International Criminal Court & India: Some Questions & Answers

Saumya Uma

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INTERNATIONAL CRIMINAL COURT & INDIA
SOME QUESTIONS & ANSWERS

Saumya Uma

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THE FUNDAMENTALS

1. What is the International Criminal Court (ICC)?

The ICC is a permanent international court to investigate and bring to justice individuals who commit the most serious violations of international law, namely war crimes, crimes against humanity and genocide. As the “court of last resort,” the ICC is an independent treaty-based judicial institution that is designed to serve as a safety net only when national courts are unwilling or unable to act.

2. When and how was the ICC created?

The ICC builds on a legacy of the Nuremberg and Tokyo tribunals, which tried perpetrators of World War II atrocities, as well as the more recent U.N. Security Council - created ad hoc war crimes tribunals of Rwanda and the Former Yugoslavia. It has been fifty years since the United Nations first recognized the need to establish an international criminal court, to prosecute crimes such as genocide. On 9 December 1948, while adopting the Convention on the Prevention and Punishment of the Crime of Genocide, the U.N. General Assembly invited the International Law Commission (ILC) to “study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide…” (Resolution 260)

The ILC concluded that the establishment of such a court was both desirable and possible, and drafted a statute in 1951, revised in 1953. The General Assembly, however, decided to postpone consideration of the draft statute until such time as a definition of aggression was adopted. Since the 1960s, the Cold War prevented efforts to further discuss the draft statute and establish an ICC. In December 1989, in response to a request by Trinidad and Tobago for an ICC to deal with the menace of drug trafficking, the General Assembly asked the ILC to resume work on an international criminal court. More recently, the horrific crimes in the Former Yugoslavia and Rwanda - for which ad hoc tribunals were established by the UN Security Council in 1993 and 1994 respectively spurred international interest in the need for a permanent mechanism to prosecute mass murderers and war criminals. In 1994, the ILC submitted its draft statute to the General Assembly. Subsequently the Assembly created the Preparatory Committee on the Establishment of the International Criminal Court to prepare a widely acceptable consolidated draft text for submission to a diplomatic conference. The Preparatory Committee met from 1996 to 1998 and finalized a text, which was then adopted by countries at the Rome Conference in July 1998.

The Rome Statute creating the ICC is a treaty adopted on 17 July 1998 by 120 nations voting in favour, 7 in opposition and 21 abstaining. The seven nations that voted against the treaty were USA, China, Iraq, Israel, Libya, Qatar and Yemen. 60 ratifications were needed to bring the ICC treaty into force. This was achieved on April 11, 2002, enabling the Court to try acts of genocide, war crimes and crimes against humanity committed after 1 July 2002. Over 96 countries – not including India - representing all regions of the world have ratified the Statute, thereby becoming members of the ICC’s governing Assembly of States Parties. They have shown an overwhelming will to make the ICC a reality.

3. What crimes can the ICC prosecute?

The ICC will prosecute individuals for serious violations of international law – namely genocide, war crimes and crimes against humanity. Individuals would also be prosecuted for the crime of aggression once the crime is defined in the Statute.

- **Genocide** includes the acts of killing / causing bodily or mental harm to members of a group with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group.

- **War crimes** cover grave breaches of the Geneva Conventions of 1949, violations of treaties such as the Hague Regulations and...
Geneva Conventions, war crimes committed in internal armed conflicts (excluding internal disturbances or riots) and violations of international customary law. The prohibited acts include wilful killing, torture or inhuman treatment, mutilation, attacking or bombarding undefended towns/villages/dwellings/buildings which are not military targets, intentionally directing attacks against civilian population, committing outrages upon personal dignity and using children under the age of fifteen years to participate actively in hostilities.

- **Crimes against humanity** include a list of prohibited acts when committed as a part of a widespread or systematic attack, directed against any civilian population. Further, to qualify as a crime against humanity, the act should have been committed pursuant to state or organizational policy, and the perpetrator should have had knowledge of the general nature of the attack. These acts can be committed by state or non-state actors. The prohibited acts include extermination of civilians, murder, extermination, enslavement, enforced disappearances, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence, and the crime of apartheid.

Of these three crimes, it is important to note that genocide and crimes against humanity are punishable irrespective of whether they are committed in times of peace or of war.

### 4. What about crimes of aggression, terrorism and drug trafficking?

There was wide support at the Rome conference for including aggression as a crime, but countries could not agree on a precise definition of the crime due to obstacles posed by several countries including the United States. As a result, the ICC would prosecute this crime only after the States Parties reach an agreement on its definition and elements. This is likely to be done at a review conference that will be held seven years after the ICC Statute came into force, that is, in 2009. As a legal concept, “terrorism” is evolving and a separate international convention on terrorism is being formulated, with the active participation of several countries, including India. However it is important to note that many terrorist acts would be covered within the prohibited acts listed under ‘crimes against humanity’. Although there was considerable interest in including drug crimes in the Court’s mandate, many countries felt that investigation of drug trafficking offences would be beyond the Court’s resources. They passed a consensus resolution recommending that States Parties consider inclusion of such crimes at a future review conference.

### 5. Why do we need the ICC?

The world needs an ICC for a variety of reasons, some of which are as follows:

- **To end impunity** – The bitter legacy of dictatorships and totalitarian regimes all around the world has resulted in the murder, disappearances, torture, illegal arrests and other gross violations of civilians. A climate of impunity prevailed, where most of the perpetrators, including heads of state, used their political clout and were never brought to justice. Impunity means exemption from punishment for grave criminal offences. The possibility for making perpetrators accountable in an international criminal court could potentially end such a climate of impunity.

- **To have true and lasting peace** – The philosophy behind the creation of ICC is that there can be no true and lasting peace without justice. Justice entails ending impunity and providing redress to victims.

- **To achieve justice for all** – Criminal responsibility will be applied equally to all persons without any distinction as to whether he or she is a head of a state, a member of a government or parliament, an elected representative or a government official. Political leaders, ordinary soldiers and non-state actors will be prosecuted alike for grave offences.

- **To act as a court of last resort** - Sometimes, national legal
systems are ineffective in bringing to justice perpetrators of large-scale human rights abuses. This happens due to inability to prosecute, a collapse of the national legal system, and unwillingness / lack of political will to prosecute. In such situations, the ICC is needed as a complementary forum through which violators may be made criminally accountable for the grave crimes committed by them.

- **To remedy the deficiency of ad hoc tribunals** – the international criminal tribunals that were set up for crimes committed in former Yugoslavia and Rwanda have certain deficiencies, such as the dependence on Security Council for their creation. These are discussed more elaborately below. The ICC is needed as an institution that would overcome such shortcomings.

- **To deter future perpetrators of heinous crimes** – Many perpetrators of egregious crimes were complacent that they would never be made accountable for their crimes, either in national or international courts. The existence of a permanent ICC that can prosecute high-ranking individuals, has the potential to deter future perpetrators of heinous crimes.

6. **But why a permanent court, when we have human rights commissions at the international and national levels, and can keep creating international tribunals whenever heinous offences are committed?**

Though human rights commissions have been created at the international, national and state levels, these are not courts of law and cannot prosecute individuals for grave crimes that are committed. They can make an enquiry and arrive at findings and observations, which are recommendatory and not binding on the government. The implementation is then left to the government. However, the ICC has the potential to make individual perpetrators criminally accountable without having to depend on the political will of the government in power within the country to do so. There are several reasons why a permanent court is more desirable that one that is created in temporarily in response to specific situations. Some of these are:

- **Victor’s justice:** International criminal tribunals were set up in Nuremberg and Tokyo for the first time to prosecute persons for war crimes and crimes against humanity after World War II. While these tribunals prosecuted and convicted some top Nazi and Japanese leaders, the atrocities committed by the victors (the Allies) – such as the atomic bombings of Hiroshima and Nagasaki - were never under scrutiny in these tribunals. In short, these tribunals have been criticized as meting out “victor’s justice”.

- **Retroactivity:** An established principle under criminal law is that a person cannot be made criminally liable for an act if the act was not defined as a crime under law on the day of the act. That is to say, that law cannot subsequently state certain acts to be crimes and apply them to past acts. However all the tribunals have been created after crimes were committed in the particular area. The need for such ex post facto (subsequent to the fact of the crime) law and legal intervention will be obviated by the ICC, as it only addresses crimes committed after the Statute came into force, that is, 1 July 2002.

- **Political will of Security Council:** International criminal tribunals can be created through resolutions of the U.N. Security Council, based on their use of powers under Chapter VII of the UN Charter, for maintenance of international peace and security. However, to do so, the five permanent members of the Security Council should arrive at a consensus on their establishment. In the 1990s, the ICTY and ICTR were created in this manner. However, prior to the 1990s and during the Cold War, no such tribunals could be created despite situations warranting the same. A permanent court would not be dependent on the political will of the Security Council members.

