Combating Impunity: A Compilation of Articles on the International Criminal Court and its Relevance to India

Vahida Nainar
Saumya Uma

Available at: https://works.bepress.com/saumyauma/8/
OTHER PUBLICATIONS

**English**

- Adivasi women and customary law and practices (forthcoming)
- A set of 5 booklets on Muslim personal law
  by Noorjehan Safia Niaz, 2003
  - Book 1: History of Development of Islamic Law
  - Book 2: Understanding & Interpretation of Quranic Verses
    on Divorce
  - Book 3: Laws Governing the Muslim Community
  - Book 4: Maintenance after Divorce: A Major Concern of Muslim Women
  - Book 5: Sources of Islamic Law
    Muslim Women's Views on Personal Laws:
    The Influence of Socio-economic factors
  by Vahida Nair, 2000

- Shah Bano and the Muslim Women Act a Decade on
  by Lucy Carroll (ed.), 1998

- Aspects of Culture & Society: Muslim Women in India
  by WRAG, 1997


**Hindi**

- A set of 5 booklets on Muslim personal law, by Noorjehan Safia Niaz (forthcoming)
- Mahila Kanoon 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 distributed in India by WRAG.

WOMEN’S RESEARCH & ACTION GROUP
P.O.Box No. 6830, Santacruz (E), Mumbai 400 055
Ph: +91-22-2610 0400 / 2615 5031 Fax: 2615 5031
Email: wrag@vsnl.com

COMBATING IMPUNITY
A Compilation of Articles on the International Criminal Court and Its Relevance to India

Compiled by
Vahida Nair & Saumya Uma

WOMEN’S RESEARCH & ACTION GROUP
## CONTENTS

<table>
<thead>
<tr>
<th>Acknowledgements</th>
<th>Vahida Nainar</th>
<th>v</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>Vahida Nainar</td>
<td>vii</td>
</tr>
<tr>
<td>1. Combating Impunity</td>
<td>Usha Ramanathan</td>
<td>1</td>
</tr>
<tr>
<td>2. Crimes and Conflicts</td>
<td>Usha Ramanathan</td>
<td>7</td>
</tr>
<tr>
<td>3. International Criminal Court And Gender Concerns</td>
<td>Saumya Uma</td>
<td>13</td>
</tr>
<tr>
<td>4. Giving Victims a Voice</td>
<td>Vahida Nainar</td>
<td>17</td>
</tr>
<tr>
<td>5. India and the ICC</td>
<td>Usha Ramanathan</td>
<td>17</td>
</tr>
<tr>
<td>6. Why India should support</td>
<td>Saumya Uma</td>
<td>27</td>
</tr>
<tr>
<td>The International Criminal Court</td>
<td>Saumya Uma</td>
<td>39</td>
</tr>
<tr>
<td>7. India’s Failed Tryst with Justice &amp; The Need for an</td>
<td>Saumya Uma</td>
<td>59</td>
</tr>
<tr>
<td>International Criminal Court</td>
<td>Saumya Uma</td>
<td>63</td>
</tr>
<tr>
<td>8. The International Criminal Court and its Implications for</td>
<td>Saumya Uma</td>
<td>67</td>
</tr>
<tr>
<td>India</td>
<td>Vahida Nainar</td>
<td>73</td>
</tr>
<tr>
<td>9. Should India View The</td>
<td>Usha Ramanathan</td>
<td>89</td>
</tr>
<tr>
<td>International Criminal Court with Double - Tinted Spectacles</td>
<td>Ravi Nair</td>
<td>95</td>
</tr>
<tr>
<td>of Suspicion?</td>
<td>Saumya Uma</td>
<td>99</td>
</tr>
<tr>
<td>10. A Case for the Nations</td>
<td>Ram Jethmalani</td>
<td>107</td>
</tr>
<tr>
<td>11. International Criminal Court - Now a Reality</td>
<td>Saumya Uma</td>
<td>113</td>
</tr>
<tr>
<td>12. To Kill a Court</td>
<td>Saumya Uma</td>
<td>117</td>
</tr>
<tr>
<td>13. Big Bully Finds Another Slave</td>
<td>Saumya Uma</td>
<td>121</td>
</tr>
<tr>
<td>14. The Gujarat Carnage &amp; The International Criminal Court</td>
<td>Saumya Uma</td>
<td>125</td>
</tr>
</tbody>
</table>
| ![Interventions by Civil Society Groups](image)
| 15. The ICC Campaign in India                                    | Saumya Uma     | 129  |
| 16. Let's Police Ourselves Better!                              | Saumya Uma     | 132  |
| 17. A Letter Campaign after the Gujarat Carnage                 | Saumya Uma     | 136  |

