

**REPORT OF A WORKSHOP ON  
INTERNATIONAL CRIMINAL COURT – CONCEPT & RELEVANCE**  
(Held on 20<sup>th</sup> July 2003, Jamshedpur, India)

A workshop on International Criminal Court – Concept & Relevance was held on 20<sup>th</sup> July 2003 at Jamshedpur, India. The workshop was co-organised by Free Legal Aid Committee (FLAC), Jamshedpur, and ICC-India, a project of Women’s Research & Action Group (WRAG), Mumbai. The participants for this workshop included lawyers, social workers, women’s rights and child rights activists.

The resource persons for the workshop were G.S.Jaiswal, advocate and Secretary, FLAC and Saumya Uma, Coordinator, ICC-India.

G.S.Jaiswal opened the session by welcoming the participants to celebrate World Day for International Justice by their participation in the workshop on ICC. He briefly outlined the history behind the creation of the ICC, the concept, its principles (such as the principles of complementarity and non-retroactivity) and its possible usefulness for India. He explained to the participants each of the three crimes – war crimes, crimes against humanity and genocide – and what the ingredients of these crimes were. He also said that the crime of aggression would become a crime under the jurisdiction of the ICC once it was defined. He also told the participants about the recent developments towards ICC’s functioning, namely the election of judges and prosecutor. He said the recent incidents in Gujarat show the futility of prosecution under the Indian legal system for grave crimes such as genocide, resulting in the perpetrators remaining scot free. He felt ICC was an important mechanism to complement the Indian legal system in ensuring that justice is delivered. He further outlined briefly the trigger mechanisms under the ICC. Subsequent to his presentation, he called upon Saumya Uma to elaborate these issues further so that the participants would get a deeper insight to the manner in which this international institution would function and ways in which we, as Indians, could derive benefit from it.

Saumya began her presentation by thanking Mr. Jaiswal for having provided the foundation by explaining the basic principles contained in the ICC. She said she would divide her presentation into three parts, and break for discussion at the end of each part, in order to ensure that the workshop is more participatory in nature. Part 1 – History of ICC, Basic principles, crimes and structure of the court; Part 2: The Indian government’s response & the relevance of ICC to India; Part 3: ICC campaign in India & strategies for strengthening the same. She also said that she had participated in a smaller discussion the previous evening where some lawyers from Jamshedpur had raised several queries on aspects of ICC – including whether it would infringe on India’s sovereignty, ICC’s mode of functioning, access to the court, protection to victims and witnesses and fair trial procedures. She further noted that it was gratifying to see that a study circle on ICC had already been started in the city and that several persons were interested to know more about the issue.

Saumya briefly outlined the historical developments leading to the creation of the ICC, and situations that triggered its creation. She talked about the Nuremberg and Tokyo tribunals, and their inadequacies; the problem of retroactivity in the Yugoslav and Rwandan tribunals, and the need for a permanent ICC to avoid dependence on Security Council resolutions for setting up tribunals, especially in the wake of a “tribunals fatigue”. She outlined the developments in international human rights law as well as humanitarian law from the 1940s till date and illustrated how ICC would give teeth to these processes by being an implementation machinery for the most serious crimes under international law. She also spoke briefly about the main principles governing the ICC, such as complementarity, non-retroactivity, no immunity and non-inclusion of death penalty, crimes covered under the ICC and the structure of the court.

This was followed by a discussion, where participants raised a number of queries such as

1. What is the difference between International Court of Justice & the ICC?
2. Why do we need the ICC when we have a National Human Rights Commission (NHRC) and International Human Rights Commissions?
3. What is the role of ICC in crimes against humanity when we have Indian laws on it?
4. How does one refer cases to the ICC?
5. What is ICC’s stand on terrorism?
6. How can orders of the ICC be enforced? Does the ICC have its own enforcement machinery just as national courts have?