- **Ad Hoc:** Many situations around the world warrant creation of such tribunals; however, tribunals have been created selectively and in an ad hoc manner. Creation of these tribunals is determined by many factors including the international press coverage a situation has obtained, the will of the five permanent members
of the Security Council, the reputation and influence that the perpetrator’s country enjoys in the international community and the mobilizing strength of civil society groups to persuade the Security Council to create a tribunal. Creation of tribunals on such ad hoc basis can be avoided if a permanent court is set up.

**Expenses:** Setting up ad-hoc tribunals is an immense financial burden on the international community, when all resources could be pooled into a permanent one.

**Restrictions on place and time:** International criminal tribunals such as those created for former Yugoslavia and Rwanda have the mandate to try individuals only for crimes committed in those territories, and that too for crimes committed within a specific period of time. They will eventually be wound up. As a permanent entity the very existence of the ICC will be a deterrent, sending a strong warning message to would-be perpetrators.

7. **How is the ICC related to the United Nations and the International Court of Justice (ICJ)?**

The ICC is a treaty-based body – an independent judicial institution, and hence is not a part of the U.N. However, the U.N. has played a key role in the establishment of the ICC. It is significant to note that the idea of an ICC was revived by Trinidad and Tobago at the U.N. General Assembly’s 44th session in 1989. The ICC will be closely linked to the U.N. by means of several formal agreements such as the relationship between the U.N. and the ICC. Such agreements will be critical to the ICC’s work.

Both the ICC and the ICJ perform different functions. The International Court of Justice (ICJ), also known popularly as the World Court, is a principal judicial organ of the United Nations. It has been created primarily to deal with disputes between nations. It does not, like the ICC, have the power to prosecute individuals. By prosecuting individuals and not states, the ICC process would avoid blaming states, thereby minimizing hostility among or within them, while singling out and penalising the actual perpetrators.

8. **What role will the U.N. Security Council have in ICC’s work?**

Chapter VII of the U.N. Charter authorizes the Security Council to take “action with respect to threats to peace, breaches of the peace and acts of aggression”. The ICC Statute has been constructed in such a way that it would not conflict with the provisions of the U.N. Charter. As a result, the Security Council may refer a “situation” to the Court when one or more of the crimes covered by the Statute appear to have been committed. Security Council’s powers under Chapter VII are binding and legally enforceable on all states. Moreover, contrary to initial proposals, the ICC will not require Security Council approval before starting proceedings. The Security Council can, however, request the court to defer / suspend investigation / proceedings already underway, for a renewable period of 12 months. This deferral is to ensure that the Security Council’s peace-making efforts are not hindered by the Court’s investigation or prosecution. The adoption of such a resolution requires nine votes, including the votes of all five permanent Security Council members. A veto by one permanent Security Council member would thus, instead of suspending the prosecution, enable it to move forward.

The existing provisions are a result of prolonged negotiations between the United States, which wanted the Security Council to have a total control over the functioning of the ICC, and other countries which wanted an ICC that would enjoy a large degree of independence from the Security Council.

9. **What are the main principles governing the ICC?**

- **Individual Criminal Responsibility:** The ICC would not prosecute states as abstract entities but individuals who have committed the alleged crimes.

- **Complementarity:** The ICC works on the principle of complementarity – that is, primary responsibility for prosecutions lies with the state; the Court would act only in situations
where the state is either unwilling or unable to prosecute the offenders. Thus the ICC would not usurp states’ responsibility to prosecute individuals under their own domestic legal systems.

- **Non-retroactivity:** The ICC adheres to the established principle of criminal law that an individual should be prosecuted only prospectively. The ICC Statute lists the crimes for which an individual may be prosecuted by the ICC. The Court would not be making individuals accountable for past crimes, but is liable to start prosecutions for any crimes committed after it came into force on 1 July 2002.

- **No immunity:** The ICC does not provide for statutes of limitation, pardons, immunity to officials (including sovereign immunity) and obedience to superior orders as a defence - the usual grounds on which many perpetrators enjoy impunity within their countries.

- **No imposition of death penalty:** Irrespective of the magnitude of the crimes committed, no individual would be sentenced to death by the ICC. This is in consonance with the international human rights standards.

10. Where is the ICC located and how is it structured?

The ICC has a permanent seat in The Hague, the Netherlands. However, the ICC Statute is clear that in certain situations, accessibility to The Hague may be difficult and may defeat the cause of justice. Taking into account exigencies in particular situations, such as when evidence and witnesses can be brought to The Hague only with immense difficulty and after incurring huge expenses, the Statute provides for arrangements to sit in other countries. The ICC has four main organs: (a) Presidency (b) Chambers (c) Office of the Prosecutor and (d) Registry.

**The Presidency** is composed of the President and First and Second Vice-Presidents, all three of whom are elected by an absolute majority of Judges for a three year renewable term. The Presidency is responsible for the proper administration of the Court, with the exception of the Office of the Prosecutor. Judge Philippe Kirsch (Canada) serves as the President, Judge Akua Kuenyehia (Ghana) as First Vice-President and Judge Elizabeth Odio Benito (Costa Rica) as Second Vice-President of the Court.

**The Chambers** is the judiciary of the Court, composed of three divisions: Appeals Division, Trial Division and Pre-Trial Division. The Appeals Division is composed by the President and four other judges, the Trial Division and the Pre-Trial Divisions of not less than six judges each. A total of 18 judges were elected in February 2003 to the ICC by the Assembly of States Parties. The judges are required to have high professional competence, high moral character, impartiality and integrity, with competence in criminal law and procedure, experience in criminal proceedings and knowledge of international humanitarian law and human rights law. The judges are nationals of States Parties to the ICC: Bolivia, Ireland, Mali, United Kingdom, Trinidad and Tobago, France, Germany, Canada, Finland, Ghana, Costa Rica, South Africa, Cyprus, Italy, Samoa, Republic of Korea, Brazil and Latvia. In consonance with the requirement for a fair representation of female and male judges, seven out of the eighteen judges are women.

**The Office of the Prosecutor** is an independent organ of the Court responsible for receiving referrals of situations and information on crimes within the jurisdiction of the Court. The Office has the mandate to conduct investigations and prosecutions of crimes that fall within the jurisdiction of the Court. It is headed by the Chief Prosecutor, who is elected by the Assembly of States Parties and has full authority over the management and the administration of the Office, including the staff, facilities and other resources of the Office. Mr. Luis Moreno-Ocampo from Argentina has been elected as the Chief Prosecutor on 16 June 2003. Chief Prosecutors are elected by secret ballot by the States Parties and are required to meet stringent qualifications, such as the highest moral character, competence and experience in the prosecution or trial of criminal cases. He is assisted by two Deputy Prosecutors who are also elected by the
Assembly of States Parties. As per the Rome Statute, the Prosecutor and Deputy Prosecutors are of different nationalities.

The Registry is responsible for the non-judicial aspects of the administration and servicing of the Court. It is headed by the Registrar, who is the principal administrative officer of the Court. The Registry’s responsibilities include administration of legal aid matters, court management, victims and witnesses matters, defence counsel, detention unit, and the traditional services provided by administrations in international organisations, such as finance, translation, building management, procurement and personnel. Victims and Witnesses Unit has been set up by the Registrar to ensure participation of victims in the court proceedings, to meet their security needs, protective arrangements, counseling and other needs of victims and witnesses. On 24 June 2003, Mr. Bruno Cathala from France was appointed as the first Registrar of the Court. He will hold office for a renewable term of five years and will exercise his functions under the authority of the .

11. Who can the ICC prosecute?
The ICC can prosecute individuals who have committed crimes on the soil of an ICC member state, or who are nationals of a member state. In addition, non-party states may accept the court’s authority on a case-to-case basis. If the Security Council refers a situation to the ICC, any individual responsible for that situation from any country may be prosecuted. ICC can prosecute any individual, regardless of his/her official position. Immunity pleas based on official position will not be allowed in proceedings before the Court. In addition to prosecuting head of states or others with powerful political contacts, the ICC may also prosecute members of armed forces and paramilitary groups for acts directly committed, as well as for acts committed by subordinates, and individuals committing crimes in their private capacities pursuant to organizational policy.

12. How will investigations and prosecutions be initiated by the ICC?
The trigger mechanisms envisaged under the Statute are as follows:
a) Cases can be referred to the Court by States Parties.
b) The Prosecutor can initiate an investigation into a crime that has come to his or her attention.
c) Cases can be referred to the Court by the UN Security Council, acting under Chapter VII of the UN Charter. Because the Council’s actions under Chapter VII are of a mandatory nature, the Court could exercise jurisdiction in any such case.

In the case of (a) & (b) above, the Court can prosecute individuals who have committed crimes on the territory of an ICC member state, or who are nationals of a member state, unless a country specifically accepts the authority of the ICC to prosecute individuals in a particular situation.

