

2ND NATIONAL CONSULTATION ON INTERNATIONAL CRIMINAL COURT & INDIA

25-26 April 2008, Delhi

REPORT

ICC-India: the Indian campaign on International Criminal Court organized the 2nd National Consultation on ICC and India on 25-26 April 2008 in Delhi. The objectives of the Consultation were to take stock of geo-political and legal developments in international, South Asian and Indian spheres, update ourselves on ICC's activities, achievements, issues, dilemmas etc, deliberate on the relevance of ICC for India and Indian government's position on the same, and to strategize on consolidating and strengthening the Indian campaign on the ICC. The Consultation had the participation of more than 80 persons, including lawyers, academics, human rights activists, representatives of non-governmental organizations, students, media persons, ICC-India's partners, advisors and friends of the campaign.

INAUGURAL SESSION

The speakers for the inaugural session of the event were **Ms. Saumya Uma** (Coordinator, ICC-India Campaign and Co-Director, Women's Research and Action Group), **Mr. Ram Jethmalani** (Senior Advocate – Supreme Court, Member of Parliament – Rajya Sabha and former Minister for Law & Justice), and **Mr. E.M.Sudarsana Natchiappan** (Member of Parliament, Rajya Sabha, Convenor – Parliamentary Forum on Human Rights & Senior Advocate – Supreme Court). The session was chaired by **Mr. Siddharth Varadarajan** (Strategic Affairs Editor, The Hindu). A 7-year report of ICC-India's activities, titled 'Towards Accountability for Mass Crimes' was released by Mr. Ram Jethmalani in this session.

Looking Back, Looking Ahead: The Indian Campaign on the ICC: Ms. Saumya Uma

Ms. Saumya highlighted the activities, endeavours and achievements of the campaign in the last 7 years. She traced the commencement of the campaign and its transformation from an awareness-raising campaign on the ICC to an anti-impunity campaign seeking justice and accountability for mass crimes in India. Some of the achievements highlighted by her include a one hour programme on the government-owned Lok Sabha television channel exclusively on the ICC, organizing and conducting 3 major events with the participation of President Kirsch of the ICC, consultative meetings with parliamentarians across party lines and from both Houses of the Parliament, engagement of the campaign in nation-wide legal education by conducting over 50 workshops and seminars in 19 states, producing and widely disseminating 7 publications on the ICC and India, extending solidarity to many anti-impunity campaigns within India, the campaign's efforts at strengthening domestic law through law reform initiatives, and an increasing support base for the campaign consisting of more than 40 partner organizations and many more individual partners and friends of the campaign.

While emphasizing that the campaign looked forward to dialoguing with the government on the ICC, she also stated that challenges to India's accession were also challenges to the Indian campaign itself. These challenges included a perception of ICC as an infringement on national sovereignty, reluctance to open up Indian human rights situation to international scrutiny, existence of impunity for mass crimes in areas of internal conflict as well as other places and with vulnerable groups, nuclearization, militarization and India's relationship with other countries in the sub-regional, regional and international spheres including the United States. She concluded by saying that while the long term objective of the campaign was to ensure accession of India to the ICC Treaty, the campaign's responsibilities extended even beyond, in

strengthening domestic mechanisms, ensuring domestic implementation and support to victims and survivors.

India & the International Criminal Court: Adv. Ram Jethmalani

Mr. Ram Jethmalani began his presentation by expressing his disappointment with the present as well as past governments in India for not having taken a favourable position on the ICC. He emphasized that the ICC was one of the healthiest developments to have taken place in the field of human rights, as it was required to deal with leaders who perpetrated horrific crimes within their countries and were powerful enough to escape being subjected to the jurisdictions of their countries. He noted that India was obsessed with an abstract notion of sovereignty, and failed to understand that international society was not possible without a partial surrender of sovereignty. He emphatically stated that those Indians who committed heinous crimes including genocide needed to be punished – if not in Indian courts, then in the ICC.