Saumya explained the difference between the ICJ and the ICC by emphasizing that the ICC is the first permanent international forum that would prosecute individuals while the ICJ deals with disputes between states. She responded to the second question by stating that though we have an NHRC and a UN Commission on Human Rights, these are not courts of law and cannot prosecute individuals for grave crimes that are committed. They can make an enquiry and arrive at findings, recommendations and observations, which are recommendatory and not binding on the government. The enforcement is then left to the government, and it is hoped that to prevent embarrassment before the national and international communities, the government would enforce the directions. However, the ICC is required to make individual perpetrators accountable without having to depend on the political will of the government in power within the country to do so in individual cases. Saumya responded to the question about crimes against humanity by stating that contrary to popular belief, the Indian legal system is neither perfect nor comprehensive. ‘Crimes against humanity’ is a concept which has been widely accepted by the international community since the Nuremberg trials in the 1940s, yet the Indian Penal Code does not list this as a crime. Genocide is not included as a crime under the IPC either, despite the fact that India was the first state to ratify the Genocide Convention in the 1950s. Seen in this light, ICC can provide Indian human rights activists the impetus to campaign for law reform to include these heinous crimes within the Indian legal system. In elaborating the trigger mechanisms to the ICC, Saumya emphasized the role of the Office of the Prosecutor in the light of present geopolitical dynamics. She also stressed that an individual could be prosecuted despite the absence of his / her country having ratified the ICC treaty if the crime was committed in a country which

accepts ICC's jurisdiction. Thus Indians will not remain insulated from the ICC process even if the Indian government fails to ratify the ICC treaty. Saumya further said that the ICC does not list terrorism as a crime, despite its serious repercussions on human rights, as there was a lack of consensus on its definition. A separate international convention on terrorism was being formulated, with the active participation of the Indian government. Saumya noted however that, many terrorist acts would be covered within the crimes listed under the 'crimes against humanity' category. Saumya further detailed the enforcement mechanisms envisaged by the ICC, and the dependence of the court on cooperation from states parties and other states.

In the next part of Saumya's presentation, she talked about geopolitical dynamics, including the response of the Indian government to the issue, as well as the American hostility to the ICC. The questions that followed were as follows:

1. How can we expect a government to accede to the ICC treaty when the government is likely to be dragged to the court & held responsible for human rights violations within the country?
2. What is the relevance of the ICC for American aggression on Iraq?
3. Can the ICC make powerful countries accountable when such powerful countries refuse to ratify / accede to the ICC Treaty?
4. How effective can ICC be when countries refuse to accede to the treaty?

Saumya responded to the first question by saying that we often believe that countries would not sign / ratify a treaty that has the potential to hold it responsible for human rights violations within the country. However, history shows that countries do ratify or accede to such conventions. Examples are the ICCPR, ICESCR, CEDAW, CRC and CAT. Countries agree to conform to the human rights standards set by these treaties for a variety of reasons – including pressure from domestic human rights groups, a desire of the government to show the international community its commitment to human rights, a desire to set right past wrongs committed in the country (possibly by a different government) and also for a variety of geo-political reasons. This is true of the ICC Treaty as well. In addition, the fact that prosecutions will be against individuals and not against governments has also been a contributing factor to the high number of signatures and ratifications received for the Treaty within a short span of time.

Responding to the second and third questions together, Saumya outlined some efforts that are being made by the international community to hold George Bush and Tony Blair accountable for the aggression on Iraq, and ICC's potential and limitations in such efforts. She also pointed out that many of the countries that have ratified the ICC are small, economically developing countries, which look to the ICC as an institution through which they would get some protection from potential aggressions by big, powerful countries.

Responding to the last question in this session, Saumya differentiated between effectiveness of the ICC and its credibility. She stated that the ICC cannot be truly international unless countries around the world participated in it. Participation of Asian, and South Asian countries in particular in the ICC, has been less than desirable. She pointed out that civil society members, such as us, have a great role to play in pressurizing our governments to accede to the Treaty. She stated however, that the ICC can still be effective in rendering justice against individual perpetrators, because an individual can be prosecuted despite the absence of his / her country having ratified the ICC treaty if the crime was committed in a country which accepts ICC's jurisdiction. How this works in practice is yet to be seen, once the ICC starts functioning.

