Report of the 1st National Consultation on International Criminal Court & India

Saumya Uma
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THE 1ST NATIONAL CONSULTATION ON
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&
INDIA
8-9 December 2005, New Delhi

ICC-INDIA:
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BACKGROUND

On 8-9 December 2005, the first National Consultation on International Criminal Court & India was held in New Delhi. This event was organized by ICC-India: the Indian campaign on International Criminal Court and People’s Watch - Tamil Nadu, in association with Amnesty International – India, CISRS, Indian Social Institute, Justice and Peace Commission, The Other Media, Partners for Law in Development, Programme on Women’s Economic, Social and Cultural Rights (PWESCR) and various individual partners of the campaign.

The International Criminal Court (ICC) has received an overwhelming support from the world community. Despite its widespread acceptability internationally, very little is known, spoken, written or discussed about the ICC in India. Over the past five years, the ICC-India campaign has been conducting state and regional level workshops on the ICC, aimed at information dissemination. The first national consultation is the logical corollary of this process.

The objectives of the consultation were to take stock of international developments related to the ICC, develop an insight into ICC and its ramifications for India, to forge links with like-minded individuals and groups working on the issue of impunity, and to collectively strengthen the ICC-India campaign. This event was timed to coincide with the visit of Judge Philippe Kirsch, President of ICC, to Delhi, in order that he could address the participants at the consultation.

The consultation consisted of seven sessions spanning over two days. It was attended by more than 60 participants consisting of lawyers, human rights activists, academics, researchers, law students, media persons and representatives of non-governmental organizations. Participants hailed from various parts of the country including Delhi, Orissa, Gujarat, Punjab, Maharashtra, Karnataka and North-eastern states. Fourteen resource persons participated in the consultation and shared their insights on various topics of the consultation.

An Organizing Committee was formed some months prior to the event to assist with the logistical arrangements for the consultation. This committee met at least thrice and deliberated on all organizational aspects of the consultation. The committee consisted of thirteen human rights activists, many of whom were based in Delhi and all of whom volunteered to take on responsibilities. Much of the manner in which the consultation shaped can be attributed to their energy and dynamism.

This report presents the highlights of the consultation with a focus on the presentations made by resource persons and the discussions that followed each presentation.

ICC-India Campaign
December 2005
Ms. Saumya Uma, the coordinator of the ICC-India campaign, warmly welcomed the participants to the First National Consultation on ICC & India. In her welcome address, she said that the ICC-India campaign, commenced in 2000, has been conducting state and regional level workshops for the past five years, with the main objective of information dissemination. These workshops had resulted in creation and expansion of the support-base for the campaign. The workshops have also facilitated linkages to be made between the ICC and specific issues of justice and accountability within the country. Enriched by such experiences, the campaign felt it necessary to organize the first national consultation on the ICC & India.

The main objectives of the consultation were a) to take stock of international developments pertaining to the ICC and also the developments in international criminal jurisprudence; b) to develop an insight into the ICC and its possible ramifications for India; c) to forge links between like-minded individuals, organizations and institutions; and d) to collectively strengthen the ICC campaign in India. Ms. Uma named the co-organizers for the event.

She also introduced the members of the Organizing Committee that was specially formed for assisting in organizing the consultation. This was required particularly in view of the fact that the secretariat of ICC-India was located in Mumbai, and the campaign had no office in Delhi. She concluded her remarks by expressing a hope that the consultation would prove to be an enriching experience for all involved.
SESSION 1

Introduction to
The International Justice System

FROM NUREMBERG TO ICC: A HISTORICAL DEVELOPMENT OF ICC

– Dr. V. S. Mani

Dr. Mani started his presentation by saying that that when we talk of a court, we also talk of a law; the development of a court and law should go hand in hand. He remarked that the development of international criminal law has taken a long time. Tracing the historical developments that led to the formation of ICC, Dr. V.S. Mani said that the beginning of international humanitarian law is probably the beginning of international criminal law, which was commenced in 1864 by the 1st Convention by International Committee for Red Cross, followed by the Hague conferences and a number of conventions. First World War saw the defeat of Germany, Turkey, Austria, Hungary, and Bulgaria. When the war ended and the Treaty of Versailles was concluded in 1919, Article 227 of the treaty envisaged a criminal trial of the former German Emperor Wilhelm Kaiser II, very strangely, “for having committed a supreme moral offense of violation of treaties.” 
Pacta sunt servanda – treaties had to be obeyed. The purpose of this trial was expressed to be “to vindicate the solemn obligations of international undertakings, and the validity of international morality.” However, as Netherlands decided that it was a political offence and gave shelter to the emperor, the article was never implemented. The real reason why Kaiser was expected to be put on trial was for the atrocities that he and his friends committed during the war. However, it also has to be noted that the atrocities during the war were committed by both sides. Due to a prick of conscience, they decided to set up a war crimes trial, in which they failed.

In 1927-8, an International Penal Law Conference took place where crimes against international peace and security were discussed. A mention of aggression was made at this conference. In 1928 – an important year for students of international law - the Paris treaty outlawing war was adopted. This laid the foundation for the statute that created the Nuremberg tribunal. In 1934, when the visiting Yugoslav king was assassinated in Marseilles at the start of a state visit to France, France and the League of Nations decided to formulate two treaties in 1937 - one on international terrorism and the other on international criminal court. One treaty laid down the law concerning international terrorism and the other treaty contained a statute for creation of an international criminal court to try the offence of international terrorism. The year was 1937, and there were no takers for the treaties due to the developments that were taking place in Europe. The fact that British India had ratified the treaty on terrorism in order to suppress the national independence movement was also highlighted.

Dr. Mani then elaborated upon the Nazi atrocities that began in late 1930s, the Second World War and situated the establishment of international military tribunals in Nuremberg and Tokyo (known as Nuremberg and Tokyo tribunals) within this historical framework. He made a comparison of the two tribunals, and observed that the Nuremberg tribunal was better known, more organized, it had four prosecution teams, it had committed persons involved in organizing it and functioned under a treaty framework - the London Charter. In comparison, the Tokyo tribunal came about by a whip of hand by one person’s decree - General McArthur, and there was only one prosecution team, probably indicating the American bias, he observed. It was also highlighted that all those who were accused of crimes were not tried (as several amnesties had been given by
McArthur), and that those who were tried were given extremely stringent punishment. There were dissenting opinions in the Tokyo trials even with regard to the quantum of punishment. However, the Tokyo trials are important for Indians due to the dissenting opinion given by Justice Radha Vinod Pal, where he raised an objection to an ad hoc, post-war trials imposed by victorious nations on defeated nations. That was the main thesis in his dissenting opinion that ran into more than 1200 pages, published later as ‘Crime in International Relations’.

The questions that Justice Radha Vinod Pal raised continue to haunt us till date. In every war, when crimes take place, there was a need for a proper trial for these crimes, irrespective of who commits these crimes. This underscores the importance of a permanent international criminal tribunal, not an ad hoc post-war tribunal. Post-war tribunal is inherently biased in favour of the victorious and can be vindictive. Soon thereafter, the Nuremberg principles came to be recognized by the United Nations General Assembly as a part of international law.

The development of international human rights law between 1945 and 1948 clearly highlighted the growing importance of international human rights law. Two important events of 1948 that gave shape to the need of ICC were cited: the U.N. General Assembly’s adoption of the Universal Declaration of Human Rights and the Genocide Convention concluded two days later. Genocide Convention clearly established that the crime of genocide, whether committed during war or during peace time, must be condemned and punished. Every state party to the convention had an obligation to do this and to enact a national law on this issue. It was pointed out that India has not fulfilled this obligation several decades after ratifying the Convention, and even while the process was on for drafting a Communal Violence Bill, such an exercise still does not measure up to the requirements under the Genocide Convention. It was pointed out to the participants that Article 6 of the Genocide Convention envisages trial before an international penal tribunal, and that the Apartheid Convention had a similar provision.

Soon after the adoption of these two documents, in 1949, the General Assembly appointed the International Law Commission (ILC) – the body that codifies international law. In 1950, the ILC was asked to assume two responsibilities: a) to draft a statute for establishment of the international criminal court, and b) to draft a code of offences against international peace and security of mankind. One was a statute for the court and the other for the law. The ILC took up these tasks through the formation of a 17 member committee in 1950. It made its first draft in 1951, worked until 1954. In 1954, the U.N. General Assembly decided that the ILC could not continue working on the statute until the definition of aggression was finalized, and hence the exercise was postponed. In the meantime, the Vietnam war took place. In 1974, the General Assembly came up with some sort of a definition of aggression.

In 1981, the General Assembly asked the ILC to renew its efforts on drafting a code of offences against peace and security of mankind. The ILC had a second look and started working on a draft code on crimes against international peace and security of mankind. In 1996, the ILC had completed its work and submitted the draft to the U.N. General Assembly. The ILC then took up the task of formulating a statute for creation of the international criminal court. Subsequently, two important events took place – crimes in former Yugoslavia and Rwanda, and the U.N. Security Council set up ad hoc tribunals to try persons for crimes committed in both these contexts. The speaker concluded by saying that momentum for the statute of the ICC gathered in the following years, with the ILC submitting its draft to the General Assembly in 1994, and the statute creating the ICC, known as the Rome Statute, being adopted in 1998 in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference).
Advocate Ashok Agrwaal commenced his presentation with difficulties encountered in defining both ‘sovereignty’ and ‘accountability’. Citing authorities, he said that sovereignty can be defined through 13 overlapping terms including sovereignty as vested in a monarch, sovereignty as a symbol of absolute unlimited control of power, a symbol of political legitimacy, a symbol of political authority, a symbol of self-determined national independence, a symbol of governance and constitutional order, a symbol of recognition, a symbol of powers, immunities and privileges, as a jurisdictional competence to make and/or apply law, and as a symbol of basic governance and competence – a constitutional process. In some of these definitions, seeking accountability is difficult. For example, in the case of a Constituent Assembly, it is clearly a symbol of sovereignty and its accountability becomes difficult because it is, by definition, a representative body.

The presentation focused on the colloquial understanding of accountability in relation to sovereignty, alluding to that aspect of the power of nation states which enables them to assert and to exercise exclusive control and authority over their territory and its inhabitants, internally and vis-à-vis other sovereign powers.

Pondering over the meaning of ‘sovereignty’, the speaker speculated on how states were able to commit mass crimes such as during Holocaust and in Rwanda and Yugoslavia. He opined that it was because states, in exercise of their sovereignty, had a monopoly on violence and control. Sovereignty is not just a matter of coercive power, but it is also constructed as a right to command and a corresponding right to be obeyed. Currently nation states are seen as enjoying absolute sovereignty within their geographical limits. This concept has been under attack since the time prior to World War II.

The speaker then traced the history of sovereignty and accountability by drawing upon ancient Hindu practices, dictates in Islam and Christian notions of the same. States and rulers did not always enjoy absolute sovereignty; sovereignty was conditioned by supervening factors. For example, in India, the ancient concept for state governance was Dharma, which was above the state. The king enjoyed limited sovereignty to administer the country but he had no right to make rules or laws because those were determined by dharma. So, it was actually a virtue to rebel against a king who violated dharma. The Mahabharata refers to a theory of social contract where the king was appointed by god with the consent of the people and the dandaneethi - a law of sanction or punishment - existed beforehand for punishing the ruler or a subject who violated dharma. The concept of sovereignty in Islam was very similar, based on the concept of tauheed – the premise that god is the creator, sustainer and master of the universe, and sovereignty of the kingdom of god is vested in him. His commandments are law, knowledge of the law was obtained through the Prophet – the misaal - and actual rule on earth is carried out through his representatives – the kilaaf. Under this dispensation, the ruler exercised authority within the limits prescribed by god and no one could be deprived of his or her rights. The king merely carried on the act of administration after gaining confidence of the people, and he had to leave power the moment he lost that confidence. A comparison was also drawn to the practices in Europe in medieval times, where states did not enjoy absolute sovereignty. State governance of all states was subjected to the fact that they were ultimately accountable to the Church and the Pope. The Holy Roman empire was an attempt to synchronize the authority of the Pope on spiritual matters with the authority of the emperor on temporal matters.

Modern nation-states came into being after the Peace of Westphalia, which was preceded by several decades of war. It was pointed out that the Treaty of Westphalia gave rise to secular power and was distinct from matters pertaining to religion or spiritual authority of church. The treaties pertaining to Peace of Westphalia ended the power of the Holy Roman
empire to intervene in the affairs of the European states in the name of the church, and made nation-states sovereign and subservient to no other. We are reaping the fruits of this peace. This accord marks the beginning of the modern system of nation-states, often called the Westphalian states.