Mr. Jethmalani elaborated and responded to each of the reasons given by the Indian delegate, Mr. Dalip Lahiri, at the Rome Conference on the ICC in 1998, for not voting in favour of the ICC. He opined that the reasons given by the delegate were riddled with hypocrisy, confusion and a lack of understanding of the issue. He referred to the Bilateral Immunity Agreement signed by India with the United States, as well as the present situations before the ICC – Democratic Republic of Congo, northern Uganda, Darfur (Sudan) and the Central African Republic. He particularly emphasized the scale and level of violence against women in all the situations and opined that he was not surprised that the Indian campaign was initiated by and had the leadership of women. He also opined that there was much to learn from the ICC Treaty in terms of victim and witness protection, and other such issues to strengthen Indian laws. He further outlined his own tireless efforts at persuading successive governments in India to accede to the ICC, and emphasized the importance of India extending international solidarity and supporting the ICC.

Role of Indian Parliamentarians on the ICC: Mr. E.M. Sudarsana Natchiappan

Mr. Natchiappan commenced his speech by recalling the consultative meetings held on the ICC with Indian parliamentarians and stated that the events created an impact on the ministries and the bureaucrats. He opined that such events were necessary as they provided the space to think about and understand the necessity and ramifications of ICC for India. He emphasized that the dialogue with parliamentarians had to be an ongoing process, as it was also the duty of parliamentarians to look beyond existing laws in India and beyond the Bills being introduced in the Parliament. He questioned why India feared a violation of its sovereignty when it came to prosecution for the most serious crimes, when it had surrendered many sovereign rights for the formation of the United Nations, World Trade Organization and on other issues. He emphasized the importance for the Indian campaign to enter into a dialogue with political parties just as it did with parliamentarians. He suggested that ICC-India campaign meets the political parties prior to their preparation of the election manifesto, and seek a commitment about accession to the ICC Treaty.

Chairperson's Remarks: Siddharth Varadarajan

Summarizing the panel, Mr. Siddharth Varadarajan highlighted India's culture of refusing culpability and international scrutiny for its human rights situations. He said that preparatory work on the ICC had been done during the Gujral and Devagowda governments, and the abstention at the Rome Conference was during BJP rule. Despite most political parties being opposed to the ICC in India, Mr. Siddharth emphasized that the significance of the ICC-India campaign lay more in its journey than in its destination alone – in generating interest in emerging anti-impunity standards in international laws and how they could be used to reform existing and introduce new Indian laws. Moreover, the Indian campaign had

been emphasizing, time and again, not on the forum in which the perpetrator should be punished, but the fact that the perpetrator should be punished at all, he said.

Mr. Siddharth was concerned about a credibility gap of the ICC since it was prosecuting African suspects alone. He emphasized that it was important for the ICC to function as a fearless, impartial, independent and truly international court. This could be indicated by opening some investigations against perpetrators from rich and powerful countries, he said. He observed that despite its shortcomings, the ICC provided a glimmer of hope to victims and survivors who had no other forum to go to. He recalled how the attempt to prosecute Pinochet in Spanish and English courts boosted the struggle of victims for justice and international scrutiny in Chile, Uruguay and other states. He opined that similarly Indian leaders should not think that they can escape accountability for mass crimes committed in India. He stated that India could not create higher and higher walls to avoid international scrutiny and remain oblivious to international developments. He also pointed out deficiencies in Indian laws, including on victim and witness protection, law on sexual violence and the absence of concept of command / superior responsibility, and the relevance of ICC standards in this regard. In his opinion, the sovereignty of the people had overriding importance over sovereignty of the state. He said it was important for 1.2 billion Indians to have a voice distinct from the stand of the government on the issue of ICC.