*Cover Designed by Dinesh Sawant*
ACKNOWLEDGEMENTS

We are grateful to Women and Media Collective, Colombo, for supporting this publication.
INTRODUCTION

Developments in India since the Gujarat carnage in February – March 2002, have left many realize the inadequacy of laws in India and the futility of pursuing legal remedies faced with a situation of state complicity in grave crimes. Consequently, it has evinced a keen interest in international law and the possibility of seeking justice at the international level when there is no hope in the domestic system. The interest is further fueled by the entry into force of the International Criminal Court (ICC) treaty on July 1, 2002 and its establishment in The Hague in March 2003.

The multilateral treaty of the Rome Statute of the ICC was adopted in July, 1998. The treaty was to come into force on ratification by sixty countries. This was achieved on April 1, 2002. Three months later, in July 1, 2002, the treaty entered into force, with war crimes, crimes against humanity and genocide happening anywhere in the world from that date onwards being at once crimes under the statute of the ICC. In February 2003, eighteen judges were elected, of which seven are women. At the inauguration ceremony for the judges of the ICC on March 11, 2003, Philippe Kirsch of Canada was elected as the President of the Court and Akua Kuenyehia of Ghana and Elizabeth Odio Benito of Costa Rica were elected as Vice Presidents.

Since the adoption of the Rome Statute of the ICC in July 1998, there have been quite a few articles written about the ICC and India. The ICC-India campaign was launched in the year 2000 to raise awareness about the ICC among the civil society and campaign for India to be a state party to the treaty. Although ICC will not deal with the Gujarat situation, in light of the new interest in
ICC, a compilation of these articles is timely. Since these articles have been written over last three years, some of the process related information are dated. Yet, they provide a sense of the basics of the ICC, the process of its establishment, the opposition to the Court and the role India has played in the process.

The first article spells out the need for an institution such as the ICC in the world today and its potential to combat impunity that has dogged the world last century. The second article written after the momentous occasion of the entry into force of the International Criminal Court treaty speaks of the challenges that the Court will face. Discussing the open hostility of the United States to the Court, the article charts out the need for an institution such as the ICC, the problems with Truth Commissions as an alternative and the inherent political difficulties of implementing the no-immunity standard.

ICC is a significant development in international law for codification of customary international law. It is also significant for the level and extent to which gender concerns are integrated into its Statute. The third article points to the historical neglect in prosecution of crimes against women in international contexts and lists out some of the important gender provisions in the Statute. The next article highlights the wide range of provisions in the statute that deals with the rights and interests of victims.

Article five discusses in greater detail the points of concerns and reservations India makes to the ICC. The arguments forwarded by the Indian administration do not quite hold out against some of the facts and concludes that indeed the reluctance on part of India to join the ICC treaty is a fear of being hauled up before the Court. Speaking from an international and regional perspective, the following article notes the positions of governments in the Asian region, being the only region with negligible number of ratifications to the ICC treaty. Making a case for India to support the Court, the article essentially exhorts India to recognize its responsibility in the world to contribute to a world free from impunity and a world where justice prevails.