The chief characteristics of such states was elaborated as follows:

- Fixed territorial boundaries - demarcation of territories was integral to such states;
- Redefinition of the relationship between subjects and the states – prior to the treaties, it was possible for subjects to be aligned to conflicting loyalties. For example, the subjects could be aligned to the church and to their king, even if the church was against the king. It was no longer possible after the Peace of Westphalia. This was reflected even today when religious minorities are challenged for their suspect loyalty to the nation.
- Citizens of a nation were subjected to the laws and whims of their own government; they could not owe allegiance to anybody or any authority beyond their own government;
- The Peace marked the beginning of well-disciplined national armies. The 30 year wars and 80 year wars preceding the treaties were fought with mercenaries; these mercenaries were particularly brutal. Hence, having well-disciplined national armies comprising of citizens was probably seen as a virtue.

However, with colonialism and the domination of the world by European thought, notions of sovereign states permeated throughout the world. For the first time in history, politics was being cast in a uniform system. It was observed further that ironically, even sovereign nation states were still enjoying their moment of glory after the World War II, there was an intense questioning during the Nuremberg and Tokyo trials, and the concept of absolute sovereignty was being subjected to criticism.

The international initiative in the 1940s against absolute sovereignty of state, through the formation of the United Nations and formulation of the Universal Declaration on Human Rights, were highlighted. These were the first steps in creating international accountability. Subsequent conventions were formulated to give teeth to such a concept of international accountability. International accountability does not spell the demise of sovereignty, though it does mean change. Changes may strengthen sovereignty; they may also limit the capacity of sovereign states to deny international responsibilities and domestic obligations, as obvious in former Yugoslavia and Rwanda. Concern for human rights underlies the chipping away of absolute sovereignty. However, the main thrust till date has been on allegations of terrorism, genocide and crimes against humanity. The presentation also elaborated on trials of perpetrators in the Yugoslav and Rwandan tribunals for genocide and crimes against humanity, Spain’s efforts to extradite former Chilean leader Augusto Pinochet from Britain for charges of crimes against humanity, Belgium court’s warrants to Congolese foreign minister and Ariel Sharon and the trial of two Libyans before a Scottish court over charges of Lockerbee as examples of initiatives being taken to counter absolute sovereignty and to ensure international accountability for grave crimes. Based on the principle of sovereign immunity, the court had said, in the case of the Congolese foreign minister, that the person could be subjected to criminal responsibility but only after he was no longer in office. Similarly, according to this principle, Ariel Sharon, the Prime Minister of Israel, would face trial, if at all, only after he is no longer in office. In this context, it was pointed out that the jurisprudence of the Supreme Court of India has rejected the principle of sovereign immunity as a defence for violation of fundamental rights. The Rwandan and Yugoslavian tribunals have tried convicted persons who were high-ranking officials. This is another example of international accountability, the legal action challenging the concept
of unlimited sovereignty. The creation of ICC has sharpened the debate over the erosion of sovereignty.

But the debate on sovereignty has not yet taken a definite turn. Many argue that the use of force or creation of adjudicatory mechanisms to protect human rights in derogation of state sovereignty may prove to be a mixed blessing. It is argued that interventions of this kind may result in converting internal conflicts into wars between sovereign states, which is what the concept of sovereignty was designed to prevent. So the respect for sovereignty can act as a barrier to such wars.

It was reiterated that international accountability limits absolute sovereignty of states to deny international responsibility for human rights violations committed on their own territories. While noting the increase in state control over its people, the presentation was concluded with a series of questions for debate and discussion that arise in the context of state sovereignty and international accountability:

- Has absolute sovereignty outlived its utility and deserves to be consigned to the dustbin?
- Whether state sovereignty must necessarily be an impediment to realization of human rights standards for the people living within its boundaries?
- Whether international intervention mechanisms are necessary for the protection and promotion of human rights standards?
- Are the contours of state sovereignty being redefined by growing respect for human rights standards or is the change being actuated by changes in power equations in international politics or by a combination of both?
- Can there be an international accountability mechanism, such as the ICC, that is not subject to the vicissitudes of international power equations?
- How does one ensure that a supranational institution that is enforcing accountability is itself accountable? To what collegium would it be accountable?
- Can justice and accountability at the international level be reconciled with a level of state sovereignty? What could be that level?
- Should justice be global or local or both?

Discussion

In the discussion that ensued, an issue that was dealt with was the disjuncture between the theoretical understanding of sovereignty and sovereignty as exercised by the states. It was pointed out that in theory, sovereignty is supposed to rest with the people, while in actuality, it is used by persons who wield state power. It is no longer even wielded in the name of the people. Accountability today happens only when the state would allow systems of accountability to set in. It is one of the primary reasons for asking for a breach of the barrier called sovereignty which is placed before us anytime there is an abuse of state power. ICC is symbolically important in breaking this barrier of absolute sovereignty of the state.

A comment was made referring to the Gujarat carnage of 2002, that Narendra Modi, the Chief Minister of Gujarat, took refuge in sovereignty. An American sociologist once said that sovereignty entails responsibility; if one failed to take responsibility, such a failure would be the first violation of sovereignty. ICC plays a role as it is an international system that holds a person accountable for gross violations. While there was a general agreement, a poser was raised as to whether or not an international mechanism would suffice to respond to a situation such as Gujarat or whether a strengthening of local accountability systems is required to be worked upon simultaneously.

However, there are problems for international institutions such as the ICC to ensure accountability when nation states do, in actuality, sign and ratify international treaties at the global level. Even prior to the ICC, ways of ensuring accountability have been by creating ad hoc, post war tribunals. States and authorities have resisting in subjecting themselves to
international accountability. The ICC is one more attempt to ensure accountability for some of the offences covered by the statute creating the ICC. The limitations are many, in ensuring accountability at both the local and global levels. One of the processes of ensuring state accountability is through periodic reports that are submitted by a state party to a treaty body created by it (such as the CEDAW committee), and the shadow reports that are prepared by NGOs and handed to these treaty bodies, based on which questions are posed by such bodies to the state representatives on their compliance with the provisions of the treaty. This process is still considered soft law as beyond the point of the committee making observations that may damage the reputation of the country or cause international embarrassment, there is no other step that is possible to ensure the state’s accountability for human rights violations. The ICC tries to go a step further in prosecuting individuals, not states, for the gravest of crimes. In the event that the state refuses to submit its periodic reports, as in the case of the Indian government, it was the responsibility of civil society within a country – to ensure ways of dialoguing with the government to ensure that it submits its periodic reports.

With regard to the implications of ad hoc tribunals for international law and the emerging trend of creating mixed tribunals such as in Sierra Leone and Cambodia, it was stated that while condemning the violations that happened in Yugoslavia and Rwanda, the ad hoc tribunals are generally set up by victorious nations against the vanquished nations. Justice Radha Vinod Pal’s critique would still apply in the case of ad hoc tribunals set up for former Yugoslavia and Rwanda, as it was still victors’ justice, and hence setting up ad hoc tribunals was not the solution to ensuring accountability for grave crimes. They would probably deliver partial justice. Hence it was important to work towards a permanent international criminal court. However, a view was raised that one cannot expect justice from New York, Geneva or The Hague when we cannot keep our own house in order. The need to establish a proper, just system at home before looking for international justice mechanisms was emphasized. The development of setting up mixed tribunals as in the case of Sierra Leone and Cambodia was also elaborated upon, with a concluding remark that local problems had to be best dealt with locally.
Dr. Subhram Rajkhowa’s presentation focused on three issues: crimes, principles and trigger mechanisms under the ICC statute. He traced the history of the definitions of crime under the ICC statute, namely war crimes, crimes against humanity and genocide, and aggression once its definition is agreed upon. He also elaborated on the definition of these crimes as stated in the ICC statute, and the elements of such crimes. He explained the concept of ‘war crimes’ as constituting grave breaches of the Geneva Conventions, crimes in the four Geneva Conventions including wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property, compelling a prisoner of war or other protected person to serve in the forces of a hostile power, taking of hostages, unlawful deportations, war crimes committed in non-international armed conflict (excluding internal disturbances, tensions, riots, isolated and sporadic acts of violence or other acts of a similar nature), violations of treaties (Hague Regulations, Geneva Conventions), and violations of international customary law.

He further noted that prohibited acts related to war crimes include attacks against civilian population, attacks against civilian objects, attacks on humanitarian assistance or peacekeeping missions, attacks when it is known that it will cause incidental loss of life or injury to civilians or damage to civilian objects, and attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments and hospitals provided they are not military objectives.

On the definition of genocide, the definition in the Rome Statute creating the ICC was elaborated upon. It was explained that the following five acts, if committed with the intention to destroy all or part of a national, ethnical (linguistic & cultural), racial or religious group, may constitute genocide: killing members of the group, causing serious bodily or mental harm to the members of the group, deliberately inflicting on a group, conditions of life calculated to bring about its physical destruction, imposing measures intended to prevent births within a group and forcibly transferring children of a group to another group. He stated that these acts have been committed in Rwanda, where atrocities took place against the Tutsi population including specific attacks on women from the community, and deliberately infecting the women belonging to the ethnic minority with HIV virus in order to destroy the community.

Elaborating on the crime of crimes against humanity, the speaker outlined the requirements of the crime as a) it should be committed as a part of widespread or systematic attack; b) committed pursuant to a State or organizational policy; c) directed against a civilian population; and d) the perpetrator has a knowledge of the general nature of the attack. He enumerated prohibited acts as including murder, extermination, enslavement, deportation / forcible transfer of population, torture, sexual violence – rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity, persecution – including on the basis of gender and enforced disappearances. He emphasized that these crimes can be committed either in times of armed conflict or peace, by state officials or private individuals.

Certain fundamental principles relating to the ICC were then explained. The concept of individual criminal responsibility, where an individual, as opposed to a state, is made accountable to the crimes perpetrated,
was elaborated upon. The principle of non-retroactivity was also elaborated, whereby the ICC statute would not be applied to crimes committed prior to 1st July 2002, when the statute came into force. The principle of complementarity was also highlighted. At the Rome Conference, there was discussion on whether or not the ICC should have predominance over domestic jurisdiction, but after deliberations, it was decided that the ICC would exercise jurisdiction only when the local courts express an inability or unwillingness to prosecute an individual who has allegedly committed crimes stated in the ICC statute. In addition, immunity is not provided for. It was also highlighted that the ICC Statute does not provide for death penalty even for the most heinous crimes under international law.

Ways in which a case can be taken up before the ICC were discussed: by a state party, by a country that accepts the jurisdiction of the court for a particular situation, by the Prosecutor of ICC and by a referral by the U.N. Security Council. The prosecutor has a very important role to play in initiating proceedings before the court, but the pre-trial chamber will scrutinize and screen such cases that are sought to be brought before the court.

**HUMAN RIGHTS ADVANCES IN THE ICC**

-Vahida Nainar

The speaker commenced her speech with the history of setting standards of conduct and behaviour of nation-states since the United Nations came into being, including Universal Declaration of Human Rights, human rights treaties and conventions on torture, rights of the child and women’s rights. These human rights conventions set standards for conduct and behaviour of people of different nation states. In addition, a body of law called the international humanitarian law, beginning with the Hague and Geneva Conventions, has existed for more than a century, which basically sets the standards as to what conduct is prohibited during war and conflict. These two sets of treaties and conventions monitor the states’ performance, but they do not really go a step ahead and hold those responsible for violations accountable in a court of law. The ICC, however, goes a step ahead.

It was discussed that the contents of the ICC statute include all provisions of Geneva Conventions, Hague Conventions, Genocide Conventions and some standards set by human rights conventions. It was reiterated that the ICC statute does not create new crimes but codifies, legislates and compiles existing standards in international humanitarian law and some aspects of human rights law. It is for this reason that it is considered one of the most significant and important developments in international law in the last decade.

The International Court of Justice deals with disputes between states. The ad hoc tribunals that have been set up are applicable to particular situations and regions. In comparison, the ICC is the first global court that deals with individual criminal responsibility. It does not recognize immunities of any kind; it does not recognize any amnesties that are given to alleged perpetrators by national courts; there are no statutes of limitations, as a result of which a situation or a case can be investigated any number of years later.

The key crimes recognized under the ICC statute include torture, enslavement, trafficking and enforced disappearances. These are crimes not only during times of war and conflict but also during “peace times”, and hence these are recognized as war crimes and crimes against humanity.