SESSION 2: CONTEXTS & THE CAMPAIGN

The speakers for the session were **Ms. Vahida Nainar** (Advisor, ICC-India & Founder-Trustee, Women's Research & Action Group), **Ms. Saumya Uma** (Coordinator, ICC-India & Co-Director, Women's Research & Action Group), **Fr. Cedric Prakash** (Director, PRASHANT Centre for Human Rights, Justice & Peace) and **Ms. Vrinda Grover** (Advocate & Advisor, ICC-India). The session was chaired by **Ms. Seema Mustafa** (senior journalist).

ICC: Achievements, Developments & Challenges: Ms. Vahida Nainar

Ms. Vahida Nainar commenced her presentation by stating that in 1998, when the ICC Treaty was being negotiated, there had been no misconception among persons involved in the negotiations that the ICC would address all crimes. Yet, the process was considered a breakthrough for the potential of a "ripple effect" that it would have on issues of justice for mass crimes world wide. Further, the ICC was a move to reduce the ad hocism by creating a permanent and independent court, she observed. She said that out of the over 1700 communications received by the ICC Prosecutor from 108 countries, atleast 80% were dismissed as they related to crimes that were not within the jurisdiction of the ICC. This reflected world-wide misconceptions about what crimes the court sought to prosecute for, she said.

She stated that worldwide, there had been a fair amount of skepticism about the ICC, now that it had functioned for over five years. One concern was that the ICC Prosecutor was trying to examine "easier situations" such as through state referrals and referral by the Security Council rather than use its proprio motu powers to take up situations on its own initiative. Ms. Nainar said that while the level of expectations from the ICC was tremendous, the court had to choose and strategize and build its credibility slowly. Another criticism was that the court prosecuted only persons of colour – a phenomenon that is probably because the ICC wants to get the United States on board. Further, in the Ugandan situation, referred by the state itself to the ICC, while the ICC assured that it was investigating crimes committed by all perpetrators, the indictments issued by it were on LRA members but not on persons from the Ugandan government, Ms. Nainar said. She added that the investigation did not have the support of all the civil society members, as many felt that it was obstructing the peace talks and that rebel groups were not coming to the negotiating table because of the ICC investigations. However, officials in the ICC claimed that because of the arrest warrants that had been issued now but could be implemented later, there was

pressure on the LRA to negotiate and participate in the peace talks. The situation of Central African Republic, which has many crimes of sexual violence, has been pursued by women's groups for many years before it is finally being investigated by the ICC, she said. Ms. Nainar concluded by saying that the ICC was a large, international and bureaucratic institution, and that we would have many frustrations with it. However it was important to explore ways in which we could engage with it, she said. She concluded by emphasizing the potential of the ICC to change national, domestic laws and bring them on par with international legal standards.

Mass Crimes at Home: The South Asian & Indian Contexts: Ms. Saumya Uma

Ms. Saumya opined that a notion existed that mass crimes are not relevant to South Asia or India as we have a good human rights record and functioning judicial systems in this part of the world, and that a further notion exists that mass crimes occur and impunity for them exist only in military dictatorships, governments ruled by right wing ideologies, monarchies and Islamic countries, but not in democracies. She stated that contrary to these notions, in South Asia, including India, impunity for mass crimes exists in a rampant manner. She highlighted the history of mass crimes in each of the South Asian countries, the need for and relevance of the ICC, domestic campaigns on the ICC in such countries as well as the progress made in the official policy of the country on the issue from prior to Rome Conference in 1998 till the present date. She stated that Afghanistan was the only country in this region to ratify; Bangladesh had signed and not ratified; Nepal had formed three Inter-Ministerial Task Forces to study its obligations if it were to accede to the ICC treaty, and the Nepal Parliament, on 24 July 2006, had unanimously issued a commitment resolution directing the government to ratify the ICC Treaty. Civil society groups were also very active in Nepal, and 106 organizations issued a joint press statement calling upon the government to do so with immediate effect in 2007. The position of the new government on the issue was yet to be known, she said. Sri Lanka too formed an inter-ministerial committee in 2005 for making recommendations on accession to the ICC Treaty, but there have been no known developments subsequently, she said. Civil society groups in Myanmar found the ICC relevant to the mass crimes that are rampant in their country at present, she said. Pakistan and India had voiced concerns at the time of the Rome Conference, and there had been hardly any progress made subsequently, Ms. Saumya observed.