13. Since the ICC would take over prosecution, would it not violate the sovereignty of states?
No. The ICC is strictly based on the principle of complementarity—that is, it would complement the national legal systems and not act as a substitute for them. The ICC’s jurisdiction would extend only to situations in which the state machinery is either unable to or unwilling to prosecute offenders. The grounds for admitting a case to the Court are specified in the Statute and the circumstances that govern inability and unwillingness are carefully defined so as to avoid arbitrary decisions. Even after the Prosecutor takes action with regard to a particular situation, the Prosecutor is duty-bound to defer to States willing and able to pursue their own investigation.

While giving primary responsibility for prosecuting perpetrators of heinous crimes to individual countries, the Rome Statute recognizes that there are some exceptional situations that warrant international intervention, in the interests of ensuring justice and accountability. For example, domestic (national) laws may not have criminalized the conduct; the legal system within the country may have collapsed; the country may not have the resources for such trials or to provide
security for suspects, victims and witnesses; prosecutors may not have the political will to open investigation; persons with political clout and influence (some of whom may be implicated in these crimes) may prevent the prosecutors from effective prosecutions within the country; the existence of amnesties, pardons and immunities could hinder the process of seeking justice.

14. Is it not possible that countries may be dragged to the Court due to political motivations?
Several checks and balances have been built into the ICC Statute to prevent a possible misuse of the ICC. Some of these are:
- First and foremost, the ICC cannot act if the domestic legal system makes a sincere effort to investigate and prosecute the alleged crime.
- When the Security Council or a State Party refers a case, the prosecutor may decide to seek authorization from the pre-trial chamber to open an investigation.
- The Prosecutor has limited authority to open investigation in any case - he cannot start an investigation without permission from a pre-trial chamber of three judges.
- The states and the accused can challenge the authority of the ICC to entertain the case or the admissibility of the case at the trial stage.
- Judges can also be excused from a specific case or removed by the Assembly of States Parties if they do not maintain impartiality.

15. What happens if a criminal evades capture?
Based on evidence presented by the Prosecutor, the pre-trial chamber can issue an international arrest warrant obligating all States Parties to the Court’s Statute to arrest and surrender the individual to the ICC. In cases referred to the Court by the Security Council under Chapter VII of the UN Charter, which gives the Security Council enforcement powers binding on all countries, the Court would be able to request the Security Council to use those powers to compel cooperation of all states in the arrest and surrender of the individual to the ICC.

16. What sentences can the ICC give?
Those found guilty could be sentenced to up to 30 years in prison or, in extreme cases justified by gravity of an individual case, to a life in prison. In addition, the ICC has powers to order a fine, forfeiture of proceeds, property or assets. It cannot issue a death sentence, and as such, conforms to international human rights standards.

17. How would the ICC enforce the sentences and implement its judgments?
The ICC Statute provides for enforcement modalities to go through courts of States Parties, which would in turn enforce the orders and judgments of the ICC. Thus, the Court largely depends on the cooperation of States Parties for implementing its orders, as well as for other aspects such as arresting and surrendering suspects to the ICC, identifying and locating witnesses and things, taking evidence, questioning persons who are being investigated or prosecuted, serving legal documents, facilitating voluntary appearance of witnesses, examining sites and exhuming graves, conducting searches and seizures, providing documents, protecting victims and witnesses, preserving evidence, and identifying, tracing and freezing assets and instruments of crime. States that are not parties to the Treaty are not obliged to cooperate with the court unless they have entered into ad hoc agreements with the ICC to do so. If a case is referred to the Court by the UN Security Council, the Security Council can order even non-States Parties to carry out decisions and warrants of the Court. Once convicted by the ICC, individuals would serve their sentences in the detention facilities of States Parties that have agreed to take them; the ICC has no prisons of its own.

18. Is there any guarantee that rights of accused persons will be respected?
The ICC has screening mechanisms to prevent individuals from frivolous, vexatious, malicious or politically motivated criminal investiga-
tions or prosecutions. The ICC Statute would also presume innocence of the accused person, until proven guilty beyond reasonable doubt. In addition, the ICC Statute contains a detailed list of rights of accused persons such as

- right against self-incrimination (being compelled to be a witness against himself/herself);
- right against arbitrary arrest and detention;
- right against any form of coercion, duress, threat, torture or ill-treatment;
- right to the free assistance of a competent interpreter and any necessary translations during investigations and court proceedings;
- at the time of investigation, the right to be informed that the person is suspected of a crime;
- right to remain silent, without any adverse inference; that is, without the silence being considered in determining the guilt of the accused;
- the right to a lawyer of the choice of the accused, and if the accused does not have such a lawyer, to have one assigned by the Court;
- upon arrest, the right to be informed of the nature, cause and content of the charge against the accused;
- to free legal aid if the accused cannot afford to engage the services of a lawyer;
- right to be tried without undue delay;
- right to appeal to the Appeals Chamber against a conviction; and
- right to compensation if the appeal is successful and conclusively shows a miscarriage of justice, unless such a miscarriage was caused by the non-disclosure of certain facts by the accused.

19. Are victims and witnesses who appear before the ICC entitled to any rights?

The ICC Statute contains historic provisions recognizing victims’ rights to participate in every stage of the trial, while maintaining a delicate balance between rights of victims and witnesses on one hand, and the rights of the accused on the other. A Victims and Witnesses Unit has been set up under the Registry to provide protective measures and security arrangements, counseling and other assistance to witnesses and victims. It will also take appropriate measures to protect the privacy, dignity, physical and psychological well-being and security of victims, witnesses and their families. The Unit includes experienced staff, trained to deal with traumatized individuals. The ICC has a special obligation to protect women victims and witnesses, in particular, where the crimes involve sexual or gender violence, and to protect child victims and witnesses from further trauma through the court proceedings. Further, it will establish principles for reparations to victims, including restitution, compensation and rehabilitation. The concept of reparations is much wider than the traditional concept of compensation. Such reparations will be met from the Victims Trust Fund, specially created for this purpose.

20. How are the expenses for the ICC being met? Will this impact on the independence of the court?

The states that have ratified the ICC Treaty, and hence form the Assembly of States Parties, will determine the ICC’s annual budget and contribute funds to meet the expenses. The amount of contribution will be according to the same rules that govern countries’ contributions to the U.N. - roughly based on their national wealth. This situation is not likely to lead to an adverse impact on the independence of the court, as the court’s independent functioning will largely depend on its prosecutors and judges, who are, in principle, independent of the Assembly of States Parties.

21. How strong is the support for the creation of an International Criminal Court?

The ICC has met with overwhelming response from states as well as a large number of non-governmental organizations. The ICC
Treaty required sixty states to ratify it for the Court to come into existence. These sixty ratifications have been obtained in a record time of four years, which is a clear indication of the widespread acceptability of the treaty. In comparison, the U.N. Convention on the Law of the Sea took twelve years to achieve sixty ratifications, while the ICCPR and ICESCR took ten years to achieve thirty five ratifications.

22. But surely the ICC is not a perfect system as it is made out to be?

No, the ICC is not a perfect system. Several criticisms have been raised about the ICC including the following:

- Individuals from powerful countries may not be made accountable, due to the influence of political, economic and military power over the process of international justice.

- The Security Council’s powers to refer a case to the ICC could result in a situation where some permanent members of the Council may choose not to become state parties to the ICC themselves but be in a position to refer individuals from other countries, including non-state parties, to the ICC.

- The Security Council’s powers to defer (suspend) a case that is being tried by the ICC could be used to prevent prosecution of crimes committed in the territories of permanent members of the Security Council or by their nationals.

- Though aggression is the ‘crime of crimes’, it has not been defined in the ICC treaty yet. States may never arrive at a consensus on the definition and elements of this crime.

- Since the ICC does not have its own implementation machinery but would depend on states’ cooperation, it may not have ‘teeth’ to actually implement its judgments and sentences.

- There would be practical difficulties to prosecution by the ICC, including bringing the key defendants into custody of the Court, access to documentary, physical evidence and testimony of victims and witnesses.

- Allowing states exemption from war crimes for a period of seven years from their date of accession is a licence to kill with complete impunity.

- The sacrosanct concept of consent of states is bypassed through territorial jurisdiction (the court’s power to try an individual if the state on whose territory the crime is committed is a state party to the ICC) and Security Council referral.

- Absence of universal jurisdiction even for the most heinous crimes under international law makes the ICC Treaty weak.

- While the ICC would take action only when national courts are unable to or fail to discharge their legal responsibilities, the ICC would determine a state’s inability or failure to do so, leading to diminished sovereignty of state.

- The court may be seen as geographically unrepresentative and Western dominated, as Arab states and countries from Asia have been slow to support the ICC, as compared to European, South American and African states. Ironically, by keeping away from the ICC process, a state would actually be lessening the chances of the ICC becoming a truly international mechanism!