Article seven is an important article that provides a brief historical background of India’s role in some of the international and internal conflicts since independence. The Indian state has used repression to curb its people’s legitimate demands and blatantly violated human rights that are internationally recognized and guaranteed by the Indian Constitution. It shows the inadequacy of the Indian laws to deal with grave crimes and exposes the myth of India having a strong, effective and independent judiciary. The number of situations within India, both internal and international, where perpetrators have escaped prosecution, is shocking.

The next article responds to some of the sovereignty arguments that the Indian government puts forward to justify its opposition to the Court and questions the notion of infallibility of domestic legal systems. Article nine questions India’s proclaimed role of peaceful nation pursuing international peace and security.

Despite the factual error in saying that terrorism is included in the list of crimes against humanity of the Rome Statute, article ten provides a hint of how difficult it will be for civil society, given the views of the current government, to engage them and change their position to accede to the jurisdiction of the Court.

Article eleven reviews the developments around the establishment of the Court and discusses some of the geo-politics that would challenge the functioning of the Court. While keeping faith in the new institution, it also points to the real danger of political pressures on the Court.

The next couple of articles discuss the efforts the United States is making to actively destroy the Court. Through multiple bilateral, what is now termed as ‘impunity’ agreements, the United States wants to get its nationals a 100 percent exemption from the jurisdiction of the Court. By signing the US initiated bilateral agreement barring extradition of each other’s national to an international Tribunal or to a third country, the Indian government is helping them achieve this objective and making so-called strides in the Indo-US relations. While international law is evolving at a rapid pace to ensure an end to impunity, India’s foreign policy is holding out in isolation. With no credible laws within its national legal system, India’s anti-ICC position leaves its citizens completely insecure with regard to any future war criminal, genocidaires and perpetrators of crimes against humanity within its territory.
The final article on Gujarat carnage and the ICC, notes that ICC itself cannot respond to Gujarat and discusses the relevance of the ICC’s concept of anti-impunity, importance of the specifics crimes recognized and the responsibility of the state in situations of mass violence.

- Vahida Nainar

1

COMBATING IMPUNITY

- Usha Ramanathan

The twentieth century has earned itself the distinction of being the bloodiest in all of human history. The two world wars were semi-colons in a period punctuated by incessant bloodshed and campaigns of violence. The capacity for destruction, and decimation of populations, stand demonstrated. The strides in arms production and the birth of the nuclear age have done much to make a myth out of peace. The rise of fascism most graphically witnessed in the Second World War, and the increasing evidence of identity, and hate politics has done much to destroy the potential for human co-existence.

The years since the Second World War have been witness to attempts at preventing abuse of power, less centrally in providing for the lives of peoples, and, in a relatively recent manifestation, in recognising and respecting communities of peoples. The language of human rights has developed most significantly to act as a bulwark against those wielding the power of the state, and in this it has given an altered meaning to sovereignty. None of this appears to have been able to curb the practice of violence and violations, even in genocidal dimensions as has been seen in Bosnia and Rwanda; nor did it prevent the declared state policy of apartheid as in South Africa; nor the aggression unleashed on Afghanistan in the post-twin tower attacks on September 11, 2002; nor the large scale attacks on the people of a state by its own government as in Cambodia or Argentina, for instance.

The Tokyo War Crimes Tribunal and the Nuremberg Tribunal, which sent leaders of the losing Axis powers to the gallows and to serve spells in incarceration, were the first successful attempts at bring-
ing perpetrators to justice. But the proceedings were tainted by the retrospective definition of crimes and the uneasy reflection that the trial and its consequences were an illustration of ‘victor’s justice’. Since then, there have been only two occasions when the world community has acted to bring to trial mass violators - when the Security Council set up the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia. Both these are ad hoc tribunals, with an after-the-fact listing of crimes that could be tried.

