

FRIDAY, APRIL 25, 2008

Mass Crimes and the inadequacy of Indian laws to address them

This year's [ICC](#)-India campaign began with its 2nd National Consultation on International Criminal Court and India in New Delhi today. The campaign is an eight-year old anti-impunity campaign, which works on issues of justice and accountability for mass crimes in India, using principles from the law related to ICC. For the uninitiated, ICC is an independent treaty-based organization that is designed to serve as a safety net for use only when national courts are unwilling or unable to act. Based in The Hague, the Netherlands, the ICC builds on a legacy of the Nuremberg and Tokyo tribunals, which tried perpetrators of World War II atrocities, as well as the more recent work of the UN-created ad hoc war crimes tribunals of Rwanda and the Former Yugoslavia. The campaign is part of the global [campaign](#).

Currently, 106 countries have become members of the ICC's governing Assembly of States Parties. India is not a State Party to the ICC. The Rome Statute creating the ICC is a treaty adopted on 17 July 1998 by 120 nations voting in favour, 7 in opposition and 21 abstaining. The ICC treaty came into force on April 11, 2002, with 60 ratifications, enabling the Court to try acts of genocide, war crimes and crimes against humanity committed after 1 July 2002. (Which means even if India decides to ratify the Statute, the Gujarat Genocide of 2002 will be out of its purview). In 1998, India had abstained from voting on the Statute. In December 2002, it concluded a pact with the U.S.- an active anti-ICC campaigner - not to surrender each others' citizens or military contractors to the ICC for prosecution.

The background material distributed at the Consultation includes an insightful article on India and the ICC written by **Usha Ramanathan**, and published in *Journal of International Criminal Justice* (Vol.3, (205) pp.627-634), where she articulates and answers some of India's concerns over the ICC Statute.

The ICC-India campaign, to use the words of **Siddharth Varadarajan**, who spoke at one of the sessions, may not succeed in making India ratify the Statute, but its success has to be measured in terms of creating awareness over the need to reform domestic laws to enhance their ability to address mass crimes.

Vrinda Grover, while speaking on "why mass crimes go unpunished: Gaps and

flaws in the Indian legal system”, called for specific changes across the board in IPC, Cr.P.C. and Evidence Act to make State institutions accountable in mass crimes.

Elaborating, she said Indian criminal jurisprudence has no scope to deal with communal riots. S.146 I.P.C. deals with rioting by an unlawful assembly. Likewise, there are different sections dealing with murder, rape etc. The various reports of the Commissions of inquiry view communal riots as violence between two groups of equal power. There is for instance, no definition of planned targetted killing, or State's complicity in planning and orchestrating a mass crime.

As a result, the arraignment of accused is always incomplete, and those who abdicated State duties are not brought to book. The same police force, which played a dubious role during communal violence, is asked to investigate. The police thus files omnibus FIRs, there is no identification of dead bodies, and no effort taken to collect corroborative evidence. IPC lifts crimes, does not talk of the context in which crimes are taking place, she explained.

Even in the case of systematic destruction of communities because of ethnicity, caste or religion, the same requirements of filing of FIR are insisted upon. In one case, when victims filed FIR after six months, the court acquitted the accused on that ground alone. Section 375, IPC, for instance, does not envision sex-related violence during a carnage as happened in Gujarat in 2002. She deplored that there is no law to make the State institutions accountable; instead we have Section 197 Cr.P.C. to provide immunity to State officials and Judges.

Vrinda Grover was sceptical about the Prakash Singh judgment of the Supreme Court calling for reforms in Policing. She doubted the motives of the petitioners in this case, as they are former DGPs, who suffer from institutional bias. They want autonomy for the police; what about their accountability, she asked.

Saumya Uma, coordinator for ICC-India, and Co-Director, Women's Research and Action Group ([WRAG](#)) gave an overview of the campaign in South Asian countries. She spoke about Afghanistan, which is the only country in South Asia to have become the State Party to the ICC. She recalled that India signed the Bilateral Immunity Agreement with the United States in total secrecy, and made the announcement after the signature.

ARTICLE ALERT: Today's Indian Express carries an [article](#) co-authored by our co-blogger Tarunabh.

Posted by v.Venkatesan at 2:49 PM



1 comments:

[tarunabh](#) said...