There is no doubt that, like other statutes, the Rome Statute is not perfect and that areas of serious concern do persist. However, the ICC is a positive step in the direction to end the climate of impunity in the world. The ICC can be improved along the way, and at least some of the shortcomings can be remedied when the Statute is reviewed in 2009. Hence, all avenues for ensuring a fair, impartial and independent court are not closed.
GLOBAL DYNAMICS

23. Which countries are supporting the ICC and which countries are opposed to it?

The ICC has met with overwhelming response from the international community. From the African continent, excluding North Africa, more than 50% of the 47 countries are parties to the ICC. Sierra Leone and Botswana were among the forerunners to the ratification of the ICC Treaty. Following South Africa’s ratification in November 2000, the ratification process gained momentum in the region, leading to ratifications of Nigeria, Central African Republic and others. A history of conflicts and the related problems in domestic justice mechanisms have motivated many states to respond positively to the ICC. From the Americas, more than half the countries have become State Parties to the ICC. Canada has been an ardent supporter of the ICC, and has taken a leadership role in ratifying early. It has also facilitated other countries in the region and elsewhere with ratification processes and implementation legislations. Many Latin American countries, with a legacy of dictatorships and impunity for grave crimes, have been quick to comprehend the importance of the ICC. In this region, the United States is a major power that opposes and undermines the ICC. The best support to ICC comes from the Europe & CIS region, with over 73% of the countries having ratified. Italy was among the earliest countries in the region to ratify, followed by Norway, France, Germany, Spain and the United Kingdom. The European Union has been a motivating force behind the ratification by a number of countries in the region. Eastern European countries that have had large-scale atrocities and conflicts, such as Croatia, Albania, Bosnia-Herzegovina, and Serbia and Montenegro have ratified the Treaty. In Oceania, consisting of many island-states, over 37% of the countries have become member states. The significant member states from this region include Australia, New Zealand and Fiji.

The Asian countries have responded poorly to the ICC, with the ratifications of only a few countries, namely Cambodia, Afghanistan, East Timor, Republic of Korea and Mongolia. The two powerful countries in this region that have not become members of the ICC are China and India. In particular, India has supported the U.S. in opposing the ICC. For a more detailed discussion of the Asian countries’ response, see below. The North African & Middle East region has responded even more poorly, with Jordan being the only ratifying country from the region. (The percentages have been roughly worked out based on regional groupings as published by the UN Statistics Division, and modified slightly by the CICC; the data is based on ratifications as of 3 May 2004)

24. Is the ICC likely to be dominated by economically powerful countries, including the USA, and be reduced to a farce?

This is not likely to happen as a panel of 18 judges, who have been recently elected, hail from varied countries that have ratified the Rome Treaty creating the ICC. (See response to question no. 10 for further details). The judges have been elected after giving due consideration to the need to represent principal legal systems of the world and for an equitable geographical representation. Moreover, it is important to note that the United States is not behind creation or the functioning of the ICC. Neither is it a state party under the ICC Treaty.

25. How has the United States responded to the ICC?

The United States has opposed the ICC through various means, detailed below. Its attempt has been to portray the U.S. as a victim of world politics, while in fact, it wishes to place itself and its nationals above any form of international justice and accountability.

- At the Rome Conference: The idea of a permanent court was initially supported by the U.S. administration as long as the court would be a tool of the Security Council, where the U.S. has a permanent veto. However at the Rome Conference, when
almost all of its allies voted for a court that would be largely independent of the Security Council, it voted against the ICC and was left standing with a list of countries with very poor human rights records.

During Preparatory Commission meetings: Subsequent to the Rome Conference, several Preparatory Commission meetings were held to finalize issues such as rules concerning procedure, evidence, elements of crimes and arrangements for financing of the Court. During these meetings, the United States tried to introduce clauses granting exceptions to its military and political officials and personnel from the operation of the ICC, simply by its own claim that they were acting as agents of the U.S. government. Such attempts were largely unsuccessful and its suggestions were rejected by a majority of countries as they violated the ICC Statute itself.

Signing and “Unsigning” the Treaty: On 31 December 2000, the last day for signature of the Rome Treaty, the erstwhile President Bill Clinton signed the Treaty, not with the intention of subsequently ratifying it but with the purpose of ensuring that its concerns constituted a part of the ICC negotiations. In May 2002, the Bush administration announced that it had resolved to “unsign” the Rome Treaty – a move that was unprecedented and criticized by countries, human rights organizations and jurists all over the world.

Present U.S. Strategies to Undermine the ICC:

At the Domestic Level: On 3 August 2002, the American Servicemembers’ Protection Act (ASPA) was enacted, providing for withdrawal of U.S. aid to countries that ratify the ICC, prohibition of American citizens from cooperating with the ICC, and “invasion” of the ICC in the Hague to free detained U.S. nationals.

At the Bilateral Level: The United States government has been securing bilateral non-surrender agreements, called bilateral immunity agreements (BIAs) with individual countries, using its political, economic and military might. Under these agreements, countries are prevented from surrendering U.S. nationals to the ICC for prosecution and from cooperating with the ICC. In July 2003, the U.S. punished 35 countries by cutting off military aid for not cooperating with it in signing the BIAs. Several countries have publicly refused to sign BIAs, including Brazil, Canada, Costa Rica, Peru, South Africa, Trinidad and Tobago and most European countries. India signed a BIA with the U.S. on 26 December 2002.

At the International Level: In July 2002, the U.N. Security Council issued resolution 1422 exempting all peacekeepers from prosecution by the ICC for a renewable period of one year. The resolution was the result of a U.S. threat to veto all international peace-keeping operations unless such a resolution was passed. In an open debate in the Security Council on the issue, it was supported only by India. On 12 June 2003, this resolution was renewed for a further period of one year (Security Council Resolution 1487). In June 2004, when the resolution came up for renewal once again, the U.S. abandoned its efforts to press for renewal of the resolution, due to strong indications that many Security Council members would not support the resolution. This is in the light of reported incidents of systemic torture of Afghans and Iraqis by U.S. personnel. It has been widely reported that the recent immunity bid of the U.S. has failed.

26. Does the ICC have any particular relevance for the Asian region, more particularly South Asia?

Yes, it does. Asia is one of the bloodiest, most war-torn and conflict-ridden regions in the world. Some of the most terrifying crimes of international significance in the past five decades have taken place in Asia, as the table below indicates:
THE STRUGGLE WITH IMPUNITY
IN ASIAN COUNTRIES

<table>
<thead>
<tr>
<th>Country</th>
<th>Experiences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cambodia</td>
<td>Legacy of genocide committed by Khmer Rouge</td>
</tr>
<tr>
<td>Indonesia</td>
<td>Brutal persecution of Chinese, brutality unleashed on East Timorese by armed militia</td>
</tr>
<tr>
<td>Afghanistan</td>
<td>Grave violations on civilians – women in particular, prior to, during and after the Taliban regime.</td>
</tr>
<tr>
<td>Tibet</td>
<td>Summary executions, torture and other grave violations by Chinese pro-unification forces</td>
</tr>
<tr>
<td>Myanmar</td>
<td>Brutalities by present military regime</td>
</tr>
<tr>
<td>Bangladesh</td>
<td>Genocide and mass rapes committed during the national independence struggle</td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>Widespread killings, disappearances, other gross forms of violations; state inability to prosecute for crimes against humanity</td>
</tr>
<tr>
<td>Pakistan</td>
<td>Rise in religious persecution, sectarian killings, torture of political opponents, violation of women’s rights by extremist religious groups</td>
</tr>
<tr>
<td>Nepal</td>
<td>High number of extra-judicial killings, disappearances during civil war with Maoist forces</td>
</tr>
<tr>
<td>India</td>
<td>Impunity for communal violence, atrocities against dalits &amp; civilians in “troubled areas”</td>
</tr>
</tbody>
</table>

Asian countries have grappled with efforts to end impunity for such gross violations. These include efforts to set up an international court to try former Khmer Rouge leaders in Cambodia, conviction of pro-Indonesian militia for crimes against humanity in East Timor and the creation of a Human Rights Commission by the interim government of Afghanistan to enquire into past violations. ICC can be a powerful mechanism to strengthen such efforts. Moreover, the Americas, Europe and the African continent have regional human rights mechanisms that are functioning. Unfortunately, Asia is the only continent where a regional human rights mechanism does not exist.

27. How have Asian countries responded to the ICC?

Asian countries have been reluctant to become member states of the ICC. Asia has two of the most populous countries – India and China. The former abstained from voting at the Rome Conference, the latter voted against the ICC and neither of these countries has become a member state of the ICC. In the South Asian region, Bangladesh is the only country to sign the ICC Treaty. India has been opposed to the ICC for a number of reasons, discussed in the next chapter. It is widely believed that India’s ratification would pave the way for other countries in South Asia to become parties to the ICC too.