Ms. Saumya went on to highlight the common features in the South Asian context, which included: a) gross violations both by state & non-state actors; b) large scale impunity that exists, both due to political unwillingness to prosecute the perpetrators as well as inability to do so; c) absence of regional human rights mechanisms such as courts or commissions; d) Almost all South Asian countries had signed the Bilateral Immunity Agreement with the United States that sought to undermine the ICC, with India being the first major victory for the US; and e) Even after more than a decade of the existence of SAARC, promotion of human rights is not listed as a goal in the SAARC charter, and it has taken very little initiative to discuss human rights issues. Some challenges before South Asia cited by her included - suspicion about the ICC being a western-dominated mechanism, notion that state sovereignty is violated, U.S. pressure through Bilateral Immunity Agreements and other forms, and technical and procedural processes subsequent to ratification. She concluded that as a leader of the Non-Aligned movement, and as an emerging global and regional leader, India's responsibilities extend far beyond narrowly-defined national interests; it has an international responsibility in upholding the rule of law rather than join hands with few countries that seek to undermine the same.

Minority Rights & Accountability for Mass Crimes: Fr. Cedric Prakash

Fr. Cedric Prakash focused his presentation on rights of religious minorities in India, namely Muslims, Christians and Sikhs. He talked about the Gujarat carnage 2002 where Muslims had been targeted for various crimes including sexual violence, and elaborated the manner in which the state machinery had

been used to perpetrate the crimes. Yet the perpetrators had the arrogance that no one could make them accountable, as had been proven by the lack of convictions of major perpetrators of the carnage even six years later, he said. Fr. Cedric also elaborated the attacks against Christians in Kandhamal district in Orissa in December 2007. The state government had passed an order stating that no relief and rehabilitation should reach the victims without the Collector's order. A petition for staying the order had been dismissed by the Orissa High Court but entertained by the Supreme Court, he said. He further said that as of April 2008, Christians were being persecuted and attacked in many states including Gujarat, Karnataka, Madhya Pradesh, Rajasthan and Chattisgarh, and were told by the police that there were no orders to protect them from such attacks. He further stated that a myth had been perpetrated with regard to forced conversions of Hindus into Christianity. In Gujarat, every year prior to Easter, the government initiated a "ghar vaapasi" programme which featured fake reconversions of Hindus who were supposedly converted into Christianity by force. The event created communal tension and hatred against members of the minority community, he said. Fr. Cedric further drew upon a third example of state complicity in attacks against religious minorities – that of anti-Sikh attacks in Delhi in 1984 subsequent to the assassination of the erstwhile Prime Minister Indira Gandhi.

Fr. Cedric emphatically stated that mass crimes were the tip of the iceberg and were a result of the systematic build up of prejudice and hatred against religious minorities. As an example, he talked about the communal situation prevalent in Gujarat - the text books in Gujarat that had inaccurate contents on religious minorities, the promulgation of an anti-conversion bill to 'protect' the national religion (Hinduism?), the Babu Bajrangi brigade that forcibly abducted young persons who had entered into inter-religious marriages and 'returned' them to their parents so that they could be married within the Hindu fold, the whipping of passion by the majority community against the minority community in Dangs district, the discriminatory destruction of old and historic dargahs and mosques for so-called developmental purposes, while ignoring the temples that mushroom on every street, as well as the discriminatory use of Prevention of Terrorism Act (POTA) against Muslims. He wondered if the government officials could be made accountable for the crimes they had committed, and further wondered if the Indian judiciary was beyond criticism. Fr. Cedric concluded his presentation by stating that India's accession to the ICC Treaty would help a) create a deterrence to perpetrators of mass crimes who had the political clout to escape accountability within India; and b) provide a sense of security to minority communities. He called upon the Indian government not to shirk its responsibility and to support the global movement for justice.