Thanks for this Venkatesan. Bringing in a legislation for mass crimes was one of the poll promises of the Congress party. The draft [communal violence Bill](#) circulated by the government was found to be inadequate and even dangerous on several counts. The Bill was a typical state reaction which sought to give even more power to the very state agencies which have historically been complicit in such mass crimes. Since then the Bill has been in cold storage in the government seems to be in no hurry to legislate on its important electoral promise.

3:30 PM A small trash can icon, likely used for deleting the comment.

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Justice has another address

Neha Jain

Posted online: Saturday, April 26, 2008 at 0006 hrs



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India needs to join the International Criminal Court for moral - and strategic - reasons.

Pakistan is not cooperating with India" was CBI chief Vijay Shankar's response this week to why Dawood Ibrahim has not yet been brought to trial before Indian courts. According to Shankar, the CBI knows exactly where Dawood is, but because he is unfortunately lurking in Pakistan, a country that has



Neha Jain

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a "record of not co-operating with India when it comes to terrorism", India has to resort to diplomatic channels in its efforts to bring him to justice. The Dawood saga and India's continuing attempts to extradite individuals suspected of having committed terrorist offences on Indian soil point to a significant lacuna in India's terrorism policy — the absence of an international forum that could either try individuals accused of acts of terrorism, or at the very least, pressure non-cooperating states into prosecuting or extraditing the accused. This is where the importance of the Second National Consultation on the International Criminal Court and India in Delhi (on April 25 and 26) lies. Although the focus of the consultation has been on the moral reasons for joining the ICC, we will highlight an additional strategic reason for doing so.

India's abstention on the vote bringing the Rome Statute for the International Criminal Court (ICC) into effect in July 1998 signalled its tortured relationship with the ICC. India's concerns with the ICC are a curious mix of national pride and frustrated ambitions. India was and remains deeply hostile towards the ICC prosecutor's ability to undertake investigations and prosecutions on an independent basis, or upon a referral by the Security Council, without the consent of the state whose nationals are being prosecuted. At the same time, India was peeved at the failure of its efforts to shape the definition of crimes included in the statute, particularly terrorism.

The first of these concerns has been addressed by several international scholars who posit that given the structure of the ICC, national concerns about sovereignty are misplaced. In brief, the argument is that the ICC's jurisdiction is complementary to that of member states. It is only if the state which has jurisdiction over the crimes is either unable or unwilling to prosecute these crimes that the ICC's jurisdiction can be invoked. India has a largely stable, independent judicial system and the Rome Statute ensures that the ICC will rarely go beyond encouraging domestic trials for such countries. But its position vis-à-vis terrorism makes best the enemy of better. India's refusal to join the ICC because it does not expressly criminalise terrorism reads the statute too narrowly, and is also a strategic mistake.

Consider the crime Dawood is accused of — plotting a series of bomb blasts in Mumbai on March 12 1993, which killed hundreds of people and injured several more. The coordinated attacks took place in 13 locations. While the Rome Statute of the ICC does not contain the crime of terrorism, these events would clearly have constituted a ‘crime against humanity’ under the statute, if the statute were in operation at that time. Technically, a crime against humanity is committed when crimes like murder, rape, serious bodily harm etc are committed as part of a widespread and systematic attack on a civilian population pursuant to the policy of a state or an organisation. Given this strict definition, not all acts of terrorism will qualify as a crime against humanity. But the Mumbai bomb blasts were certainly systematic, widespread, and arguably pursuant to the policy of terrorist organisations. In the words of Judge Philippe Kirsch of the ICC (in conversation with Indian parliamentarians in December 2005), “it is therefore highly likely that certain acts of terrorism could in fact come before the ICC not as crimes of terrorism, as your eye would see them, but as crimes against humanity.”

Now, like in Dawood’s case, it is possible that the suspected perpetrators of the attack are within the jurisdiction of a foreign country, which refuses to prosecute them in its own courts and also refuses to extradite them to face trial in India. As the statement of the CBI chief makes clear, under present laws, there is nothing India can do legally to make sure that these suspects are tried for their alleged crimes.