It was emphasized that the ICC statute is unprecedented in the manner in which it legislates on crimes against women. A range of sexual and gender-based violations are recognized as crimes under the statute as war crimes and crimes against humanity. These include rape, sexual slavery, enforced prostitution, forced pregnancy and other forms of violence that are not invasive but are nevertheless violations of a sexual nature. The definition of genocide is taken verbatim from the Genocide Convention, but the ICC statute clarifies in a footnote to say that genocide can be committed through sexual violence.
This is significant as we have seen in contexts within the country, as in the case of Gujarat, that genocide can be committed through sexual violence and rape.

The crime of persecution was also elaborated upon. The ICC statute recognizes persecution as a crime against humanity. Persecution occurs when a particular group or collectivity is targeted, based on religious, racial, ethnic or on the basis of gender. Gender-based persecution is an important addition in the understanding of the crime of persecution. The crime of apartheid is also one of the crimes of humanity. The speaker referred to discussions on whether or not violations of dalit rights would constitute ICC crimes. If such crimes were construed as caste-based violations, the term caste does not feature in the ICC statute. However, what exists is persecution on the basis of political belief, race, nationality, ethnicity, culture, religion or gender, and there are ways in which the dalit situation can be construed as a crime of persecution. In addition, the crime of apartheid exists in the ICC statute and one does not have to be creative in saying that the dalit situation is a form of apartheid practised for centuries in India.

It was emphasized that the basis of all humanitarian treaties and conventions is the principle of non-discrimination. This is also embedded in the ICC statute. The ICC is required to apply and interpret the statute in a non-discriminatory way. If the court does anything that contradicts the principles of human rights, such an act is not allowed in the functioning of the court.

In addition, there are several administrative and procedural rules that are made to ensure that the provisions in the statute are implemented. ICC provisions relating to evidentiary and procedural guarantees to victims and witnesses, including victims of gender violence, were also outlined. These are particularly significant in cases of prosecution and investigation of gender-based and sexual violence. These include the rule that no corroboration is required for testimony of a victim of sexual violence, the rule prohibiting admission in evidence the prior or subsequent sexual conduct of a victim of sexual violence. A provision for in camera proceedings also exists, as well as for withholding of the identity of the victim at the discretion of the court, after taking into account due process requirements.

The fact that the ICC would prosecute individuals and not states was reiterated, explaining further that such individuals include persons acting on behalf of the state as well as non-state actors. For women, prosecution of non-state actors for violation of women’s rights is significant, as when violations of women’s rights is talked about in peace times, these are committed mainly by non-state actors, such as by patriarchal and conservative forces. The ICC will not investigate single instances of violations, but when these violations are widespread or systematic, committed pursuant to the policy of a state or an organization, and when it raises to the level of crimes against humanity, these are crimes that could come within the ambit of the ICC.

In her conclusion, the speaker cautioned that no investigation or prosecution would happen on its own; the ICC could not be expected to act on its own when crimes within the ambit of the ICC were committed in a country. Like any other international institution, this institution requires to be pushed, influenced and advocated upon. The onus was on persons working at the ground level on those issues to document the violations in ways that would withstand the evidentiary requirement of the ICC for taking up the situation, and have a level of advocacy to ensure that the prosecution happens.

Chairperson’s comments

The speakers have laid down the fundamentals of ICC, the human rights advances in the ICC, and elaborated upon the scope and limitations of the ICC. The responsibility of taking it ahead lies with us, so that a stronger civil society will make this court stronger, in order to enhance human rights. The responsibility of taking the ICC ahead, both within India and at the international level, is a challenge for the civil society.

Discussion

Provisions relating to child rights that feature in the
ICC statute were elaborated upon, highlighting the fact that the ICC does not recognize perpetrators under the age of 18 as they were considered child perpetrators. This was a particularly tricky issue in the situations that are presently being studied by the prosecutor. In Northern Uganda, where the Lord’s Resistance Army (LRA) fights against the government’s army, most LRA soldiers are children, who had been kidnapped when they were 3-4 years old. The conflict has been ongoing for the past 15-20 years. The issue that the ICC is now trying to grapple with is, whether the age of the child at the time the child was kidnapped and forcibly enlisted in the army relevant or the age of the child today relevant, for the provision prohibiting prosecution of child perpetrators. There is a general consensus that if the child was forcibly conscripted when the child was under the age of 18, that child should not be considered a perpetrator. At the same time, that child has perpetrated unspeakable atrocities, comparable with adult perpetrators. The process of doctrination is so complete that the child is unable to distinguish between what is right and what is wrong. The victim community in northern Uganda is opposed to the ICC taking action against such children as they do not want their children, who are now returning to their homes after several years of violence, to face an investigation and trial by the ICC.

The possibility of the ICC taking action against persons responsible for such doctrination was discussed. This was a concern within the country too. For example, in Kashmir, parents wanted to take action against persons who lured children into committing violations, such as by giving children grenades to throw. It was discussed that this would be possible under the principle of command responsibility that was recognized in the ICC statute. Under this principle, persons who planned, directed, masterminded and implemented a plan that led to violations of a serious nature, could be held accountable for the crimes that were executed by others under their command.

Discussion ensued on whether or not poverty could be seen as genocide and crimes against humanity. The definition of genocide has been laid down elaborately by the Genocide Convention and the ICC statute. It was felt that it would be difficult to link up poverty directly to genocide. It was clarified that the court deals with criminal responsibility and the ICC statute has a conventional notion of what a crime is, focused largely on physical harm that is invasive. The possibility of holding representatives of multi-national corporations (MNCs) accountable by the ICC was also discussed. It was emphasized that there was no category of perpetrators that was envisaged in the ICC statute. Anybody who had committed a crime covered under the ICC statute was liable to be prosecuted, subject to fulfillment of other requirements under the ICC statute. Hence, a member of the MNC was liable to be prosecuted in his / her individual capacity.

The unique features of ICC that distinguished it from the United Nations and several mechanisms created under it were discussed. Unlike the human rights mechanisms created under the auspices of the United Nations, the ICC statute is a treaty signed by countries at the Rome Conference, and the treaty provides a role for the U.N. Security Council. In the trigger mechanisms, the Security Council can also refer cases to the ICC, and the Security Council would not have the veto power that it normally has to prevent cases coming to the court. It can only prevent cases from being considered by the ICC if the Security Council is itself examining the situation. This was the reason why the United States is apprehensive of the court. Secondly, the fact that the United States has signed a bilateral immunity agreement with a number of countries indicates that the United States is convinced that the ICC will indeed be effective in making individuals accountable for grave crimes.

The sources of funding the ICC came up for consideration. Wealthier nations would not be in a position to influence the administration of justice by the ICC as an elaborate mechanism had been laid down as to how member states will contribute financially to the functioning of the court. The countries that had become members of the ICC would determine ICC’s annual budget and make financial contributions. The amount of contribution would be based on the same rules that govern contribution to the United Nations – roughly based on their national wealth. This
procedure has been laid down so that countries that are better off are not in a position to influence justice administration.

The inadequate response of the International Court of Justice (ICJ) to the Palestine issue was discussed, observing that international institutions had failed to administer justice in Palestine. Participants wondered if the ICC would respond any differently. It was reiterated that the ICJ was not a criminal court, and hence it was subjected to the same limitations that are encountered in implementing any human rights treaty, where the onus is on the state to implement the provisions. The ICC, on the other hand, acts after getting a guarantee of state cooperation. However, one had to wait and watch as to what would happen if the state refuses cooperation at a later stage, after indictments were made against certain persons.

Participants observed that since the ICC’s functioning was heavily dependent on state cooperation, this was a huge limitation in its functioning. However, while implementation does ultimately depend on state cooperation, there were ways of ensuring state cooperation, such as through U.N. Security Council resolutions that direct the state to cooperate. For this reason, the ICC was not a toothless mechanism; it could “wear dentures” and be effective as and when it obtains state cooperation.

The linkages between local and global aspects of crimes against humanity were discussed. It was recalled that the Vienna Declaration on human rights clearly stated that violation of human rights in any part of the world was a global concern. And yet, mass killings of dalits and other disadvantaged groups within the country had hardly been addressed in international forums. It was reiterated that not only state officials were liable to be prosecuted by the ICC but also non-state actors. This marked a shift in thinking as previously, under the principle of due diligence, the state alone was ultimately held accountable for an individual’s violations. However, the crime had to have a degree that meets up to the requirements under the ICC statute. The ICC was not intended to examine local disturbances and riots. It is when the violations raised to a certain level and the state concerned was unwilling or unable to prosecute, that the ICC would step in. However, one way in which the global could be brought to the local was by looking at the ICC as another mechanism that sets standards. If these international standards could be brought home and incorporated into Indian laws through law reform, that would strengthen the Indian legal machinery and increase its capacity to deal with the crimes locally.

In the context of state complicity with mass cremations in Punjab in the late 1980s through anti-insurgency measures of the Punjab police, it was observed that when the court had convicted certain police officers for these crimes, the Punjab government pardoned them, as a result of which they were never held accountable. The possibility of the situation being taken up by the ICC was discussed. There was consensus on the fact that this was not possible as the ICC could not take up cases retroactively, but only deal with crimes committed after 1 July 2002 and crimes committed on a soil or by a state’s nationals only subsequent to the state becoming a member of the ICC. Crimes of this nature, committed after 1 July 2002, could fall within the ambit of the ICC.

The distinction between crimes against an individual and a mass crime was discussed. It was clarified that the ICC statute does not state any minimum number of victims to qualify as a crime. The requirements for a crime against humanity included a) widespread – which meant that the crime should have been perpetrated on a large number of persons; b) systematic – which meant that the crime had to have an identifiable pattern to it; and c) done in implementation of a plan or a policy of a state or an entity. Such an entity could be a non-state actor, including a political outfit.

Fair trial standards incorporated in the ICC statute were highlighted, stating that all rights of accused that are recognized under international law have been incorporated into the statute, including right against self-incrimination, right to counsel, free legal aid if the accused cannot afford to engage the services of a lawyer, and several other rights. During the drafting of the ICC statute, a key concern had been to ensure that the due process requirement was not compromised.
Judge Kirsch commenced his speech by opining that discussions on the ICC were extremely important, as they helped dispel misapprehensions and misunderstandings that one had about the ICC. The worst enemy of the court was ignorance. The court was created under difficult circumstances, and hence there were certain misapprehensions, though it was observed that the level of understanding about the ICC had increased greatly in the past one year. The ICC was described as a court of last resort when nothing else functioned; it was not a court of appeal for states. The ICC will be able to function only when the national system is really unwilling or unable to function and to carry out genuine prosecutions. This happened in very rare circumstance and in extremely high level of crimes. The ICC now has four situations before it out of which three have been determined by the prosecutor of the ICC as requiring an investigation because the level of crimes committed in those situations is extremely high.

The inadequacies in the functioning of national systems was noticed after World War I. After World War II, a momentum gained to create a permanent court to deal with situations of massive crimes that national systems were least likely to be able or willing to deal with. But subsequently, the Cold War paralyzed this process and instead, ad hoc tribunals were created. Explaining why it was better to have a permanent international criminal court rather than an ad hoc tribunal, the Judge pointed out the differences between the two mechanisms. The ad hoc tribunals are temporary; they respond primarily to events that happened in the past; they are limited geographically; each time a tribunal is created, it is dependent on political will for its creation; its creation always involves substantial costs and delays, leading to disappearance of evidence and witnesses, thereby weakening the possibilities for justice. Hence it was imperative to have a permanent ICC for trial of crimes that would happen in the future, without a predetermination of when or where those crimes occurred.