In the South East Asian region, East Timor has ratified the ICC treaty; Philippines and Thailand have signed it, other countries such as Singapore, Malaysia, Indonesia and Brunei have not yet indicated a readiness to become parties to the ICC. In the North East Asian region, the Republic of Korea, Mongolia and Cambodia have ratified the ICC Treaty. Two unique campaigns on the ICC are being carried out in this region to bring domestic laws in conformity with international human rights standards – in Taiwan (which is not a member of the U.N. and has no possibility of becoming a party to the ICC Treaty) and Hong Kong (which is a special administrative region of China).

28. What are the impeding factors in Asia?

Some factors that have contributed to slow ratification in Asia are:

- Existence of military, right wing and non-democratic regimes that are not amenable to democratic processes including
justice, equality, peace and accountability for all – the very values that ICC promotes.

- Suspicion about the ICC being a Western-dominated mechanism that would undermine and subvert the legitimate interests of developing countries in Asia.

- Related to the issue of suspicion about Western-domination is a mistaken notion that the ICC would violate sovereignty of countries. Such a notion does not take into consideration the principle of complementarity that the ICC is founded upon.

- The notion of ‘Asian values’ advanced by some countries has led to a mindset against the ICC. Through this notion, countries such as Malaysia, Singapore, China and Indonesia argue that Asian values are less supportive of freedom and more concerned with order and discipline, and that suppression of civil and political rights are really beneficial for economic development.

- Asian countries that are dependent on the United States for financial and military aid have come under considerable pressure not to become members of the ICC Treaty.

- Even governments that agree in principle to the ICC undergo technical and procedural processes that are time-consuming. These include revision of existing laws or enactment of new ones to bring them in conformity with the Rome Statute, translations of ICC-related documents into local languages and creating awareness on the ICC among members of the country’s judiciary, law officials and members of the civil society.

29. Is the ICC relevant in the present trend of imperialist globalization?

The present trend has been spearheaded by countries with questionable human rights records, and reinforced by undemocratic international institutions that serve the economic elite. To the contrary, the ICC is a positive aspect of globalization – globalization of justice and human rights. As a facet of imperialist globalization, a few countries that have political, economic and military might, including the U.S., are attempting to place themselves above the law. The ICC seeks to make individuals responsible for grave crimes accountable, irrespective of their position. It is due to this that such countries fear the ICC and have attempted to kill it even before it started functioning.

30. Is it realistic to expect states to become parties to the ICC when that would impose regulations on their actions?

Many states have ratified international conventions and agreed to a regulation of their own behaviour, by committing to a certain standard of international human rights. A variety of factors contribute to states’ decisions to do so, including

- pressure from civil society groups within the country;
- a clean human rights record;
- a desire of the government to show the international community its commitment to human rights;
- a desire to set right past wrongs committed in the country;
- pressure from other countries through bureaucratic and diplomatic channels;
- a change of political regime within the country; and
- a possible domestic political mileage to the government.

In addition, some countries and leaders believe that the ICC is needed even though it makes their actions more open to international scrutiny. This is because they believe that it will help make the world a more democratic place and equalize the playing field and that without such a process, there is really no hope of moving past the rule of power. These, and other such factors, have resulted in the ratifications of over 95 countries to the ICC treaty till date.

31. What can the ICC do to make individuals from powerful countries accountable when such countries refuse to ratify the ICC Treaty?
Theoretically, even when a country refuses to become a party to the ICC, the ICC can still try nationals of that country if the country on whose territory the crime was committed is a party to the ICC, or if such a country accepts the authority of the ICC for a specific situation, or if the Security Council refers the matter to the ICC. Whether this would be possible in reality is to be seen only when the ICC initiates prosecutions against individuals of non-States Parties.

32. **In a world that is so polarized, where the effectiveness of the ICC really depends on geopolitics, is the ICC campaign worth promoting?**

The U.N. is basically a political institution, and hence there is a constant tendency to political game-play, where the more powerful have distinct advantages over the less powerful. Conversely, the ICC is a judicial institution, which by its very nature, is supposed to exclude power politics. Further the surest way of guarding against possible political manipulations would be by ensuring truly international participation and representation in the Court.

### INDIA & THE ICC

33. **What is the official Indian position on the ICC?**

For years prior to the Rome Conference held in 1998, India was actively involved in formulating International Law Commission’s draft statute of the ICC. The ILC is theoretically made up of independent experts nominated by countries. This was one way in which Indians were supportive of the concept of an independent and permanent international criminal court. India was therefore, aware of the possible consequences of the ICC and the ingredients of the draft statute. However, there was a general impression that the ICC was a distant dream and would have very few takers. The Rome Conference that commenced in June 1998 was preceded by a change of government within the country. At the Rome Conference itself, Indian delegates were surprised by the overwhelming willingness of countries to give up absolute sovereignty in favour of a largely independent ICC. The Indian delegation then looked for ways to avoid the court’s jurisdiction, and made some proposals at the Conference that could have paralysed the negotiations. When such proposals were rejected by other delegates, India decided to abstain from voting on the Statute, along with 20 other countries. Since 1998, the Indian government has not shown any readiness to become a state party to the ICC. In recent years, it has joined hands with the United States in its opposition to the ICC.

The Indian government has voiced several concerns relating to the ICC Statute at the time of the Rome Conference in 1998 and on some occasions thereafter. These include:

- **Inherent jurisdiction of the ICC,** that is, inherent authority of the Court in deciding whether or not it should take up a case. Based on the principle of complementarity, the ICC would decide this by determining whether or not a state had acted, and acted in a manner consistent with justice. This is thought to be violative of national sovereignty.
The ICC’s complementary forum particularly in the context of a state’s unwillingness to prosecute individuals for widespread violations. India viewed that the ICC should be invoked only in truly exceptional situations - in “failed states or where national judicial processes had collapsed.”

The role of Security Council in referring cases to the ICC, and in deferring prosecutions by the ICC.

The power of the Prosecutor to initiate suo moto investigations in the absence of a formal complaint either from a government or any of the persons affected by the human rights violations – based on doubts about the independence of the Prosecutor.

The inclusion of war crimes committed during non-international armed conflict, within the purview of ICC, on the ground that this would make inroads into its sovereignty.

Non-inclusion of terrorism, including externally inspired terrorism and cross border terrorism, as crimes within the ICC’s mandate.

The ICC statute has failed to respect the sacrosanct principle of consent of States, since Indian nationals may be tried by the ICC even if the Indian state boycotts the ICC.

In addition, the Indian government has also said that the functioning of the ICC would undermine India’s interests as its sovereignty would be violated, and that ICC could be misused by India’s adversaries to cause political embarrassment.

34. If the Indian government opposes the ICC, doesn’t it have good reasons to be?

No. Many of the stated Indian objections are not based on facts, or are based on an incomplete understanding of laws relating to the ICC. Others reflect an unfounded fear in and suspicion of the ICC.

Let us analyse each of the objections that the government has made till date:

- **Inherent jurisdiction of the ICC**: India’s argument that the ICC should refrain from entertaining cases based merely on a state’s own claim that it has investigated and/or prosecuted the offence, would perpetuate impunity through a state’s unwillingness to prosecute or the state shielding a perpetrator.

- **Principle of complementarity**: By saying that ICC should be invoked only in “failed states” or where the legal machinery has completely broken down, an attempt is made to prevent any international accountability for the present climate of impunity that exists largely due to a lack of political will of the government to effectively prosecute perpetrators.

- **The role of Security Council**: India’s objection to Security Council’s powers to refer cases to the ICC has lost its substance in the light of the U.S. opposition to the ICC, which will result in blocking any possible referrals of situations from the Council to the Court. Its concern about the Council’s powers to defer/postpone cases before the ICC is not without substance. The Security Council’s powers in this regard are a result of its powers and responsibility to maintain international peace and security, under Chapter VII of the U.N. Charter. This power is curtailed by a requirement of positive votes by members of the Security Council, including all the permanent members, for such a deferral. So one negative vote would pave the way for ICC to entertain a case rather than obstructing it from doing so. Further, the Security Council’s power to set up ad hoc tribunals stands redundant by the existence of a permanent tribunal. Criticisms such as retroactivity and selective application, discussed more elaborately in Answer 6 above, too would stand averted.

- **Powers of Prosecutor**: In raising an objection to the powers of the Prosecutor, the Indian government has disregarded the
checks and balances hemmed into the ICC Statute to rule out a frivolous and biased use of this power, such as (a) the Office of the Prosecutor has been constituted as an independent organ of the Court; (b) every member of the Office has been restrained from seeking or acting “on instructions from any external source”; and (c) the Prosecutor’s powers are strongly curtailed by the intervention of a pre-trial chamber of three judges that will decide whether there is a case to be investigated and tried. The government has been deeply concerned about the potential for individuals and organizations to take cases to the ICC by sending complaints to the Prosecutor. It has expressed a similar concern with regard to the Optional Protocol to ICCPR and the Optional Protocol to CEDAW, both of which allow individuals to complain directly to international human rights committees.

