarat. Arvind Narrain also highlighted the difficulties involved in prosecuting these cases under present Indian law, and the bias of health officials, police personnel, prosecutors, magistrates and judges that have contributed to a lack of justice and accountability for the carnage-related cases. He concluded by expressing a need for a law to deal with such mass crimes, taking into account ground realities and the obstacles faced by the survivors in accessing the legal system and demanding justice.

The Campaign for Implementation of Srikrishna Commission report: Saumya Uma

Saumya Uma talked about the communal violence in Mumbai in 1992-93 that followed the destruction of Babri Masjid. She said that the communal violence that shook Mumbai happened in two phases. The first phase occurred in when Babri Masjid was demolished on 6th December 2007. The second phase occurred

between Jan – Mar 1993. This second phase was much more organized and systematic in targeting members of the Muslim families in the city. Following the violence, Justice Srikrishna (who was a sitting judge in the Mumbai High Court at that time) was appointed to investigate the violence. He submitted his report in 1998. Through its investigations the Commission confirmed that 900 people had died in the violence. Of these 275 were non-Muslims. As many as 200 people disappeared during the riots. The commission in its report observed that the government did nothing to stop the communal violence for almost three months. Also, despite the presence of the armed forces within Mumbai, the state government did not allow the army to control the situation.

In his report, Justice Srikrishna also named 31 police officers against whom the Commission found substantial evidence indicating indiscriminate shootings that led to the killings of many Muslims, and other such cognizable offences, and had therefore recommended that they be prosecuted for their crimes. Some of the prominent cases that the Commission highlighted were – Hari Masjid Case, Sulemaan Usman Bakery, Abdul Haq Ansari etc. Also, the Commission had recommended that 1371 cases should be re-opened and re-investigated. However, all these cases had been closed by the Government as ‘*A Summary*’ cases (no evidence) despite the fact that the Commission itself had concrete evidence against the accused in all these cases.

She stated that successive state governments, irrespective of their political ideology, have done very little to take action on the recommendations of the commission. Nine years after the release of the report in 1998, the officers and politicians indicted in the report continue to enjoy total impunity. While on the one hand some of the police officers have been rewarded with increments and promotions, the politicians too have continued being in active politics and often worked with renewed vigour despite the report, she said.

Non-implementation of the report is a clear example of the selective exercise of political will as to whom to hold accountable under the law, Saumya observed. The present campaign aims at bringing the voices of the survivors to the forefront, demanding an implementation of the recommendations made in the report, including prosecution of 31 errant police personnel, politicians, compensation to survivor families, re-opening of cases closed for want of evidence and quashing of false cases framed by the police against witnesses in order to intimidate them. She concluded that this campaign is a part of the larger campaign against state impunity and complicity in mass crimes, and to ensure justice and accountability to all.

Communal Violence Bill: Critiquing the Bill through the Lens of International Standards: Saumya Uma & Vahida Nainar

Following her presentation, Saumya Uma and Vahida Nainar led an exercise, whereby students were asked to highlight the features of communal violence keeping in mind the Gujarat and Mumbai experiences, and then asked to formulate an ideal bill on Communal Violence in the light of the features listed by them. The features listed by them included state complicity, partisan role of police, biased investigation, hate speech and preparations prior to communal violence, absence of witness protection measures and that victims belonged to minority / marginalized / vulnerable groups of population. During the course of interactions the students were guided to brainstorm on the following aspects – definition of communal violence, objective (preamble) of the bill, provisions related to investigation, crimes, witness protection, punishment, rehabilitation and compensation. The following issues / dilemmas emerged during the discussion:

- Should the Bill focus only on communal violence or more broadly on genocide and crimes against humanity? Could it be called a Collective Violence Bill?
- Should crimes include only the crimes stated in the Indian Penal Code or other crimes not presently featured in Indian law?

- How will the Bill ensure that state agencies are made accountable if they are complicit?
- Should investigations be left to the police? While past experience indicates that police play a biased role in lodging FIRs and conducting investigations, creating a parallel structure to the police may not be practical. Should police investigations be made transparent and be kept under the scrutiny of a citizens committee instead?
- What witness protection measures can be prescribed? Should they be only at the time of trial or from the time of crime till after the judgment? Should punishment of hostile witnesses go hand-in-hand with witness protection measures?
- What provisions should we include in reparations? Is compensation to the victim / survivor adequate or should we also include rehabilitation, counseling and restitution? Would a public apology, guarantee of non-repetition or acknowledgment of the crime be relevant and practical in the Indian situation?
- Should punishment include death penalty?

Ms. Saumya Uma then briefly highlighted the loopholes in the Communal Violence (Prevention, Control & Rehabilitation of Victims) Bill 2005, particularly stating that the Bill further empowered state agencies under the erroneous presumption that state agencies will remain neutral in times of communal violence. She stated the rationale for many civil society groups including Women's Research & Action Group and the ICC-India campaign to reject the bill in entirety. The participants decided that on behalf of CCLS & NALSAR a signature campaign would be undertaken to render solidarity with those opposing the Bill and that the signatures would be sent to the President, Prime Minister and other concerned Minister of the UPA Government.

The session ended with representatives of Centre for Culture, Law and Society of NALSAR thanking the resource persons for their inputs.

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