One of the purposes behind the objective of the creation of ICC was also to prevent crimes and reduce conflicts – particularly internal conflicts – and to deter future perpetrators from committing heinous crimes. The U.N. Secretary General had recently observed that the ICC has already contributed to a reduction of crimes. While this was very difficult to prove, it was possible to prove that a number of states had already changed their legislations as a result of the ICC statute. The reason is partly substantive - as the ICC statute is the most updated version on the list of crimes under international law, and technical – as no state party wants to be caught in a situation where they are deemed to be unwilling or unable to prosecute perpetrators within their national systems due to lacunae in domestic law. For this reason, many countries have adjusted their domestic laws and procedures in conformity with that of the ICC. Secondly, the Judge had also observed, from the daily clippings provided by the court on the happenings in the world, that notice is taken of the court everywhere, particularly in situations that have been the objects of investigation by the ICC. While there were sometimes apprehensions and sometimes hope, the existence of the ICC was certainly being noted. Notice was also being taken, at a more general level, by differing national perspectives - as to what issues the ICC will, could, should or should not deal with. If such a notice was being taken of the court 2 ½ years after its existence and before its trials have actually begun, with a measure of cautious optimism, one could say that once the trials begin and results begin to show, this effect would increase.
It was highlighted that a primary difference between the creation of ad hoc tribunals and the ICC was the mode of its creation. Unlike the ad hoc tribunals that were created by five permanent members of the U.N. Security Council, the ICC was created through a treaty by a large number of states and hence had a more broad-based support. It was pointed out that despite the conduct of proceedings at Nuremberg, the fact remains that the Nuremberg trials are seen today as victors’ justice. The U.N. Security Council’s creation of ad hoc tribunals for former Yugoslavia and Rwanda took place despite similar objections. Rwanda had voted against the resolution that created the ad hoc tribunal for the Rwandan situation. In contrast, the prospects for cooperation between the ICC and states was higher because the ICC had been created through a consensus among a larger number of states, and because these states that created it wanted a stringent cooperation system. The dependence of the ICC on state cooperation is also a distinctive feature. It was observed that by and large, till date, the ICC has faced no serious problems of cooperation between states and the ICC, because the ICC is inherently more accepted than the ad hoc tribunals.

If the ICC is compared with other international conventions, such as the Law of the Sea Convention, which does not touch on domestic legal systems or the need to develop domestic legislations with the ICC, this Convention took twelve years to achieve 60 ratifications, while the ICC statute achieved the same number of ratifications in four years. It was noted that this was a very serious reflection of the interest that states have in creation of the ICC and of making it functional.

It was further emphasized that the ICC is created in a way that it is an independent institution, as opposed to being a part of the United Nations. However, the ICC has entered into a relationship agreement with the United Nations that sets out issues for cooperation between the two institutions. The manner in which the ICC was designed to function independently as a judicial and not a political body was further elaborated, by emphasizing that in 1998, when the court was created, the court had a jurisdiction that was completely unpredictable; the creating states had no idea as to what situations, cases, regions or contexts would be taken up subsequently by the ICC. None of the states that created the ICC could be sure that one day, its nationals would not be subjected to prosecution by the ICC. The states therefore provided for adequate safeguards to prevent the ICC from making any politically-motivated prosecutions. States created the ICC in such a manner that it would function purely in a judicial manner and not lend itself to any kinds of political inclinations. Due to these safeguards, the apprehension that the ICC would carry out politically-motivated prosecutions has no basis.

Further, the judge pointed out that since his appointment as a judge of the court, in his personal experience, not a single officer of the court or a staff of the court had made any comments of a political nature with regard to the situations that the ICC is presently studying.

An update on the progress made by the ICC was also given, where it was stated that the development of the ICC had been much faster than it was anticipated. There have been three referrals from states parties to the ICC to situations in their own territories, namely the situations in Uganda, Central African Republic and Congo, and one referral by the Security Council of the situation of Darfur (Sudan). At the time when the Rome Statute was formulated, these referrals were not anticipated at all. It was anticipated that states parties would refer situations occurring on other, not their own, territories. In addition, it was stated that the prosecutor of the court was also monitoring eight other situations, based on communications the prosecutor had received from individuals and organizations from various parts of the world. Till the present time, almost 1600 communications had been made, out of which about 80% had been dismissed for a lack of jurisdiction and a lack of fulfillment of requirements under the ICC statute. Such a non-fulfilment of requirements was related to the nature of the crime, the time frame of the crime and whether the crime was committed by a national or in the territory of a state party to the ICC. The judge also said that there were separations of power between the Office of the Prosecutor and the judiciary of the ICC, and
hence details of the communications received by the prosecutor and the situations he was monitoring were not and should not be known to the judges.

In July 2002, the Court issued the first arrest warrants against individuals in Uganda who are members of the Lords’ Resistance Army (LRA). These warrants were under seal till October 2005 for security reasons. A challenge faced by the ICC as compared to tribunals, is that while the ad hoc tribunals dealt with crimes committed in a past conflict, the ICC was dealing with crimes committed in ongoing conflicts. Therefore an extreme vulnerability and threat to the life of victims, witnesses and staff of the ICC existed.

For this reason, arrest warrants issued against members of the LRA were unsealed only when the prosecutor could give guarantees to the pre-trial chamber that issued those warrants that the court had taken the necessary steps to ensure security for persons involved. It was emphasized that all the situations that were presently being investigated were precarious, dangerous and difficult situations, invoking security considerations. The ICC had an office set up in Campala – Uganda and one in the Democratic Republic of Congo, to carry out preliminary activities related to the investigations, defence, victims and witnesses and to provide information to local communities for obtaining the required cooperation.

The judge emphasized that the ICC was not a panacea, but was one of many tools aimed at achieving justice on an international level. The ICC was created in such a way as to absolutely require the cooperation of states and others for the court to be successful. The court does not have an army or its police, and hence, for its operations to be successful, it requires states’ and others’ cooperation. The challenge that the ICC now faced was in obtaining state cooperation, for executing arrest warrants and surrendering suspects to the ICC. International organizations have supported the ICC, especially the United Nations, with which a relationship agreement was entered into two years ago. This has been supplemented by other agreements including on peace-keeping missions in Congo. The European Union and the Organization of African States had also encouraged ratification of the ICC statute in their respective regions. Civil society, which was instrumental in getting this court created, in encouraging ratifications and assisting individual countries in drafting implementing legislations, had a very important role to play. Its role would continue for a long time in creating awareness and disseminating information, and in dispelling misapprehensions that exist.

The international community has taken more than half a century to create this court. Meanwhile many crimes and atrocities were committed and many conflicts occurred. The judge stated that the responsibilities given to this court were tremendous, but that the court was prepared for that responsibility to establish its own credibility. Its credibility had to be established by demonstrating in practice impartiality, independence and fairness in its proceedings, and in ensuring as effective proceedings as possible. It was underscored that to perform this role, cooperation of states, international organizations, non-governmental organizations and individuals with the ICC was absolutely necessary.

The judge stated that he was open to answering questions, but stated that because of his position as the president of ICC and a judge, he would not be able to comment on specific situations, politics of states, speculate on what the court could or could not do, or infringe on the prosecutor’s territory.

Discussion

A criticism against the human rights community has often been that it distances itself from politics to such an extent that human rights itself depoliticizes political issues, which is not very helpful. Many of the violations have been committed in a political context, and if the politics was not understood, it would be difficult to understand the crime. While it was agreed that the political nature and context of the crimes itself was required to be understood, the court was required to act in a neutral and objective manner. It was further emphasized that the court was not a human rights court but a criminal court, and will be unable to monitor the human rights situation in any country. The court will only deal with crimes of grave concern, and it was essential for the ICC to focus only on those crimes,
as such a functioning would give the ICC its legitimacy.

It was observed that one of the issues that delegitimizes legal processes in prosecution of mass crimes in India is delay. As an extreme measure, when dispensation of very quick justice, through speedy trials, is attempted, that violates fair trial standards and results in injustice as well. The ICC would also be looking at the question of delay when it looks at the inability or unwillingness of a state to prosecute offenders. For the ICC to prove to be different and to establish its legitimacy, it was wondered as to how the ICC would address the issue of delays, in the context of the fact that it has taken over two years for the ICC to investigate crimes and trials are yet to commence. Delay was a very serious issue of which the court is aware. Some steps were taken in the statute to alleviate the problem of delay, the most obvious being the creation of a pre-trial chamber. The chamber had been created largely to avoid enormous delays in the course of trials. During the course of trials, sometimes, issues that are absolutely extraneous to the determination of guilt or innocence of the accused are introduced, such as whether or not the court has jurisdiction, admissibility of the case, the national or international nature of the conflict. Dealing with these issues during the trial could disrupt the trial. Pre-trial chamber has been created to deal with all these issues separately, so that once the pre-trial phase is over, the trial would be condensed by limiting its scope. In addition to the rules of procedure and evidence, in May last year, the judges adopted court regulations. When the regulations were developed, the need for speedy and effective proceedings was kept in mind, as long as these were consistent with due process and rights of the accused. Once a few years have passed and the pre-trial chambers begin to function with experience, at the Review Conference in 2009, technical amendments could be made to the statute to accelerate proceedings.

The proprio motu powers of the ICC prosecutor to take action based on his own initiative was discussed. Such powers of the prosecutor were controversial and were discussed intensely at the Rome Conference, the concern being that the prosecutor could be political. Ultimately the prosecutor was given these powers for two reasons: a) because it was easier for the Security Council and states not to do anything about a situation where serious crimes had occurred. Cambodia is one such example of an absolute tragedy with nothing being done; b) because the prosecutor’s act of referral could not be more political than that of states or the Security Council. As a result, the prosecutor’s power of referral is carefully circumscribed.

The prosecutor could decide to start an investigation on the basis of communications received from individuals and organizations. However, the first task of the prosecutor was to analyse the information received to examine if the information gave a legal basis to start an investigation. The difference between starting an investigation based on a state party referral, and based on proprio motu powers of the prosecutor is that in the case of the latter, the prosecutor has to go before the pre-trial chamber and get its approval before he starts investigation. If the pre-trial chamber approves, the prosecutor has to make his intention to start the investigation public and inform all states concerned, irrespective of whether they are state parties or not. Such states could then say that the ICC ought not to deal with the case because they were taking action under national law. The pre-trial chamber, having heard the state’s contest, could give a second authorization for the ICC’s ability to take up the matter. If the state continues to contest, the matter would go before the Appeals Chamber. In summary, while possibility exists for the prosecutor of the ICC to initiate prosecution based on his own initiative, the procedure for this is most stringent.

The motivations behind countries amending their national laws to meet the ICC standards came in for discussion. States that were parties to the ICC had to ensure that their national laws laid down procedures for cooperation with the ICC, in order to be able to fulfil their obligation to cooperate with the court. Countries that were not parties to the ICC would examine the substance of their legislations including definition of crimes, but not focus on procedural aspects unless they had an intention to ratify the ICC treaty.
The necessity for the ICC to become universal was discussed, based on two reasons: a) reasons of principle—because it was the only international judicial mechanism created by treaty; and b) due to constraints on the jurisdiction of the court, necessitating consent of the state whose national was being accused or on whose territory the alleged crime was committed. At the Rome Conference, there was a move to adopt universal jurisdiction. However, such a move would have resulted in a loss of enormous support for the ICC among many states. Given the restricted jurisdiction, the ICC cannot act in many situations of grave crimes. In an internal situation, where the state of nationality of accused and the state of territory of crime is the same, and if it is not a state party, the ICC cannot act. Hence support for the ICC had to become universal. Unlike the South American, African and European regions, the Asian region’s response to the ICC has been minimal. It was pointed out that there had not been a single ratification from Asia since the ICC treaty entered into force, and that this was a matter of concern. Emphasis was placed on the fact that it was in a state’s interests to ratify the treaty and give itself the legal protection of the court, as in the eventuality of an attack by a neighbouring country, perpetrators from that country could be made accountable for war crimes and crimes against humanity.

A primary reason for poor response of Asian countries to the ICC was the lack of experience that these countries had in internationalizing an understanding of crime and internalizing interpretations that come from what seems like the outside. No Asian court or commission on human rights existed. No Asian institutions existed that were focused on developing a code of crimes that would apply across jurisdictions. Asian countries have been individualistic in the way they dealt with crimes, and lacked a regional approach, unlike other regions of the world. National human rights commissions from Asian countries have commenced a dialogue amongst each other only recently, and that too has been a soft approach. It was opined that it was not practical for Asian countries to wait till they gained a regional experience through an Asian court of human rights, before becoming members of the ICC. One way in which Asian countries’ engagement with international law and organizations could be facilitated was by increasing exposure to international law, organizations and events, both through non-governmental organizations as well as by international organizations that are concerned with human rights. It was felt that a useful approach with Asian countries could be to highlight some positive political consequences that could flow from participating in the ICC, rather than placing a moral obligation on states to ratify.

In the context of discussing the role and limitation of the ICC in creating awareness and disseminating information about the ICC, a distinction was made between dissemination, explanation and promotion. While it was the duty of the court to explain what the court was and what it could do, whenever and wherever it was invited to speak, the ICC could not promote itself and approach countries and ask them to ratify the ICC treaty, as such an act would be seen as political. The reach of the ICC in information dissemination was also limited, and therefore non-governmental organizations assumed a larger role in awareness-raising.