- **Inclusion of war crimes committed during non-international conflict:** The Indian government has, in 1949, accepted international conventions that set standards for gross violations committed during internal armed conflict, such as Common Article 3 of the four 1949 Geneva Conventions. The ICC Statute is not revolutionary in incorporating standards of behaviour for internal conflict; neither would the provision create a new obligation on India if it were to become a member state of the ICC. Moreover, stringent requirements (high thresholds) have been built into prosecution of such crimes. The ICC will not try crimes arising out of “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”.

- **Non-inclusion of terrorism as a crime:** India’s position of wanting to include acts of terrorism, including externally inspired terrorism and cross-border terrorism, within the jurisdiction of the ICC is inconsistent as time and again, it has reiterated that it will fight the war against terrorism through domestic (and not international) means. Regardless of this, though terrorism ought to have been added as a crime, it is important to note that many of the crimes that are classified as acts of terrorism are already within the definitions of the crimes set out in the ICC. So, using the non-inclusion of terrorism as an ICC crime as a pretext to keep out of the ICC is misleading as to its real intentions - India’s fear and suspicion of the potentials of the ICC.

- **Non-inclusion of use of weapons of mass destruction (WMD) including nuclear weapons as a crime:** At the Rome Conference, when the Indian delegation advanced arguments for inclusion of first use of nuclear weapons as a crime, the suggestion was dismissed by most delegates as hypocrisy as India had conducted nuclear tests in Pokhran merely a month earlier, on 11th and 13th May 1998. Sustained objection to the ICC Statute on this issue is contradictory to domestic policy that has perpetuated an unaffordable nuclearisation drive at the cost of more pressing developmental needs of the Indian people. Further, though the use of nuclear weapons are not explicitly outlawed in the ICC Statute, there are other provisions that would make the consequences of using such weapons criminal, including prohibitions on deliberately attacking civilians and civilian objects, and a prohibition on attacks that cause damage (including environmental damage), death and injury disproportionate to the anticipated military advantage.

- **Violation of Consent of States:** See answer to question 35 below.

- **Violation of Indian sovereignty:** See answer to question 36 below.

- **Politically-motivated prosecutions:** See answer to question 14.

35. Does the ICC violate established international law and practice with regard to consent of states?

No it does not. First, the UN Charter, and thus the Chapter VII powers of intervention (for maintenance of international peace and security), has the authority of universality in customary international
Secondly, the authority given to the Security Council by the ICC Statute has already been exercised in the establishment of the ad hoc International Criminal Tribunals, the ICTY and ICTR, under Article 42 of the U.N. Charter. Thirdly, it is incorrect that the ICC would exercise absolute jurisdiction over individuals whose nationality is that of a non-state party to the treaty. In cases other than those referred to the ICC by the Security Council, the Court is empowered to exercise its powers either with the consent of a State in whose territory the crimes were committed or of the State of nationality of the accused.

36. Will the ICC violate India’s sovereignty?

No, it would not, for the following reasons:

- The ICC would prosecute only individuals, not states.
- The ICC is not intended to replace national courts, but rather to strengthen and complement them. Under the principle of complementarity, primary responsibility for prosecutions lies with the state; the ICC would act only in situations where the state is either unwilling or unable to prosecute the offenders.
- Absolute sovereignty has never rested with any country, including India. By becoming a member of the United Nations, signing and ratifying several important Treaties, and submitting regular reports to U.N. committees and sub-committees, India has implicitly accepted the overarching role of international law and international legal mechanisms.
- In this age of economic globalization, when the country has opened itself to privatization and liberalization policies, including sharing of rights over intellectual property, environment, labour and mining, reluctance to globalisation of justice is without any justification.
- No government can claim to have unchecked powers to do what it wants with its people, and construe sovereignty as absolute and unbridled. While people’s sovereignty must be respected and promoted, international rule of law warrants justice and accountability for gross abuses.

37. How has India responded to U.S. efforts at undermining the ICC?

India has supported U.S. efforts at undermining the ICC. On 12 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. (Resolution 1422). This move has threatened to undermine the integrity and independence of the ICC. On 26 December 2002, India signed a bilateral non-surrender agreement with the U.S. barring either country from surrendering their nationals to any international tribunal for prosecution. The agreement is reciprocal in nature, and amounts to an express assertion of non-cooperation with the Court. For further details, see answer to question 25. As a strategic move by the Indian government, the signing of this treaty was shrouded in secrecy. There was no public information of the impending deal and no discussion of the issue in the Parliament or through a national debate. Ironically, in a statement made subsequent to signing the agreement, U.S. Ambassador Robert Blackwill said: “India and the U.S. shared the strongest possible commitment to bringing to justice those who commit war crimes, crimes against humanity and genocide.”

38. How have the Indian Parliamentarians responded to the ICC?

Some Indian Parliamentarians have raised the issue in the Parliament from time to time, and questioned the government as to why it has not ratified the ICC Treaty as yet. In one such instance, a strong case for India’s reconsideration of its stand on the ICC was made in the Rajya Sabha in August 2001 by Ram Jethmalani, Fali S Nariman and Kapil Sibal, obliging the erstwhile Minister of External Affairs, Jaswant Singh, to state that the government would “readdress” itself to the question and would even welcome a discussion in the House. (Hindustan Times, 17 August 2001) On 25th July 2002, Eduardo Faleiro, a Member of Parliament from Goa, made a special mention on the ICC in Rajya Sabha. He said that the International Criminal Court was “fully in line with the fundamental
principles that guide the Indian polity” and urged the government to ratify the Treaty.

39. Can the ICC try Indians even if India does not become a state party to the ICC?
Yes. Indians arrested abroad for committing a crime are already subject to prosecution by other countries, in the absence of extradition treaties with such countries. So, being tried in foreign courts is not a new development that has been brought in by the ICC. However, the ICC would adhere to international standards on all aspects of the trial, including on rights of the accused. Further, as per the provisions of the ICC Statute, Indians may be tried in the ICC even if India does not become a state party to the ICC. If the state where the offence is committed is a party to the Treaty, or if the Security Council decides to refer the matter to the ICC, India’s non-state party status would be of no consequence. In practice, such a situation is likely only if the Indian state machinery is unwilling or unable to investigate and prosecute for the crime.

40. Why should India join the ICC?
Only 60 members of the United Nations were required to agree to the Court for it to come into existence. Currently, the Court enjoys the support of more than 95 countries from all over the world, including some of India’s close allies. So, while the international community would certainly like India to join the ICC, the ICC has been created and will function despite India’s objections to the Court. Seen in this light, India’s critique of the ICC can be constructive only if it is heard by persons involved with the ICC and if it influences the ICC process. For this, it is essential that India engages with the ICC.

41. India has comprehensive and sophisticated laws to deal with human rights violations. So why does India need the ICC to bring offenders to justice?
Contrary to popular opinion, Indian laws are neither comprehensive nor sophisticated. They are grossly inadequate to respond to the present human rights situation within the country, and have gaping loopholes. Some of the most serious human rights violations under international law – such as genocide, crimes against humanity, torture, extermination, enforced sterilization, persecution, enforced disappearances and extra-judicial killings - find no specific mention in Indian law, despite such crimes having been committed in India. Other crimes in the Indian statutes do not adequately reflect the gravity of crimes that are committed in India now. For example, targeted killings of a large group of people based on their religious identity can only be tried as murder under Indian law. Both these situations lead to an absence of justice for such heinous violations of human rights.

42. India has a world-renowned Constitution, an independent judiciary and an unquestionable commitment to justice. So why cannot India be left to take care of its own prosecutions?
It is true that the Indian Constitution contains many important values. However, having a comprehensive Constitution is, in itself, inadequate to ensure prevention of grave human rights violations and to provide justice for such violations. Very often, there has been no accountability for persons who commit grave crimes, violating provisions of the Constitution and other laws, due to the political clout that the perpetrators wield. Practices of torture, enforced disappearances and extra-judicial killings used by police and armed forces are cases in point. Several factors have obstructed the path of justice, such as:

- Political unwillingness to prosecute perpetrators. The government’s failure to take action on the perpetrators of the communal riots in Mumbai in 1992-93 even after they had been named in the report of the Srikrishna Commission is an example.
- Absence of an independent investigating agency, leading to impunity especially where police and the armed forces are major perpetrators;
Inadequate and inappropriate procedures of investigation;

The non-binding nature of findings and recommendations of inquiry commissions set up by the government to inquire into major human rights violations, and of human rights commissions;

Perpetrators’ political clout, facilitating them to weaken investigations and scuttle prosecutions;

Legal lacunae – the inadequacy of laws to deal with grave human rights violations;

Legal provisions requiring prior sanction from the government for prosecuting certain government officials, and individuals committing certain crimes – contributes to a climate of impunity;

Declining fair trial standards through legislations such as TADA and POTA.