The statute for the establishment of an International Criminal Court constitutes a departure from this ad hoc, retrospective, victor’s justice experience of trial and accountability. Voted in July 1998 at the Diplomatic Conference in Rome, the overwhelming support for the statute was a surprise even to the optimists among those present. There were 120 votes in favour of the statute, 22 abstained from the vote — India is known to have kept company among the abstentions — and only 7 rejected the statute - the US prominent among the detractors. On April 11, 2002, in a remarkably short time for a multilateral document, the requirement of 60 ratifications was crossed, clearing the decks for establishing the court. The statute will now come into effect on July 1, 2002, although it may be another year before the court may begin to function.

Defining crime

There are four sets of crimes that are covered by the ICC statute: genocide, war crimes, crimes against humanity and aggression. The crime of genocide is not new to international criminal law, and is set out in the Convention on the Prevention and Punishment of the Crime of Genocide 1948, to which India too is a party. Genocide, by definition, is acts specified in the Convention “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”, and includes”

(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part....”

The Genocide Convention is specific that “attempt to commit genocide” and “complicity in genocide” are also punishable offences. What the Genocide Convention does not do is to provide a tribunal to try these offences. Instead, it leaves it to a competent tribunal in the country where the act was committed to try the offence or to an international penal tribunal whose jurisdiction the contracting states have accepted. This is where the ICC now steps in.

The ICC statute, drawing upon experience, elaborates on what constitutes war crime and crimes against humanity. For instance, ‘crimes against humanity’ includes extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, enforced disappearance of persons ... And it includes “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”.

The crime of aggression is still being beaten into shape, and will not be triable for a good while yet.

The definition of crimes has universal application. That is, when an act defined as a crime in the ICC statute is committed, it would be a crime in the eyes of the court whether or not any state so defines, or whether or not a state is a party to the statute. It is, at this point, important to recognise that it is not states but individuals who will be tried by the court. States are only required to cooperate with the court in matters such as producing the accused, gathering evidence, protecting witnesses, imprisoning convicts and such. The question of acquiescing in the trial of accused is also therefore irrelevant.

The ICC is a court that will complement the jurisdiction of national systems; it will not replace or supersede national courts and systems of trial. It is only where a state is unable or unwilling to try offences that are within the jurisdiction of the ICC that the ICC will get into the act. The ICC would, however, have inherent jurisdiction to decide whether a state is unable or unwilling to
act. Where the proceedings in the state are being taken to shield the perpetrators, for instance, or there is unjustified delay, or the proceedings are not being conducted independently or impartially, and are inconsistent with an intent to bring the person concerned to justice, the ICC may find that the state was unable or unwilling to act.

The Indian government, for one, has reacted with horror at the possibility of being tried without its consent. International judicial institutions have, so far, been dependent on states giving their consent before adjudicating on any issue before them. This is true, for instance, with the International Court of Justice. The ICC, however, does not depend on such consent. If it did, it is unlikely that it would make even a tiny dent on the regimes of impunity that have developed over the past century.

It must be clarified that the ICC does not deal with all acts that may constitute crime in law. In dealing with war crimes, for instance, the ICC will have jurisdiction only where the act is committed “as part of a plan or policy or as part of a large-scale commission of such crimes”. The ICC may try crimes against humanity where it is committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. The thresholds are rather high. And where the court is confronted with “armed conflicts (which are) not of an international character”, it 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”.

**Trigger mechanisms**

The ICC may be activated by a state that is a party to the ICC. A case may also be referred to trial by the ICC by the Security Council acting under Chapter VII of the United Nations Charter. This could have the effect of doing away with the setting up of ad hoc tribunals, as became necessary in the cases of Rwanda and Yugoslavia. The prosecutor appointed under the ICC statute may also commit a case to trial where an investigation has been initiated by the prosecutor, either suo motu or on information received. So, the prosecutor may investigate a complaint received from any source, including any governmental or non-governmental per-

son, body or organisation. Any investigation by the prosecutor on the basis of information received is, however, to be preceded by a presentation of the information, as scrutinised, to a Pre-Trial Chamber of the court, which will decide whether the information ought to be pursued.