The accessibility of the court to victims and non-governmental organizations on behalf of victims was discussed. Many communications had been sent to the prosecutor of the ICC from sources that were unknown to the judges, but in principle, the communication could be received from “any credible source” – including victims, non-governmental organizations or associations acting on behalf of victims.

The issue of politically-motivated referrals also came in for discussion. It was pointed out that the Ugandan government’s referral of the situation of northern Uganda to the ICC was considered to be politically motivated. Emphasizing the fact that the ICC was and ought to be an independent judicial institution, investigating situations and not people, the Ugandan situation clearly indicated that the perpetrators were not only members of rebel groups but also members of the Ugandan army. Yet, the five indictments issued by the prosecutor had not reflected neutrality, leading
to a concern among civil society members that the ICC was being used by some states. In response, it was opined that the credibility of the ICC was dependent, not on what was being referred to it but what the ICC itself did. While acknowledging that some communications that had been sent to the prosecutor could have been politically-motivated, it was important to examine how the ICC acted upon such communications. In principle, the ICC would deal with crimes committed by members of both parties to the conflict if it found evidence of such violations by such members. The indictments issued by the prosecutor against five members of the Lord’s Resistance Army were based on a measure of discretion that the prosecutor had.

In the context of the fact that the ICC was a multi-lateral treaty and was being funded by states parties, the mechanism adopted by the Assembly of States Parties to ensure that it did not interfere in the judicial work of the court came for scrutiny. Funding for the ICC had not been a problem so far. The continuing momentum that was gaining in favour of the ICC and the confidence of the states in the ICC would ensure that the states parties provided the ICC with the means to perform its functions. No evidence of any link between funding of the ICC by the states parties and interference with the judicial proceedings had been found. It was observed that the system of funding by the states parties was safer than voluntary contributions that the ICC statute also provides for. The court had already made up its mind that before accepting voluntary contributions, it would be extremely careful to ensure that such contributions did not create room for a suspicion that the judicial proceedings could be influenced.

The seemingly contradictory obligations of states that had ratified the Rome Statute and subsequently entered into bilateral immunity agreements with the United States (that prevented surrender of their nationals to the ICC) came up for consideration. As a matter of law, when states parties enter into agreements with other states, they were obliged to ensure that such agreements were consistent with their obligations under the ICC statute. It would be interesting to observe how the ICC dealt with these agreements if such agreements were brought before the ICC for interpretation in future.

**Chairperson’s comments**

Some of the issues that Judge Kirsch had dealt with have already been talked about in earlier sessions. However, it was always helpful to hear them from the perspective of the court. Judge Kirsch was thanked immensely for having accepted the invitation of ICC-India to address participants at this consultation. This was the first time that individuals and non-governmental organizations in India have had an opportunity to hear about the ICC directly from an official of the court.

Judge Kirsch’s address was important for another reason too. Much as ratification is a long-term objective, dispelling myths and raising awareness among members of civil society and others is a primary objective of the ICC-India campaign. The campaign’s endeavour has been to facilitate a better understanding of the ICC and the potentials of this judicial institution in contributing to reforms in Indian laws. Judge Kirsch’s address and interactions with the participants have contributed to this effort in a big way.
The speaker commenced her presentation by emphasizing the tremendous participation of members of civil society in the formulation of the ICC statute and the work of activists and non-governmental organizations (NGOs) subsequently in ensuring ratification of the treaty by 100 countries. It was stated that it would have impossible to achieve the human rights standards that have been integrated into the ICC statute without the active participation of international human rights groups. Groups and individuals from all over the world had participated in the deliberation process of the ICC statute in 1998, and came together under the umbrella of the NGO Coalition for International Criminal Court (CICC), situated in New York. CICC, with over 2000 members around the world, had planned, coordinated and strategized on the interventions to be made by the civil society at each stage of the drafting process. The association of CICC with the issue of ICC was traced to a time prior to the Rome Conference of 1998. The entire endeavor at the Rome Conference had been to bring states (that is, their diplomats and bureaucrats) to the negotiating table. Many of these persons depended heavily on inputs from NGOs as they were not very conversant with aspects of international law, but had to deal with complicated issues. CICC provided these inputs and facilitated an exchange of documents to all the interested people and to delegates on a number of wide-ranging issues; it is also now open to providing information to the Court. Sectoral caucuses had also been formed under the auspices of the CICC, including caucus on child rights, faith-based caucus and victims’ caucus, in order to promote awareness of the ICC and its linkages to specific issues. The CICC also facilitates and promotes general awareness of the ICC among members of civil society and in private informal meetings with state delegations.

The ICC required ratifications by 60 countries for it to enter into force. This required number of ratifications had been achieved in a record time of four years, which was unprecedented. The 60 ratifications had not happened automatically, but had been the achievement of an intensive and successful international campaign for creating awareness and ratification, initiated by several thousands of individuals and organizations. Such efforts had been coordinated and strategized by the CICC. The court now had the support of 100 member states. It was stated that the biggest support for the court had come from Europe, Latin America and the African continent. Such regions had a regional court and commission on human rights, while such mechanisms were absent in Asia. This led to a lack of engagement with international law and international human rights standards in Asia, contributing to Asian countries’ slow response to the ICC. Afghanistan, Cambodia, Kazakhastan, Fiji and Iran were some of the countries grouped under the Asian region that had ratified. It was further explained that the powerful countries in Asia, including Japan, China, Indonesia and India, were yet to become member states of the ICC, while the less powerful countries in the region were waiting for these countries to take the lead on the issue.

Ms. Nainar further stated that in her opinion, key nations including India are reluctant to join the ICC as they have concerns about the ICC, some of which are legitimate. She enumerated such concerns as follows: a) non-inclusion of first use of nuclear weapons and weapons of mass destruction as a crime under the ICC statute; b) the fear of misuse of powers of the prosecutor; c) role of Security Council in referring and deferring cases to the ICC; d) non-inclusion of the crime of terrorism; e) lack of consensus in arriving...
at a definition of aggression; and f) ICC as a potential threat to national sovereignty. States had not agreed upon a definition of aggression as a crime at the time of the Rome Conference in 1998; consensus may be reached at the review conference of the Rome Statute, scheduled for 2009. India had also been concerned that the prosecutor of the ICC may misuse his power to seek communications and act upon those communications received from any individual from any part of the world. India fears that the prosecutor may initiate politically-motivated prosecutions, supporting the agenda of more powerful countries, which could be against the interests of India. The role of the Security Council, though limited to referral and deferral, has also been seen as problematic by India, as it could allow the Security Council a level of control over the proceedings before the ICC. The crime of terrorism had also not been included though consequences of acts of terrorism are covered within the gamut of crimes against humanity. The Indian government has also been reluctant as it feels that joining the ICC would mean that it would have to give up its sovereignty to an international organization. It was emphasized, however, that the unstated concern of the Indian government was the fear of situations in Kashmir and North eastern states being taken up by the ICC.

The role played by Indians in the drafting process of the ICC statute was briefly discussed. Indians had actively participated in the formulation of the draft by International Law Commission in the early 1990s up to the time of the Rome Conference in 1998. India had also ensured that at least one representative was being sent to be present at all preparatory commission and other related meetings on the issue. Indian delegates at the Rome Conference had been cooperative and had supported proposals for integrating provisions on gender issues into the ICC Statute.

In the years subsequent to the Rome Conference, the United States and India joined hands on the issue of ICC. In July 2002, India supported the United States in a Security Council resolution exempting all peacekeepers from prosecutions by the ICC for a renewable period of twelve months. While all other countries opposed this resolution, including the United Kingdom and China, India was the sole supporter of the United States in this resolution. Subsequently, India signed a bilateral immunity agreement with the United States that sought to undermine the ICC.

The speaker emphasized that while some of India’s concerns are legitimate, the manner in which such concerns could influence the treaty was through the review conference that is planned for 2009. At this review conference, India will have no right to vote unless it becomes a state party by then. The presentation was concluded by reiterating the importance of ICC as a standard-setting mechanism for India, that could be used for bringing about domestic law reform and strengthening of domestic legal machinery. ICC was only a court of last resort but it was imperative to strengthen the domestic legal machinery to deal with grave crimes that could be committed in future.

THE UNITED STATES & THE ICC

– Eric Sirotkin

The speaker began his presentation by saying that the ICC was not only a criminal statute but a step towards institutionalism of peace, led by concerted efforts of civil society; it was also the ultimate anti-terrorism law. It was stated that the ICC statute elevated rule of law in an unprecedented manner.

The official response of the United States subsequent to the September 11 attacks, when a “war against terrorism” that had been declared by the Bush government, were outlined. It was stated emphatically that this “war” was endless, with an ambiguity as to whom this war was against. The declaration of war against terrorism principally marked the beginning of a return to violence. It was recalled that some years ago, when the
infamous bombings of Oklahoma took place, hundreds of Americans had been killed and injured, and yet, the United States administration had not declared a war against terrorism. Rule of law had been declared supreme at that time. In the period subsequent to September 11 attacks, the United States government had failed to examine the possible alternative responses and initiatives that could have been taken instead of declaring a war against terrorism.

Quoting an Italian philosopher, the need for finding a way to create a new order of criminality and justice was emphasized. It was also imperative to move from force, brutality and domination to rule of law and accountability in international relations, and from a culture of war to a culture of peace. ICC was crucial in bringing about this shift. The support for the ICC had been overwhelming, and hence, the ICC has become a reality faster than many persons thought it would. However, the transformation from the culture of war to a culture of peace has not been easy. The struggle has also been to ensure that states are brought within the ambit of international law so that their conduct can be regulated, without a total loss of state sovereignty. It was observed that John Kerry, the presidential candidate who had competed with George Bush for the last presidential elections, had talked in favour of the ICC. So it was possible that while the present government of the United States was totally opposed to the ICC, a change in government could shift the future policy of the government to the issue. However, this would be possible only with active and concerted efforts of the civil society.

Obstacles posed to this process were discussed. The goal of the ICC is to end states’ commission of violations with impunity, and to make individual perpetrators accountable. However, the ICC would act only if the domestic courts failed to act. However, the present administration in the United States consisted of neo-conservatives who wanted to act with impunity, with scant respect for civil liberties. This administration had brought about an onslaught, not only on the ICC but on the whole body of international law. This approach was difficult to comprehend by most peace-loving individuals of the United States and elsewhere. It was pointed out that neo-conservatives, including Dick Cheney and Donald Rumsfield, had been writing and airing their neo-conservative views for several years now, dating back to the early 1990s. Ideas propagated by this think-tank from the 1990s included the notion that the United States was engaged in a battle of the “west versus the rest”, that western culture was under attack and had to be spread, that the United States had to be the dominant military power, that any country in any region of the world that rose to be a regional or global power in the Middle East and Asia had to be put down, and that it was imperative to oppose the opinion of the international community.

It was opined that a country that believed in pre-emptive war, which was violative of provisions of the U.N. Charter, was most unlikely to support the ICC. However, the silver lining to this propaganda in recent times has been that this has facilitated a discussion on issues relating to international justice and internationalism, which had not occurred in previous years. Millions of people are opposed to the moves of the present U.S. administration, and have staged demonstrations.

A statement of Robert Kennedy was quoted: ICC is a powerful step to move from an age of separation to oneness, in collective support of humanism. It was emphasized that there was great power in unity and destruction in separation. Analysing the qualities of addiction by the present United States administration, it was stated that such qualities included denial, paranoia, fear and control. The administration thinks that control is all that matters, and hence sees the ICC as a threat to its control. It is for this purpose that it passed the Hague Invasion Act that provides for “invasion” of the Hague to free detained American nationals. To the contrary, in a state such as Mexico, Valenta - a small province - had passed an ordinance in support of the ICC because of the civil society being motivated and active in creating awareness. The presentation was concluded with a recognition of the need for awareness-raising on the ICC and the role of civil society members in this important activity.
The speaker commenced his speech by emphasizing that the ICC was an alternative to terrorism, as an institution of peace. In the South Asian region, Bangladesh was the only country to sign the ICC statute. However, it has not become a member state of the ICC till date as it is concerned about the position of India, and the ramifications of Bangladesh becoming a state party to the ICC when its powerful neighbouring countries had not. In the South Asian region, it was possible to promote the ICC as part of the peace process, especially since South Asian countries share the common experience of being affected by terrorism. It was pointed out that terrorism was often resorted to by persons who were frustrated with not having obtained justice from their domestic legal machinery; ICC could be the court of last resort for such prosecutions, hence preventing the spread of terrorism in the long run. It was clarified that the ICC was not about a country being held accountable but about holding individual perpetrators responsible.