Absence of statutory remedies for claiming compensation from the state for human rights violations committed by its officials; and.

General problems concerning the Indian judicial system, such as backlog of cases, delays in courts, a lack of protection to victims and witnesses, insensitive prosecutors and judges, and corruption.

43. Are the Commissions set up at national and state levels on human rights not adequate to provide justice?

Commissions set up at national and state levels to respond to human rights violations, including that of women, minorities, scheduled castes and scheduled tribes make important interventions in monitoring human rights violations, and in promoting and protecting human rights. However, they are not intended as solitary remedial forums, but meant to complement the work of courts. Systemic flaws in its functioning and the restrictions imposed by the Human Rights Protection Act have impeded their effective functioning. Problems such as an absence of independent and adequate investigative machinery, absence of an independent forensic department, lack of a victim and witness protection programme, the need for a prior permission from state government to visit a jail or penal institution, lack of financial independence, backlog of cases, lack of powers to investigate violations by armed and paramilitary forces, absence of power of prosecution and statutory limitations have weakened the effective functioning of such commissions. Strengthening and promoting the independent functioning of such commissions are crucial to ensure justice and accountability for grave human rights violations.

44. How about inquiry commissions that are constituted to investigate specific human rights violations from time to time?

Inquiry commissions in India have the potential to play an important role in creating accountability for grave human rights violations. However, they are not courts of law, and can neither prosecute individuals nor prescribe any punishment to perpetrators. The state can initiate prosecutions based on the findings of such commissions, but is not duty-bound to do so. The recommendatory nature of such reports and findings is problematic, as it gives the option to the state not to implement them. The selective scuttling by the government of independent reports of inquiry commissions (such as the Srikrishna Commission report) as opposed to implementing those that align with it defeats public confidence in commissions of inquiry.

45. Is the ICC relevant for human rights campaigns within the country?

ICC-related laws and principles have the potential to contribute to and strengthen domestic campaigns on human rights. If India were to become a state party to the ICC, it could be motivated to make domestic prosecutions more effective and efficient, as it would not want any of its citizens to be tried in the ICC. Irrespective of the Indian government’s position on the ICC, ICC-related laws and principles now form part of the body of international law, and can act as a standard for law reform on various issues within the
country, some of which are discussed below. It is important to note, though, that the ICC provisions are formulated based on international experiences, and address only the most serious violations under international law. A use of such provisions without analyzing and adapting them to Indian situations and requirements, may not have the desired effect of strengthening domestic human rights campaigns.

Women’s rights: Definition of rape is much broader under the Rome Statute, and takes into account sexual attacks committed within the context of widespread and systematic violence. Other gender-related crimes in the Rome Statute, such as sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization find no mention in the Indian statutes. The Statute also contains gender-just procedural and evidentiary provisions under the ICC Statute, provisions for victim participation in proceedings and provisions for protection of women victims and witnesses, particularly those who experience sexual violence. Reparations, as a broader concept than ‘compensation’ that exists under Indian law, could be used for victims of sexual and gender violence. These could be used to strengthen the domestic legal system to respond more effectively to violations of women’s rights, and to make it more gender-sensitive.

Child rights: The ICC Statute prohibits many acts that violate children’s rights, by including them within the definition of war crimes and crimes against humanity. These include enslavement and trafficking of children, rape, sexual slavery, enforced prostitution and other forms of sexual violence committed on children, and provisions to protect children in armed conflicts. It also contains child-friendly procedural and evidentiary provisions that may inform the Indian campaign to make the legal system more child-sensitive.

Campaign on Dalit Human Rights: The definition of and crimes listed under ‘crimes against humanity’ in the Rome Statute – including murder, torture, persecution committed on racial, cultural and ethnic grounds, offences directed at sexual and reproductive functions of women, imprisonment or other severe deprivation of physical liberty, and enslavement - could be meaningful for the campaign on Dalit human rights in India.

Campaign for Rights of Victims & Witnesses: The ICC has established a Victims and Witnesses Unit within its Registry. ICC’s perspective on rights and interests of victims and witnesses includes three key issues: protection, participation and reparations. This could be particularly relevant for formulating any victim and witness protection regime into Indian law, practice and/or jurisprudence.

Campaign for Rights of Lesbians, Gays, Bisexuals and Transsexual (LGBT) groups: The crime of persecution, construed as a crime against humanity in the ICC Statute, includes persecution on the ground of gender. Ongoing research is aimed at developing an understanding of persecution of LGBT groups as gender-based persecution. However, due to the high threshold for crimes against humanity, it is not every violation that would attract the definition. The violations would have to be part of a widespread or systematic attack, committed pursuant to state or organizational policy, with the perpetrators’ knowledge of the general nature of the attacks.

Campaign against Torture: Based on the jurisprudence of ICTY and ICTR in the 1990s, the Rome Statute has expanded the definition of torture that is stated under Convention Against Torture (CAT). While the CAT definition requires the alleged act to be committed by a state official, or by non-state persons with official instigation, consent or acquiescence, the Rome Statute definition encompasses torture both by state and non-state actors. Moreover, the CAT definition recognizes an act as amounting to torture only when it is for the purpose of punishing, seeking information, intimidating or effecting discrimination of any kind. The Rome Statute definition dispenses with this criteria. It treats torture as a war crime and a crime against...
humanity. The Indian campaign against torture could take advantage of these developments, both for law reform and for seeking justice and accountability.

- **Campaign against Death Penalty:** The Rome Statute does not provide for death penalty even for the most serious crimes under international law. This can be used as a rallying point to strengthen the Indian campaign for abolition of death penalty even in the ‘rarest of rare cases’. Death penalty was intensely discussed at the Rome Conference in 1998, and many of the countries’ arguments and positions against the death penalty could inform the Indian campaign.

- **Campaign against State Repression:** Torture, extra-judicial killings (known in Indian parlance as “encounter deaths”) and enforced disappearances - the hallmarks of state repression – have been incorporated as crimes in the ICC Statute but do not feature under Indian law. The ICC could also be meaningful for certain state-level campaigns to end impunity and create accountability for such crimes, as well as campaigns for abolition of repressive laws that give unbridled powers to state officials.

- **Campaign Against Communal Attacks:** The definition of genocide in the ICC Statute includes genocidal acts targeted at groups based on religion. The crime of persecution, construed as a crime against humanity in the Statute, includes persecution on the ground of religion. These provisions could be particularly useful in efforts at creating accountability for communal attacks. They could also be relevant in any exercise that may be undertaken to formulate Indian laws on genocide and crime against humanity, against the backdrop of religion-based attacks.

- **Anti-nuclear campaigns:** Though the ICC Statute does not specifically outlaw possession or first use of weapons of mass destruction (WMD), including nuclear weapons, it prohibits acts that are the consequences of use of WMD. These include deliberate attacks on civilians and civilian objects, attacks that cause damage (including environmental damage), death and injury disproportionate to the anticipated military advantage, murder, extermination, inhumane acts, wilful killings, indiscriminate attacks on civilians, wanton destruction of property not justified by military necessity, causing harm to defenseless persons and destruction of buildings dedicated to religion, education, art, science and charitable purposes. These prohibited acts constitute war crimes and crimes against humanity under the ICC Statute, and as such, may provide inputs to the anti-nuclear campaign within the country.

- **Peace Movement:** The ICC is created with a philosophy that there can be no long-lasting peace without justice. The ICC may also be used as a tool in negotiating peace settlements. For example, where leaders of warring sides would rather have their soldiers subjected to trial in the ICC rather than a national-level tribunal, the ICC could be used as a confidence-building mechanism. The definition of the crime of “aggression” and its future inclusion into the ICC Statute would also have some bearing on whether the ICC could be used as a mechanism to deter wars and conflicts. If a full-bodied, depoliticised definition of the crime is ultimately adopted, it could have the potential of deterring first strikes, or even pre-emptive strikes.

46. Is there any campaign on the ICC in India?

The Indian campaign on International Criminal Court is called **ICC-India.** It was started in the year 2000 out of a concern with the existing climate of impunity in India. It now functions as an activity of Justice and Accountability Matters (JAM), a programme of Women’s Research and Action Group (WRAG), Mumbai. It is a member of the New York-based NGO Coalition for International Criminal Court (CICC), an umbrella organization with more than 2000 member organizations. The main activities of the campaign include research, publication, information dissemination, campaigning, network and outreach. These activities are aimed at public education and awareness-raising on ICC and its relevance to India,
establishing a national network, disseminating information and co-
ordinating activities among the members of the national network,
strengthening the Indian legal system by contributing meaningfully to
the ongoing human rights, law reform and law enforcement cam-
paigns within the country on various issues and, in the long run,
initiating and sustaining a dialogue with the Indian government, and
facilitating its accession to the Rome Treaty.