Why Mass Crimes Go Unpunished: Gaps and Flaws in the Legal System: Ms. Vrinda Grover

Ms. Vrinda Grover, based on her criminal law practice, highlighted some of the features of mass crimes in India: a) though it was public knowledge as to who were the perpetrators of communal violence in Gujarat (2002), Mumbai (1998) and Delhi (1984), this could not be translated into law and the perpetrators could not be made accountable; b) victims from minority communities and those belonging to particular castes had to face more obstacles in obtaining justice; c) perpetrators who were political leaders or had a political clout were rarely prosecuted, and even if they were, no convictions took place; d) fundamental premises of criminal law were overturned in situations subsequent to mass crimes, as police, who were often the perpetrators of such crimes, were also the investigating authority, and state agencies perpetrate the crime and are expected to prosecute for the crime as well; e) communal violence, in the experience of India, was often not a clash between two groups with equal power with the state as an innocent bystander, but had state connivance, perpetration and orchestration as a chief feature; f) absence of an independent and effective investigative agency, and the pressure exerted by state governments over the police force had been acknowledged by the Supreme Court in Prakash Singh's case, where it issued a set of guidelines in 2006-2007.

Ms. Grover stated that the Indian Penal Code (IPC), Indian Evidence Act and Criminal Procedure Code were not designed to deal with mass crimes of the type that we are witnessing within the country. While the IPC spells out crimes that could cover some of the mass crimes, the context of the crime – the systematic, targeting of a group because of its identity – which made the crime more grave – was given no recognition by the IPC, she said. The judiciary was not taking cognizance of the context of the crime either, she said, citing as an example, a case related to the anti-Sikh violence of 1984, where an accused was acquitted because the First Information Report had been lodged after six months. She also pointed out the gap between law on paper and the reality in courts, by citing the experience of survivors of Hashimpura violence who were ridiculed while deposing in court. “There is an urgent need to forge new legal tools to alter the pattern of continuing injustice and rampant impunity, not by whittling down the guarantees and rights of the accused but by exacting greater accountability from the State and empowering the victim”, she said. While acknowledging that there had been a few victories in prosecution and conviction of perpetrators in mass crimes, such as in Bilkis Bano’s case, she opined that the reasons for the success lay outside the purview of law, through massive and continuous support to survivors by many persons.

Chairperson’s Remarks: Ms. Seema Mustafa

Ms. Seema Mustafa said that the importance of the campaign lay in the increasingly unresponsive and insensitive state that was either a silent bystander or participating in perpetrating grave crimes, and not allowing democratic institutions to function. She said that there was a growing tendency on the part of the ruling political classes to be unapologetic and to justify mass violence, citing Gujarat as an example, where votes had been garnered on the basis of the violence. The skepticism and fear of the ICC stemmed from the fear of international scrutiny over what happens within the country, she said. Implementation of the law in a manner that strengthened the struggle of the victim / survivor and proved as a deterrent to future perpetrators was crucial, she added.

The session concluded with questions and answers, including on the implications of Bilateral Immunity Agreements, the importance of activism to make law work, reasons for the success in Bilkis Bano’s case, progress of the Nanavati Commission inquiring into the Gujarat carnage, and the failure of the Indian judiciary in ruling in favour of victims / survivors when armed forces commit atrocities on civilians.

In the post-lunch session of 25 April as well as the entire day on 26 April 2008, the campaign had organized internal discussions with its Board of Advisors, partner organizations, individual members and potential partners of the campaign. These discussions focused on introspecting the campaign’s work in the past seven years, discussing the present work of the campaign, determining focus areas and work plan for the future, and a discussion on other aspects of the campaign such as financial sustainability, campaign strategies, outreach, visibility and alliance-building, structure, division of responsibilities and leadership. About 40 persons participated in these deliberations.

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