The influential position of India in getting other South Asian countries to join the ICC was underscored. It was emphasized that unless India came on board the ICC, it would be very difficult for other smaller countries in the region to sign as they were looking for indications from India. It was the responsibility of civil society within India to ensure that we can dialogue and persuade the Indian government to join the ICC, as a part of its larger exercise at showing respect for international law. It was suggested that a campaign could be around the issue that if India wanted a permanent seat in the Security Council, ratification of important international treaties, including the ICC treaty, ought to be a pre-condition. In order to involve various interest groups and issues, one needed to emphasize the fact that perpetrators of mass killings of Kashmiri pundits as well as that of religious minorities could be held accountable by the ICC, and that the ICC was an alternative to violence. The speaker concluded the presentation by emphasizing that it was important to present the viewpoints of victims and accused, and to perceive the ICC as a mechanism for countering impunity for heinous crimes.

Discussion

An observation was made with regard to the role of the Indian government in deliberately suppressing information about treaty-making by the executive from the Parliament. It was pointed out that it was seven years subsequent to the Rome Conference that the ICC came to be discussed in the Parliament for the first time, in 2005; this happened due to the effort of non-governmental organizations, and not the government. In an ICC meeting held in India after 1998, a government representative had been invited to speak. The representative had not been briefed by the government, and had been given an earlier draft of the ICC statute to refer to, when the Rome Conference had already been concluded and the statute of the ICC had been voted upon. It was embarrassing to hear his concerns to the ICC statute, many of which had already been overcome in the final draft of the statute. Under Indian law, ratification of a treaty was an executive decision and does not require parliamentary consent and hence the parliament was not kept informed. Difficulties were also encountered when the Indian government signed the bilateral immunity agreement with the United States in December 2002, and there was no place to raise the issue because the parliament had been neither informed nor included in the decision-making on the issue.

The approaches of India and United States to international law were quite different: while India did not care at all about international law, the U.S. administration was worried about international law all the time. It was pointed out that the United States had a Vice President who liked to say that he loved international law but did not follow it at all. The approach of the present U.S. administration has been to talk of national law only, and to look beyond and use international law only in those exceptional situations when it served the American interest to do so. While the U.S. administration was extremely fearful of international law, a huge education gap existed in the United States about internationalism and
international law. Supporting internationalism in public required courage and a desire for peace, and many politicians in the United States would not talk about it in public. It was further observed that the erstwhile President Clinton’s act of signing the ICC treaty was more symbolic than serious, and that the United States was fearful that the ICC would mirror its domestic human rights record. Commenting on the bilateral immunity agreements that the United States had signed with more than a hundred countries, it was pointed out that the United States was proud to have arm-twisted and bullied the countries to sign the agreement.

The validity of the Indian government’s concerns to the role of the Security Council (of referral and deferral) came up for discussion. During the negotiation process for the ICC treaty, the Security Council was vested with far more wide-ranging powers than what it was ultimately vested with. As the negotiations proceeded, it was clear that there may be some situations where the state was unable to address through its domestic legal machinery and it might not refer the situation to the ICC either. Though a concern existed that perpetrators from the United States and a few other powerful states would perhaps not be held accountable, most states were of the opinion that if some role for the Security Council was provided, it would perhaps not impede the investigation of the ICC. It was for this purpose that the Security Council was given the power of referral. It was observed that the Security Council’s power of deferral was a more serious concern, as it carried with it the potential to prevent the ICC from acting upon a particular situation. However, based on the recent referral of the Darfur situation to the ICC by the Security Council, where the United States abstained, thereby facilitating the referral, it was noted that while the United States was not openly supportive of the ICC, it was open to using the institution when it served its interests. This was particularly in view of the fact that the United States would find it extremely difficult to create ad hoc tribunals time and again in future.

It was further observed that when India had first raised the issue of non-inclusion of the first use of nuclear weapons as an ICC crime at the Rome Conference, the suggestion was dismissed as hypocrisy as it had conducted nuclear tests in Pokhran merely a month or two prior to the Rome Conference. India did not appear serious about pursuing the issue to its logical end. However, if it was serious about this issue, the government ought to pursue it at the Review Conference in 2009 when an opportunity for improving the ICC statute and incorporating new crimes into it existed.

**Chairperson’s comments**

The Indian government’s position on nuclear weapons requires consideration. India had officially adopted a doctrine that allows use of nuclear weapons in defence, with no limit to the size of the arsenal on air or on ground, and with no limitation to the technological sophistication of such weapons. The use of nuclear weapons involved violence at a large scale, in complete violations of every single criteria set out by the landmark judgment on use of nuclear weapons by the International Court of Justice in 1996. If nuclear weapons are intended to be used against civilians under any circumstances, that would result in indiscriminate killings which could be considered crimes against humanity within the purview of the ICC statute. It was emphasized that no greater act of terrorism existed than the use of nuclear weapons against civilians. Not only first use of nuclear weapons ought to be prohibited; all use of nuclear weapons ought to be prohibited. For years, India had lobbied for a special session in the United Nations on nuclear disarmament. The erstwhile Prime Minister, Mr. Rajiv Gandhi, had presented a paper on the same in 1988. However, some years later, when the issue was put to vote at the fourth commission, India voted against its own demand. This was the level of hypocrisy within the Indian government.
SESSION 5

International Justice from an Indian Perspective: India’s Contributions, Concerns and Engagements

IMPUNITY IN INDIA

– Ram Narayan Kumar

The speaker began his presentation by stating that based on his own experience within and outside India, India’s engagement with justice had been more fragmented than collective, with differing experiences and expectations of people. The evolution of law had failed to be in close contact with people’s experiences and aspirations. Using the freedom movement of India as a point of reference, the speaker discussed the Government of India Act brought in by the British administration and Mahatma Gandhi’s refusal to endorse that law due to the implications of the law on the independence movement. Tracing India’s engagement with law subsequent to Indian independence, he said that law had become subordinated to politics and subjected to the dictates of the power-holders.

The speaker noted that international law had also grown hand-in-hand with legitimacy of rule of law and discontentment of people. Britain and France had acquired the legal mandate for their presence in the Middle East. However, Israel, which was created from the ashes of the Holocaust, was now perpetuating violence.

It was emphasized that the human rights perspective has gained through the power of law because it had the support of people. Referring to the landmark judgment of 1979 with regard to the erstwhile Prime Minister Indira Gandhi’s election, it was noted that the judgment was a culmination of confrontation between the legislature and the judiciary. Legal initiatives by which the fundamental right to property was deleted from the provisions of the Indian Constitution, in the name of public interest, were also elaborated upon. Supreme Court decisions had established the rule of just compensation when the government compulsorily acquired an individual’s property. Using these examples, it was opined that no clear law and principles existed on the issue of compensation, leading to extreme arbitrariness and reduced accountability for unjust state actions in both domestic and international law. Unless the element of arbitrariness was removed from law, impunity for abuse of human rights would continue to be perpetuated.

The presentation was concluded with a reiteration of the need to have intellectual engagements and dialogues on the use of law to end impunity, and to critically examine international law before implicitly accepting the same.

RELEVANCE OF ICC FOR HUMAN RIGHTS IN INDIA

– Dr. Usha Ramanathan

The speaker commenced her presentation by stating that a reason why some persons engaged themselves with the ICC was because it provided a renewed hope for ensuring accountability of individuals. The issue of countering impunity involved holding the state and individuals hiding behind the veil of state accountable and answerable, and that at a particular stage, many persons had lost hope in holding the state accountable, either through domestic or international law or both. The ICC proved to be a useful tool in countering impunity with renewed vigour. The ICC was also a good
debating point to circumscribe the limits to which the state can exercise its power.

The speaker situated the ICC in the context of post-World War II, which was replete with rhetoric about state sovereignty. The state had control over law-making and over violence. Laws were being formulated by particular groups of people who were powerful stake holders within the state, and in a manner that served their interests. The activities of violence and law-making have been systematically controlled by the state in such a manner that certain persons would be named as perpetrators and incarcerated, while others would be allowed to escape the clutches of law. An example was the response of law to terrorism, where, when one group of people commit the act of terrorism, the act was considered a crime while when the state, on the pretext of retaliation, committed the same act, it was not a crime. Through the power holders’ control of the law-making process, rule of law had been transformed to rule by law.

Highlighting that crimes such as genocide and enforced disappearances were absent from the Indian statute books, it was noted that the ICC was useful in facilitating a process by which crimes stated in the ICC statute could be introduced into Indian law. Such an exercise would counter the consolidation of state power.

The significance of the ICC in setting standards and norms was emphasized, stating that the ICC statute upheld fair trial principles and the rights of the accused. This was compared with the present situation in India where, in the name of speedy trials, principles of fair trial were being blatantly violated. Such speedy trials were justified on the ground of perceived pragmatism. The notion of sovereignty as sovereignty of the people, who were agents of the state that is obliged to protect them, was reiterated. Over a period of time, the fundamental nature of rights has been eroded; it is the deprivation of such rights that has become fundamental. We have to battle against deprivation of such fundamental rights. Quoting the words of K.G. Kannabiran, rights had to be battled for. The biggest obstacle to this process in India has been the perceived pragmatism.

Nothing justifies the commission of certain acts, irrespective of who the actor may be. However, double-standards prevailed in existing law. The law laid down one set of procedures and guidelines for crimes committed by individuals, and another set for “acts” committed in “retaliation” by agents of state. The principle of prohibition from using more force than required for self-defence applied only to individuals and not to agents of state. Agents of state were often equipped with powers to shoot at sight, especially in contexts that were labeled as “disturbed” and hit by militancy, and few provisions existed to circumscribe such powers. It was pointed out that while a post mortem for unnatural deaths caused by an individual was compulsory, such an obligation does not extend to unnatural deaths caused by agents of the state under their custody. In Punjab, thousands of persons were killed by the police and secretly cremated without a post mortem.

Pragmatism is often used to counter accountability for violations of human rights committed by state agents. In the name of pragmatism, we are told that peace requires to be restored and so, we need not know the truth about the illegal cremations in Punjab. In the name of pragmatism, confessions to police officers were being allowed, special courts for speedy trials were being set up, and terrorism was addressed through an extraordinary law. In the name of pragmatism, it is said that India cannot afford human rights. The police routinely picks up a family member to force an accused to surrender to police custody or for interrogation. This practice has become systematized and is not questioned, on the ground of pragmatism. The Indian criminal justice system has collapsed and that the legitimacy of the judicial system is very low. However, the state had a capacity to be immune from any type of attack. The Indian state has learnt to use law as its instrument and not for its people.

The active participation of human rights activists and non-governmental organizations throughout the process of formulating the statute creating the ICC had ensured that the statute was not formulated solely by the bureaucrats and diplomats of various states so
as to perpetuate and serve their own interests. Due to this reason, the ICC was very useful in providing a framework to talk about state impunity, to hold agents of the state responsible. The speaker concluded by stating that the ICC had provided an opportunity for reiteration of fair trial principles, and had provided a language and framework in which crimes could be recognized and formulated.

**Chairperson’s comments**

The strength of the Indian state was its basis of jurisprudence. After the Gujarat carnage, some were convinced that for justice, one need not approach an international forum at all. In the past few years, realizing the repressive system within India, there was a shift in such a position, and a realization that international standards, principles and mechanisms were equally important. If a perpetrator cannot be made accountable under domestic law, there is no harm in attempting to hold the person accountable under international law. To serve the interests of justice, it was important to hold the perpetrators accountable, under any law – domestic or international.

It was also noted that sovereignty vested with the people but that people misunderstood this, through a false sense of nationalism. Due to this sense of nationalism, very few people would criticize the repressive state, she said. The Indian nation state was practising this nationalism in its politics, through notions of the Indian state being unimpeachable, and India as having been vested with “pure nationalism.” The Indian state was complacent that it could never be held accountable for the massive violations. While it was important to police the powerful Indian state, it would be difficult to do the policing when everyone was complicit in the crimes. The ICC was perhaps a useful tool to police the repressive state and to challenge unlimited state power and to counter impunity.

**Discussion**

It was observed that if the state was gaining in power, the people were consequently losing power, and a way had to be found to empower the people to challenge the impunity of the state and its agents. Participants shared their experiences of the impeccable image that India had projected for itself in the international community, to such an extent that there was a refusal to believe that mass violations had taken place in India. Such violations had not caught the attention of international media due to the influence of the Indian government. A belief exists abroad that India has a strong judiciary. India was benefiting from the international image it had carefully built up, based on its policy of non-alignment in the past decades.