The campaign activities are coordinated by full-time staff, supported
and assisted informally by human rights activists, lawyers, jurists,
law students and social workers from various parts of the country.
A Board of Advisors consisting of eminent persons from India and
abroad, provide guidance to the campaign.

47. How can interested persons participate in the ICC-India
campaign?

Interested persons can join the national network and involve them-
selves in the Indian campaign in a variety of ways. For further infor-
mation or to join the Indian campaign, write to:

The Coordinator,
ICC - India
Project of Women’s Research & Action Group (WRAG)
Post Box 6830, Santacruz (East),
Mumbai 400055, India
Phone : +91 (22) 2667 2015
Telefax : +91 (22) 2667 3799
Email : iccindia@indiainfo.com / wrag@vsnl.com

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**GLOSSARY**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>ASP</td>
<td>Assembly of States Parties</td>
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<td>ASPA</td>
<td>American Servicemember’s Protection Act, 2002</td>
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<td>BBC</td>
<td>British Broadcoring Corporation</td>
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<td>BIA</td>
<td>Bilateral Immunity Agreements</td>
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<td>CAT</td>
<td>Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1984</td>
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<td>CBI</td>
<td>Central Bureau of Investigation</td>
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<td>CICC</td>
<td>NGO Coalition for International Criminal Court, New York</td>
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<td>FIR</td>
<td>First Information Report</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Convenant for Civil and Political Rights, 1966</td>
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<td>ICESCR</td>
<td>International Convenant for Economic, Social and Cultural Rights, 1966</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the territory of the Former Yugoslavia</td>
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<td>IPC</td>
<td>Indian Penal Code, 1860</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<td>NGO</td>
<td>Non-government Organization</td>
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<td>NHRC</td>
<td>National Human Rights Commission</td>
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<td>PHRA</td>
<td>Protection of Human Rights Act,</td>
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<td>TADA</td>
<td>Terrorist and Disruptive Activities (Prevention) Act</td>
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<td>UN</td>
<td>United Nations</td>
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<td>U.K.</td>
<td>United Kingdom</td>
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<td>U.S.</td>
<td>United States of America</td>
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<tr>
<td>WMD</td>
<td>Weapons of Mass Destruction</td>
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OTHER PUBLICATIONS

English :
- A set of 5 booklets on Muslim personal law, by Noorjehan Safia Niaz , 2003
  - Book 1: History of Development of Islamic Law
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  - Book 3: Laws Governing the Muslim Community
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  - Book 5: Sources of Islamic Law
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- Aspects of Culture & Society: Muslim Women in India, WRAG, 1997

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- Mahila Kaanoon Aur Reeti Rivaaz, WRAG, 1999
- Bharatiya Muslim Mahilaayen, WRAG, 1999

Reprint :
Dossiers published by International Solidarity Network of Women Living under Muslim Laws. Conceived as a networking tool, they aim at providing information about lives, struggles and strategies of women living in diverse communities and countries. These dossiers, Volume Nos. 1-21, have been reprinted and disseminated by WRAG.

Photo credit: UN/DPI, Evan Schneider

Provisional site of the ICC, known as the “Ark” on the outskirts of The Hague, The Netherlands. The building houses the Division of Common Services, the Judges’ Chambers and the Office of the Prosecutor, among other offices.

Photo credit: ICC-CPI/ Wim Van Capellen

Some members of the Board of Directors of The Victims Trust Fund, elected on 12 September 2003, with senior officials of the Court. (Left to right, front row) HE Tadeusz Mazowieki – former Prime Minister of Poland, Her Majesty Queen Rania Al-Abdullah of Jordan, Madame Simone Veil – former Minister of Health of France and former President of the European Parliament; (back row) President of the Assembly of States Parties of the ICC HRH Prince Zeid Ra’ad Zeid Hussain, ICC Registrar Bruno Cathala, ICC President Philippe Kirsch and ICC Prosecutor Luis Moreno Ocampo

Photo credit: ICC-CPI / Wim Van Cappellen

Third Session of Assembly of States Parties (ASP), held in The Hague, The Netherlands, 6 -10 September 2004. The ASP meets annually, and convenes representatives of all States Parties to the Rome Statute as well as observers to discuss the progress of the ICC and other relevant issues.

Photo credit: ICC-CPI / Wim Van Cappellen
The ICC Judges at the Inaugural Ceremony in The Hague, where they were sworn in, 11 March 2003.

*Photo credit: ICC-CPI/Wim Van Capellen*

The first bench of the ICC, consisting of 18 judges. Left-right, bottom-top: Mr. Claude Jorda (France), Mr. Mauro Politi (Italy), Ms. Anita Usacka (Latvia), Mr. Sang-hyun Song (South Korea), Mr. Karl T. Hudson-Phillips (Trinidad & Tobago), Ms. Fatoumata Dembele Diarra (Mali), Ms. Akua Kuenyehia (Ghana), Ms. Maureen Harding Clark (Ireland), Ms. Sylvia H.de Figueiredo Steiner (Brazil), Ms. Elizabeth Odio Benito (Costa Rica), Mr. Philippe Kirsch (Canada), Mr. Gheorghios M.Pikis (Cyprus), Mr. Erkki Kourula (Finland), Mr. Adrian Fulford (United Kingdom), Ms. Navanethem Pillay (South Africa), Mr. Hans-Peter Kaul (Germany), Mr. Renee Blatmann (Bolivia) and Mr. Tuiloma Neroni Slade (Samoa).

*Photo credit: ICC-CPI/Wim Van Capellen*

Left to right: ICC Prosecutor Mr. Luis Moreno Ocampo (Argentina), Deputy Prosecutor Ms. Fatou Bensouda (The Gambia) and Deputy Prosecutor Mr. Serge Brammertz (Belgium). Ms. Bensouda heads the Prosecutions Division and Mr. Brammertz the Investigations Division of the Office of the Prosecutor respectively.

*Photo credit: NGO Coalition for the International Criminal Court (CICC)*

Mr. Bruno Cathala, Director of the Division of Common Services (left) with Mr. Sam Mueller, Deputy Director.

*Photo credit: ICC-CPI / Wim Van Cappellen*
Women’s Research & Action Group (WRAG) was founded in Mumbai in April, 1993 in the wake of the communal riots post-December 1992. Muslim women who were already subordinated by the politics of gender and personal laws became further marginalized with identity politics gaining prominence in their strategies to deal with the faced oppression from within and outside the community. WRAG stemmed from the need to create space to raise the issues concerning women from marginalized sections of society from a perspective of gender and identity. It also focuses its activities towards situating women’s concerns and interests within a human rights framework. It envisions a gender-just and secular society founded on the principles of equality, justice, and respect for rule of law, human rights and democratic values; and build a world where every woman, irrespective of her caste, class, religion, race, ethnicity or other factors, is able to live a life to her fullest potential, free of fear, violence and want.

WRAG seeks to work with individual women in the community, particularly those from marginalized sections of society, in order to bring about an improvement in the socio-economic and legal status within the family and society. In addition, WRAG works at policy-level interventions aimed at creating a climate that is conducive for promotion of women’s human rights, dignity and secularism. It remains proactive at efforts for justice and accountability with regards to violations of women’s rights.

ABOUT WRAG …

ACTIVITIES OF WRAG

Community Outreach Programme
This programme began in 1999 and aims at empowerment of women within their families and in communities, through community work and policy-level interventions. Activities include community empowerment through solidarity-building, rights awareness workshops, training of potential trainers from communities, training programmes on gender, sexual and reproductive health, capacity-building activities with adolescent girls, facilitating men’s involvement in gender issues, initiating and supporting solidarity groups of single women, and facilitating community participation in the campaign for reform of Muslim Personal law.

‘Justice & Accountability Matters’ Programme
Started in 2003, this programme aims at ending the climate of impunity for grave crimes that exists within the country, and creating a culture of respect for rule of law and human rights, particularly of women. Activities include ICC-India: The Indian campaign on International Criminal Court, programmes on legal literacy and human rights awareness, campaigns on human rights, women’s rights and the law.

Campaign On Secularism
In the recent context of increased communalisation, WRAG has sought to work on the issue both at the preventive and curative levels. Areas of intervention are advocacy & action, research & publication, programmes for communal harmony in communities, promoting justice for victims of communal violence and solidarity-building with secular-humanist organizations.

Research
Women and Law project 1994-1998: A survey on Muslim women’s socio-legal and economic status and their views on personal laws, conducted in 45 districts from 15 states of the country in collaboration with other organisations and individuals.

Adivasi Research Project 2001-2002: An action research on adivasi women’s experiences and views on their customary laws and practices, conducted in parts of Maharashtra and Gujarat.
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