The ICC has jurisdiction over a case if either the suspects are nationals of a member state or if the crimes are committed on the territory of a member state. In a case like this one, because the crimes were committed on Indian soil, India could have referred the case to the ICC if it was its member at the time when the crimes are committed. It does not matter whether the foreign state whose nationals or residents are alleged to have committed the crimes is a member or not. The ICC can assume jurisdiction and require all member states to co-operate with the prosecution irrespective of the consent of the state whose nationals are being prosecuted. For instance, if the suspects were to seek refuge in a foreign state which is party to the statute, that state would be obliged to surrender the suspects to the ICC and assist in its investigative efforts. If the foreign state is not a member of the ICC, it will not have any obligation to co-operate with the ICC. But the international attention that an ICC trial will inevitably bring to the case may shame it into prosecuting or extraditing the suspects.

A review conference of the Rome Statute is due in 2009, where the question of criminalising terrorism is bound to emerge. If India goes to the conference as a voting member state, its words will carry more weight than if it goes there as an outside observer. All moral and strategic considerations indicate that India should ratify the statute and do so urgently.

This article is co-authored with Tarunabh Khaitan. The writers are legal researchers at the University of Oxford

http://www.thaindian.com/newsportal/uncategorized/india-should-ratify-icc-ensure-justice-to-all-experts_10041977.html

India should ratify ICC, ensure justice to all: experts

April 25th, 2008 - 6:28 pm ICT by admin -  [Email This Post](#)

New Delhi, April 25 (IANS) Calling the International Criminal Court (ICC) “the need of the hour”, lawyers, rights activists and journalists gathered here Friday for the second national consultative meet of the ICC and India said the country should ratify the treaty for the global court to ensure justice for everyone. Created in 2002, ICC is the only permanent global court capable of trying individuals accused of the most heinous crimes under international law. Also called as the “court of last resort”, it is an independent treaty-based organisation which is designed for use only when national courts are unwilling or unable to act.

Vrinda Grover, advocate, said that the need of the hour, especially with mass crimes going unpunished, is to forge new legal tools and added that the ICC is an ideal one.

“The Indian Penal Code (IPC) lists a whole lot of crimes but not the context in which those crimes were committed. There, a murder committed because of a person’s religious affiliation will require the same proceeding as a murder in any other context, which is just not done.

“I have seen so many acquittals because the FIR was lodged six months after a murder was committed. How can you expect a person to lodge an FIR within 10 days when his own life is at risk and he is on the run from the mob? It’s only after he finds his family or finds security that he can come and do that... These are the glaring lacunae of our [system](#),” Grover said.

“Similarly, in cases of sexual violence, there is no definition of the kind of sexual assaults that so many women reported after the Gujarat carnage in 2002. When there is no definition, how can one expect justice? ICC, in that context, is the need of the hour,” she added.

At present, 106 countries have ratified the ICC treaty and India is not one of them. ICC is able to prosecute individuals for violations of humanitarian law, namely genocide, war crimes and crimes against humanity.

India was actively involved in the formulation of a draft statute of the ICC by the International Law Commission. However, at a conference in Rome in 1998 to vote on the statute, India and 20 other countries abstained from becoming signatories.

Since then India has been disengaged with the ICC process. In December 2002, it concluded a pact with the US not to surrender each others' citizens to the ICC for prosecution.

“An important feature of the ICC is that it has the potential to make individual perpetrators criminally accountable without having to depend on the political will of the government in power within the country,” said Saumya Uma, coordinator ICC-India.

“That is because there are human rights commissions at the international, national and state levels but these are not courts of law and can't prosecute individuals for grave crimes. They can make enquiries and submit observations which are recommendatory and not binding to the government,” she added.

“Also, in most of the cases of mass crimes like the 2002 Gujarat riots or the 1984 anti-Sikh riots, the criminal justice system expects the state to act as the guardian, but will the state ever prosecute itself? There has to be accountability and an independent investigative agency. Simply making laws won't help,” Grover said.

Father Cedric Prakash, director of the Prashant centre for human rights, justice and peace, has been actively involved in bringing relief to the victims of the Gujarat riots. He said ICC will bring in not only a sense of accountability, but also a sense of [security](#) to the minorities all over the world.

“India should become a global member of justice for the sake of its people,” he said.

<http://newspostindia.com/report-50685>

India Should Ratify ICC, Ensure Justice To All: Experts

Friday 25th of April 2008

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