Whenever massive violations occur, such violations placed an enormous burden on the victim. Citing the example of genocide in Bangladesh, it was observed that by taking a position that justice for domestic issues should be sought only through the domestic legal system, immaterial of how the system functioned, the victim was burdened to wait endlessly for the system to change and to take cognizance of the crimes committed.

The notion of universal jurisdiction and its linkages with the ICC, and its implications on perpetrators of mass crimes were also discussed. The importance of engaging with international law in a way that is relevant to us, and the need to be with the victims while pursuing justice through national and international law were emphasized.
SESSION 6

Participants’ Perspectives on The Relevance of ICC to Their Work

This interactive session with participants was facilitated by Vahida Nainar and Dr. Usha Ramanathan. The session started with a round of self-introduction by each participant and a sharing of their perspectives, as well as their own perceived relevance of the ICC to their work.

Participants working with non-governmental organization focusing on women’s economic, social and cultural rights, observed that in their organizations, international human right instruments were not used to address solve local problems. However, it was found important and interesting to understand how the instruments can be used to obtain global justice. Support for the ICC campaign was essential because of its principles related to global justice. Others working on women’s rights issues found the domestic laws patriarchal, and expressed an interest in the ICC to understand the integration of gender issues into its statute and the perspective with which such crimes were recognized by law. Linkages were also made between the ICC and justice for violations of women’s rights, particularly but not limited to situations of armed conflict.

Some participants engaged with the ICC-India campaign for the past several years found the ICC meaningful for domestic efforts and campaigns that worked towards ensuring justice and accountability within the country. For others, whose organizations were grappling with the issue of large scale impunity by agents of the state for violations of human rights, the relevance of ICC to their work was direct and immediate. Rights-based approach, combined with the objective of promoting peace and justice, brought such organizations’ activities closer to the activities of ICC-India and the principles underlying the ICC.

Representatives of non-governmental organizations working on varied issues such as prison reform, rights of under-trial prisoners, commercial sex workers, law students, child soldiers, peace and security issues including the use of light weapons, were engaged in awareness-raising activities with various groups of persons. It was found important to include the ICC in such organizations’ awareness-raising activities in future. Translation of the resource material produced by ICC-India into local languages was found an essential activity for more effective information dissemination. Information dissemination led to an increased access to justice. In such a context, the ICC was relevant as a mechanism through which international justice can be imparted for the most serious crimes.

Academicians, including faculty members of law faculties of state universities, had a success story to share on their inclusion of the ICC into the syllabus of the LL.M. program of some universities. The scope for conducting public education programmes, debates and discussions on the ICC in law colleges and other places was emphasized.

Participants hailing from states that had experienced mass human rights violations in the past few decades identified with the ICC as a tool to end impunity and ensure accountability of individual perpetrators, thereby promoting justice and peace. This was particularly relevant in view of the fact that many such perpetrators have not been held accountable due to their political clout. The ICC was found to be a progressive piece of legislation that would empower victims during the process of administration of justice by providing an opportunity for participation and to voice their concerns. Other participants, working on developmental issues such as the right to food and livelihood, were able to identify with and support the principles of ICC although they found little scope in using the ICC in their advocacy work. The ICC was also found relevant to the issue of police reforms and the rights of indigenous persons (adivasis). To persons...
working on issues related to international accountability, the ICC was relevant as a tool for implementing global justice.

The facilitators summed up the session by stating that it was useful to see how the ICC could be incorporated into the work of participants. The ICC was a set of guidelines and principles and provided a framework to use as a standard in one’s own area of work. The ICC principles could be incorporated directly or indirectly into one’s own work. The ICC was also a useful tool in recognizing the wrongs and naming them. At times when a campaign on justice and accountability lacked rigour, the ICC could be a useful tool to give a voice to victims and their perspectives. The ICC would also give us a sense of history and understanding of the violations that have happened throughout the world and aspects of justice that we ought to be more rigorous in pursuing. It was noted that there was often a politics of forgetting and politics in forgetting, that is used by the state to close unhealed wounds in the name of peace. The ICC would ensure a mechanism through which justice was not bartered in the name of peace.
SESSION 7

The ICC-INDIA Campaign

– Saumya Uma & Pouruchisti Wadia

The session commenced with an outline of the history of the ICC-India campaign. The campaign was commenced five years ago by a small group of individuals who were convinced of its relevance to India. The driving force and context that provided this relevance could have been different to different individuals. One immediate context and relevance was the impunity and a lack of accountability for atrocities committed in Mumbai during the 1992-3 post-Babri Masjid communal riots. The impunity stemmed from a lack of political will to prosecute 21 perpetrators who had been named by the Srikrishna Commission report on the communal riots. The growth of the campaign was traced from its commencement as an email network based in the residence of a member, to the adoption of the project by Women’s Research & Action Group in 2002 and the subsequent expansion of its support base and the modest achievements of the campaign in the recent past.

It was stated that while the long-term objective of the campaign was to ensure India’s accession to the ICC treaty, the short-term objectives, which the campaign was focusing more on, included using ICC standards to strengthen the domestic legal system. The campaign focused primarily on information dissemination and hence has been holding state-level and regional workshops on the issue in various parts of the country. This work was supported by research and publication activities, in which three publications on the relevance of ICC to India have been brought out. A research project on the ICC has been conceptualized but not implemented yet.

Advocacy work with Parliamentarians had commenced this year. Two consultative meetings with Parliamentarians had been held in the months of August and December 2005, and these meetings seem to have the effect of evoking interest in the issue among Parliamentarians who participated in the meetings as well as those that did not. The campaign looked to having a sustained dialogue with Parliamentarians. Simultaneously, the campaign focused on organizing smaller discussion-meetings in Delhi the entire year to forge links with like-minded individuals and groups in Delhi.

The formation of an Organizing Committee for the National Consultation was an indication of the support of individuals and groups for the campaign and that this trend was a very important one, especially since the ICC-India campaign had no office in Delhi but was organizing events in Delhi. The Organizing Committee had contributed substantially to making the logistical arrangements, and that indicated a broad-based support for the campaign. Integration of ICC into the work of other groups, campaigns and issues has begun happening in small measure. This was especially so on the issues of women’s rights and the ICC, the anti-torture campaign and on protection of victims and witnesses.

A need was felt for reflecting on how each of us, who wanted to associate with the campaign, could contribute to it in our own ways. The objective of discussing the ICC-India campaign was because each person’s interest areas differed – some wanted to work on law reform, others wanted to work on campaign and advocacy. The focus areas for the discussion during this session included: a) advocacy and dialoguing with the Indian government; b) how to increase the support base for the campaign; c) how to retain people’s interest in the campaign through communication and coordination and by staying connected; and d) to develop an action plan.

The need for participation of the campaign in domestic efforts at law reform was underscored. It was interesting to look at the possibilities for using the ICC framework and provisions for domestic law reform.
This would help make the linkages between the global and local, and facilitate the use of international human rights standards in newer domestic laws that get enacted. Information dissemination was an extremely important activity of the campaign and ought to continue and expand to new groups of peoples in states and cities that had not been covered so far. Importance of working with bar associations across the country, as well as dialoguing with human rights commissions at the state and national levels were found imperative. At the state level, events could be organized jointly with the human rights commission, and its officials could also be invited to participate in events organized by non-governmental organizations.

Strategies to expand the support base for the campaign were discussed. One possibility was to expand the ICC-India campaign into an anti-impunity campaign, with which many more people would be able to associate themselves. An immediate need was felt to reach out to non-lawyers, as well as victim communities, law students and academicians. The resource material on the ICC also had to be prepared keeping a non-lawyer readership in mind. The campaign had not commenced any activities related to media advocacy till this year. However, in August 2005, rapport-building with media persons in Delhi was commenced as a preparatory activity to the first press conference of ICC-India scheduled for the evening of 9 December 2005. The media-related work that has been commenced needs to be taken forward in the years to come. Linkages needed to be made with ICC campaigns in other Asian countries as that could contribute to a strengthening of the domestic campaign. Annual meetings with members of the campaign in South Asian countries would result in a positive exchange of information and strategies on the issue.

The efforts of the campaign at getting partnerships with organizations was discussed. Till date, over 25 organizations based in various states within the country had become partners of the campaign. Being a partner entailed accepting principles related to the ICC and to contribute in some way towards the campaign, given each organization’s skills, areas of focus and limitations. It was proposed that a document needed to be prepared outlining the implications of such a partnership, the campaign’s expectations from the partner and the risks and benefits involved.

Other suggestions included organizing information dissemination workshops for students of journalism, exploring ways of working on the issue during regional summits and meetings, forging links with national and South Asian associations, doing media advocacy with state level media persons, and having signature campaigns on specific issues.

The annual action plan for ICC-India campaign was drawn up. This included organizing state-level workshops in states not covered so far, having a training of trainers programme, translation of ICC-India’s resource material into regional languages – particularly Oriya, Gujarati and Hindi, a south zone workshop in January 2006, an event in Delhi in March 2006 and continuance of the ongoing work with Parliamentarians and media persons. A more detailed month-by-month action plan will be drawn up by the secretariat after interactions with members by email.

The Consultation ended with a vote of thanks by Saumya Uma to all participants and resource persons, with the hope that they would continue to actively participate in the campaign activities in future.
## ANNEX A: PROGRAMME SCHEDULE

### 8 Dec 2005, Thursday

<table>
<thead>
<tr>
<th>Time</th>
<th>Topic</th>
<th>Resource Person</th>
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<tbody>
<tr>
<td>9.00 – 9.30 a.m.</td>
<td>Registration, Distribution of Information Kit</td>
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<tr>
<td>9.30 – 9.40 a.m.</td>
<td>Welcome, introduction of participants</td>
<td><strong>Saumya Uma</strong>, Coordinator, ICC-India</td>
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<tr>
<td>9.40 – 10.10 a.m.</td>
<td><strong>Introduction to the International Justice System</strong></td>
<td><strong>Dr. V. S. Mani</strong>, Director, Gujarat Law University</td>
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<td>§ From Nuremberg to the ICC: A Historical Development</td>
<td><strong>Ashok Agrwal</strong>, Advocate, Supreme Court</td>
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<td>§ State Sovereignty and International Accountability</td>
<td>Chair: <strong>Dr. Subhram Rajkhowa</strong>, Reader in Law, Gauhati University</td>
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<tr>
<td>10.10 – 10.40 a.m.</td>
<td>Discussion</td>
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<td>10.40 – 11.00 a.m.</td>
<td>Tea</td>
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<tr>
<td>11.00 – 11.45 a.m.</td>
<td><strong>International Criminal Court</strong></td>
<td><strong>Dr. Subhram Rajkhowa</strong></td>
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<td></td>
<td>§ Fundamentals of the ICC</td>
<td><strong>Vahida Nainar</strong>, Chair, Women’s Initiatives for Gender Justice &amp; Advisor, ICC-India</td>
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<td>§ Human Rights Advances in the ICC</td>
<td>Chair: <strong>Dr. Jimmy Dabhi</strong>, Executive Director, Indian Social Institute</td>
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<td>11.45 – 12.15 noon</td>
<td>Discussion</td>
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<td>12.15 -12.45 p.m.</td>
<td><strong>ICC: Achievements, Developments and Challenges</strong></td>
<td><strong>Philippe Kirsch</strong>, President, ICC</td>
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<td>12.45-1.30 p.m.</td>
<td>Discussion</td>
<td>Chair: <strong>Vahida Nainar</strong></td>
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<td>1.30 – 2.15 p.m.</td>
<td>Lunch</td>
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<td>2.15 p.m.</td>
<td>Depart to Parliament House</td>
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<tr>
<td>4.00 – 6.00 p.m.</td>
<td><strong>Event on ICC with Parliamentarians</strong></td>
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## 9 Dec 2005, Friday