Participants also raised concerns about victims and witnesses' protection. This was specifically in the context of a recent case in Gujarat (known as Best Bakery case), where all accused persons were recently acquitted by additional sessions judge, Fast Track Court One, Vadodara. The persons were charged with brutal murder of 14 persons, looting and destruction of property on 1 March 2002 in Gujarat. A main reason for the acquittal was that key witnesses had turned hostile, succumbing to pressure and threats from the perpetrators. The situation is particularly serious since the perpetrators are closely associated with and / or are members of the present government in Gujarat. If the hypothetical example of perpetrators of the Gujarat carnage were to be tried by the ICC, participants wondered if a victim or witness would be able to withstand pressure from sources within or close to the government. Several participants, who were criminal lawyers, expressed the view that witnesses turning hostile and being prevented from giving truthful testimonies is a huge obstacle in the way of criminal justice in the country. Best Bakery case was a recent and most publicized example of this phenomenon. Mr. Jaiswal responded to this concern by saying that when the case comes under international scrutiny, it becomes that much more difficult for governments to influence the justice delivery system. Manipulation with the legal system is possible when the case is being tried within the local area that the government has a powerful influence in. Saumya added to this response by detailing the safeguards stated in the ICC Treaty with regard to victim and witnesses protection, including the establishment of the Victims and Witnesses Protection Unit, and its responsibilities. She commented that while she could not say that the victim / witness would be completely insulated from pressures by perpetrators when she has to depose before the ICC, she could confidently say that the safeguards envisaged under the ICC were several steps more developed to handle such eventualities than the Indian legal system was. This provided an impetus for us to draw inspiration from the ICC for reform of our legal system, she said.

In the third part of her presentation, Saumya outlined the short history of the Indian campaign on the ICC, its objectives and focus areas, its achievements and some obstacles faced, its manner of functioning and its future plans. Participants were keen to know how interested persons could contribute to the ICC campaign in India. Saumya responded to this query by stating the following activities that the campaign had planned, in which participants were welcome to involve themselves:

- Law research – a comparison between Indian law and ICC-related laws
- Research – on how ICC can be useful to various human rights issues in India
- Information dissemination – through workshops, writing, publication etc.
- Media outreach
- Networking and outreach, strengthening the campaign
- Introducing education modules in universities and colleges on ICC
- Dialoguing with the government

While discussing strategies that the campaign could use in India, several participants suggested that opposition political parties' help could be sought to raise the issue in the Parliament. Some felt it might be beneficial to approach smaller parties rather than the big ones such as the Congress. Participants also suggested that the campaign link up with national commissions on human rights, women's rights and minority rights, as well as with civil rights and democratic rights groups in the country.

Most participants felt that the issue of ICC, though interesting, was a highly complex one, especially for persons who have been working on rights issues at the local level. A consensus was arrived at that the participants needed more time and information to understand the enormity of the issue and its relevance for India, and that a half day workshop was highly inadequate for this process. A two-day workshop should be planned sometime in future.

The participants further felt the need to set up a core committee in Jamshedpur for information dissemination on ICC. A core committee was set up at the workshop, headed by Mr Jaiswal, and consisting of several lawyers and activists. This committee would collect information and disseminate the same through workshops, discussion groups and study circles. The committee plans to take information to the grassroot organizations that are committed to issues of justice and accountability. FLAC volunteered to coordinate the ICC campaign in the Eastern Indian states, including Bihar, Jharkand, West Bengal and Orissa. FLAC has suggested that sub-committees may be formed subsequently to study specific issues relating to the ICC, such as Women's rights, Children's rights, Evidence, Procedure, Victims & Witnesses' Protection, Rights of Defence and Fair Trial. The ICC-India secretariat, based in Mumbai, has promised to share all information with the core committee and support its activities in every way possible.

The workshop ended with the participants and the resource persons vouching to work together to strengthen the Indian campaign on the ICC. Mr. Premchand, chairperson, FLAC delivered a vote of thanks, and expressed the need for several such workshops on ICC in future in order to gain a better understanding of the issue.