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<thead>
<tr>
<th>Time</th>
<th>Topic</th>
<th>Resource Persons</th>
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<tbody>
<tr>
<td>9.00 – 9.40 a.m.</td>
<td>Film Screening: “If Hope Were Enough”</td>
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<tr>
<td>9.40 – 10.25 a.m.</td>
<td>Global Dynamics</td>
<td>• Vahida Nainar</td>
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<td></td>
<td>• International Campaign on the ICC</td>
<td>• Eric Sirotkin, Member, National Lawyers Guild, U.S.A.</td>
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<td></td>
<td>• The United States &amp; the ICC</td>
<td>• Dr. M.P.Raju, Advocate, Supreme Court</td>
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<td>• Asian Responses</td>
<td>Chair: Praful Bidwai, Columnist</td>
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<td>10.25 – 10.45 a.m.</td>
<td>Discussion</td>
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<td>10.45 – 11.00 a.m.</td>
<td>Tea</td>
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<td>11.00 – 11.45 a.m.</td>
<td>International Justice from an Indian perspective: India’s contributions, concerns and engagement.</td>
<td>• Ram Narayan Kumar, Director, Peace Studies Programme, South Asia Forum for Human Rights</td>
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<td>• Impunity in India</td>
<td>• Dr. Usha Ramanathan, Law Researcher</td>
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<td></td>
<td>• Relevance of ICC to Human Rights in India</td>
<td>Chair: Uma Chakravarti</td>
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<tr>
<td>11.45 – 12.30 p.m.</td>
<td>Discussion</td>
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<tr>
<td>12.30-1.15 p.m.</td>
<td>Participants’ perspectives on relevance of ICC to their work</td>
<td>Facilitators:</td>
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<td>Dr. Usha Ramanathan &amp; Vahida Nainar</td>
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<tr>
<td>1.15 -2.00 p.m.</td>
<td>Lunch</td>
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<td>2.00-2.20 p.m.</td>
<td>ICC-India Campaign</td>
<td>• Pouruchisti Wadia</td>
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<td>• Activities &amp; Achievements</td>
<td>• Saumya Uma</td>
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<td></td>
<td>• Challenges Ahead</td>
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<tr>
<td>2.20-3.00 p.m.</td>
<td>Discussion on Campaign Structure &amp; Annual Work plan of the Campaign</td>
<td>Facilitators:</td>
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<td></td>
<td></td>
<td>Saumya Uma &amp; Pouruchisti Wadia</td>
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<tr>
<td>3.00-3.30 p.m.</td>
<td>Conclusion</td>
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<td>PHOTOGRAPHS</td>
<td>ANNEX B</td>
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ANNEX C: CONTENTS OF RESOURCE PACKAGE

Introduction to the International Justice System
- ‘The meaning of sovereignty’ by Benjamin Ferencz, from New Legal Foundations for Global Survival, pages 163-177

International Criminal Court
- The Rome Statute Simplified – a fact sheet prepared by the NGO Coalition for International Criminal Court (CICC)
- Genocide, by Diane F. Orentlicher, from Crimes of War: What the Public Should Know
- ‘Ending Impunity for Gender Crimes under the International Criminal Court’, by Barbara Bedont and Katherine Hall-Martinez, from The Brown Journal of World Affairs
- Fact sheets on ICC by Amnesty International
- Poster on Violence against Women & the ICC, by Amnesty International

International Criminal Court: Achievements, Developments & Challenges
- Misguided Fears about the International Criminal Court, by Benjamin Ferencz, Pace International Law Review, Spring 2003
- ICC Monitor dated April 2005, published by CICC
- ICC Monitor dated August 2005, published by CICC

Global Dynamics
- Ratification chart updated on 28 October 2005

International Justice from an Indian Perspective: India’s Contributions, Concerns & Engagement
- India & the ICC’ by Usha Ramanathan, Journal of International Criminal Justice – 3 (205), pages 627-634
- Publication: ‘Combating Impunity: a Compilation of Articles on the International Criminal Court and its relevance to India’, compiled by Vahida Nainar & Saumya Uma
- Publication: ‘International Criminal Court & India: Some Questions and Answers’ by Saumya Uma
- Publication: ‘International Criminal Court & India: Responses to Queries Raised by Parliamentarians’ by Saumya Uma
- ‘India’s Reaction to the International Concern Over Gujarat’ by A.G. Noorani, from Gujarat: The Making of a Tragedy, pages 389-395

ICC-India Campaign
- Brochure of ICC-India
- ICC-India Campaign in a Nutshell
- List of Campaign Partners, as on 1 December 2005
- Calender of Events of the Campaign for 2006
ANNEX D: THE RESOURCE PERSONS

ASHOK AGRAWAL
He is a lawyer with over 22 years standing at the Bar, practicing in Delhi. He has been involved as an activist and as a lawyer in issues of civil liberty and rights since the mid 1970s. He is a member of ‘The Committee for Information & Initiative on Punjab’, and was involved in bringing out reports on rights violations in Punjab during the post 1984 period. Since 1995, he has been litigating before the Supreme Court & National Human Rights Commission with regard to enforced disappearances in Punjab. He has recently completed an empirical study on the functioning of the writ of habeas corpus in Kashmir since the start of the insurgency in 1990, in collaboration with South Asian Forum on Human Rights (SAFHR).

ERIC SIROTENIN
He is an advocate practicing in the United States. He is a member of International Association of Democratic Lawyers and a member of National Lawyers Guild in the United States. He has written and spoken extensively on the International Criminal Court and the role of United States.

DR. JIMMY DABHI
He is the Executive Director of Indian Social Institute – an institute for Research, Training, Action for Socio-Economic Development and Human Rights in New Delhi. He is also a professional member for Indian Society for Applied Behavioural Science (ISABS), and has done his Ph.D. in Sociology of Organisation on NGOs culture and effectiveness. He has worked extensively with Dalits and tribal communities on human rights issues and has been an active civil society member during Gujarat carnage 2002.

DR. M. P. RAJU
He is an advocate of Supreme Court and serves as Senior Counsel for the central government. He is a visiting faculty in constitutional law and administrative law in McGill University, Montreal, Canada. He is also a visiting faculty at the Indian Law Institute, New Delhi. He has authored several books including one on the Uniform Civil Code and on minority rights. He has published articles on the ICC, particularly its relevance in the Indian context.

PHILIPPE KIRSCH
He is the President of the International Criminal Court, and hails from Canada. Judge Kirsch is member of the Bar of the Province of Quebec and was appointed Queen’s Counsel in 1988. He has extensive experience in the establishment of the International Criminal Court, international humanitarian law, international criminal law and public international law. In 1998, Judge Kirsch served as Chairman of the Committee of the Whole of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (the Rome Conference). He was also Chairman of the Preparatory Commission for the International Criminal Court (1999 – 2002). He also has extensive experience in the development of international criminal law, with particular regard to issues related to terrorism. Judge Kirsch appeared twice as an Agent before the International Court of Justice. He has also participated in international arbitrations and was a Member of the Permanent Court of Arbitration (1995-1999). He has written extensively on the International Criminal Court and other international legal issues.

POURUCHISTI WADIA
She has a masters degree in social work from Tata Institute of Social Sciences, and is a law graduate. She has several years of working experience in representing women in cases of domestic violence, in the Bombay High Court and Family Court. She coordinates a project on legal literacy & human rights awareness in the ‘Justice & Accountability Matters’ programme of Women’s Research and Action Group, Mumbai. She assists the coordination of the Indian campaign on International Criminal Court.

PRAFUL BIDWAI
He is a columnist, and writes extensively on issues including dalit rights, peace and nuclear disarmament and international relations. He is a member of the National Coordination Committee of Coalition for Nuclear Disarmament & Peace (CNDP), Fellow of Transnational Institute, Amsterdam and the Vice President of International Peace Bureau, Geneva & London.
RAM NARAYAN KUMAR

He has been involved with human rights, democracy and peace issues in South Asia since 1975 when he was imprisoned for 19 months for his vocal opposition to Indira Gandhi’s Emergency regime that lasted till March 1977. He is the Director of Human Rights and Peace Studies programme in South Asia Forum for Human Rights (SAFHR). He is also a member of ‘The Committee for Information & Initiative on Punjab’, and was involved in bringing out reports on rights violations in Punjab during the post 1984 period. He is the lead author of a recently released book, ‘Reduced to Ashes: The Insurgency and Human Rights in Punjab’.

SAUMYA UMA

She is a lawyer and a women’s rights activist. She graduated from National Law School of India, Bangalore, in 1994. She obtained an LL.M. in Human Rights and Family Law from Bombay University, and an LL.M. in International Human Rights from University of Nottingham, U.K. She initiated ICC-India: the Indian campaign on the International Criminal Court, in 2000 and continues to coordinate the campaign. She works as Co-Director of Women’s Research and Action Group, a Mumbai-based non-governmental organization, since 2002. She co-compiled articles on ICC and its relevance to India for the publication ‘Combating Impunity’ in 2003, authored a book titled ‘International Criminal Court & India: Some Questions and Answers’ in October 2004, and ‘International Criminal Court & India: Responses to Queries Raised by Parliamentarians’ in December 2005.

DR. SUBHRAM RAJKHOWA

He is a Reader in Faculty of Law, Gauhati University. He also heads the Citizens’ Collective – a network of organizations based in the seven north eastern states, working on human rights issues. He has delivered lectures and made presentations on the ICC and on other human rights issues in academic and NGO forums in India.

UMA CHAKRAVARTI

She is a renowned feminist historian, and has been actively participating in the women’s movement & the civil rights movement in India for the past several decades. She teaches history at Miranda House, Delhi University. She was also a panelist of International Initiative of Justice in Gujarat, which undertook a feminist analysis of the Gujarat carnage 2002.

DR. USHA RAMANATHAN

She is a law researcher. She participated in the Preparatory Commission meetings prior to the establishment of the ICC, and in the 1998 Rome Conference that led to the statute for the creation of an ICC. She has written, spoken and researched extensively on the ICC, mass crimes and criminal justice, focusing particularly on the Indian context. Her articles on the ICC and India have been published in Indian and international journals. She is a founder member and member of the Advisory Board of ICC-India: The Indian campaign on International Criminal Court.

VAHIDA NAINAR

She has been doing women’s rights and human rights work for the past 18 years. She has been actively involved in the international civil society efforts advocating, supporting and influencing the creation of the International Criminal Court for the past 8 years. She is a former Executive Director of the Women’s Caucus for Gender Justice, New York formed in 1997 to ensure a gender perspective in the International Criminal Court. She works as the Chair of the Board of Women’s Initiatives for Gender Justice, The Hague and as Vice-President of Urgent Action Fund, Africa. She is also a founder trustee of Women’s Research & Action Group, Mumbai, a founder member and member of the Advisory Board of ICC-India: The Indian campaign on International Criminal Court. She is presently an independent consultant on research and advocacy in the field of gender, conflict and international law.

DR. V.S.MANI

Dr. Mani is the Director of Gujarat National Law University, Gandhi Nagar. He has done his Ph.D. in International Law from Jawaharlal Nehru University, New Delhi. He was previously the Director of the Human Rights Teaching & Research Programme at Jawaharlal Nehru University, New Delhi. He has published over 100 articles and written 7 books. He is also the Executive President of Indian Society of International Law, New Delhi for the term 2003-2006, and editor of Indian Journal of International Law. He is also a member of Editorial Board of International Review of the Red Cross.
### ANNEX E: LIST OF PARTICIPANTS

This list is based on the list of participants in sign-up sheets. We acknowledge that some participants’ names could have been excluded inadvertently and apologize for the same.

<table>
<thead>
<tr>
<th></th>
<th>Name</th>
<th>Position</th>
<th>Organization</th>
<th>Address</th>
<th>Contact Information</th>
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</thead>
<tbody>
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<tr>
<th></th>
<th>Name</th>
<th>Title</th>
<th>Organization/Address</th>
</tr>
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<tbody>
<tr>
<td>50.</td>
<td>Seema Durrany</td>
<td>Program Officer</td>
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## ANNEX F: MEMBERS OF THE ORGANIZING COMMITTEE

<table>
<thead>
<tr>
<th>Name</th>
<th>Organization</th>
</tr>
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<tbody>
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<td>Amita Punj</td>
<td>Partners for Law in Development, New Delhi</td>
</tr>
<tr>
<td>Anthony Arulraj</td>
<td>Justice and Peace Commission, New Delhi</td>
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<td>Azim Khan</td>
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<td>Ayesha Sen Choudhury</td>
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<td>Lalitha S.A.Nayak</td>
<td>CISRS – Joint Women’s Programme, New Delhi</td>
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</table>
OTHER RELATED PUBLICATIONS

- **International Criminal Court: Conversations with Indian Parliamentarians**
  published by Women's Research & Action Group and People's Watch - Tamil Nadu, 2005

- **International Criminal Court & India: Responses to Queries Raised by Parliamentarians**
  by Saumya Uma
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