If either the state on which the crime was committed, or the state of which the accused is a national is party to the ICC statute, the court would have jurisdiction. This would, of course, mean that even a state that has canvassed against the statute and the court, and which has boycotted the court may find its national being brought to trial before the court. The US, with its self-appointed role as a policeman of the world, has reacted like the archetypal bully. The US Congress has authorised the President to use all force necessary (a phrase of which the US is particularly fond) to wrest back from the ICC any US national who may be held by the court in proceedings before it. The Bush administration has also endorsed the American Service members’ Protection Act, calling for sanctions against countries that support the ICC. This ‘unsigned’ of the ICC is unprecedented, but is clearly indicative of the restraints that bully states believe could be imposed on them if they breach standards of conduct in, or out of, warfare.

It is significant that states that have a problem with genocide, crimes against humanity and war crimes being tried by an international tribunal are even now demanding that terrorism be internationalised, and that years of standard setting in the arena of human rights be reduced to a rump in the name of fighting terrorism. In India, this is especially ironic when Ayodhya and Gujarat stand as symbols of how terrorism does not get defined, and when new standards are being set for impunity.

*Published in International Environmental Law Research Centre Briefing Paper 2002-3*
CRIMES AND CONFLICTS
On The Promise And Potential Pitfalls
Of The International Criminal Court.

- Usha Ramanathan

On July 1, the International Criminal Court (ICC) came into being. The first stage was crossed on April 11, 2002, after 66 states deposited their instruments of ratification with the United Nations. By June 27, seventy-one countries had ratified the ICC statute, well above the number of 60 needed to give effect to the statute. The universality of the crimes set out in the statute will mean that war crimes, crimes against humanity and genocide committed anywhere in the world will all be crimes within the understanding of the court. The court will exercise its jurisdiction only where either the state on whose territory the crime was committed, or the state of which the accused is a national, is a party; or where the Security Council refers a matter to it. And it will not substitute national courts, but be complementary to them - that is, where the national systems are unable or unwilling to deal with the crimes.

Only the states that have ratified the statute on or before July 2, 2002 will have the right to participate fully in the first Assembly of States Parties, which will be held in September 2002. The 18 judges of the court, and the prosecutor, are expected to be elected next January after the Assembly of State Parties decides in September this year the rules of procedure to select the judges and officers of the court, and determines issues relating to its budget.

Even before the court takes its first steps, the United States has begun its campaign to vilify it. Threats, both blatant and veiled, have accompanied this campaign in large measure. To begin with,
the Bush administration threatened to ‘un-sign’ from the statute that Bill Clinton had signed on to just before he demitted office. But there is no procedure for un-signing. Moreover, in international law, when a country signs a treaty, even where there is no ratification, there is an obligation not to act contrary to the letter and spirit of the treaty. So, the Bush administration adopted a variant that it thought up to un-signing. On May 5, it addressed a letter to the U.N. Secretary-General to inform him that, “in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, ... the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary’s status lists relating to this treaty.”

Meanwhile, the U.S. Congress currently has before it the American Servicemembers’ Protection Act (ASPA), a law which would authorise the use of military force if U.S. citizens are held in the ICC in The Hague. The law, which has passed Senate scrutiny, advocates the use of “all means necessary” to retrieve its citizens from the court. This proposed law, and the fiery rhetoric around it, has proved to be a diplomatic embarrassment. The Dutch Parliament is reported to have endorsed unanimously a resolution expressing concern about what is also being referred to as the Hague Invasion Act. It has urged the Dutch government to take up the matter with both the European Union (E.U.) and the North Atlantic Treaty Organisation (NATO).

The response of the U.S. embassy in the Netherlands has been nebulous: “The ASPA provision grants an authority for the President to use all means necessary. It does not require or suggest that any particular means be used to address this issue. Should matters of legitimate controversy develop with the ICC’s host-country, the Netherlands, we would expect to resolve these controversies in a constructive manner, as befitting relations between close allies and NATO partners. Obviously, we cannot envisage circumstances under which the United States would need to resort to military action against the Netherlands or another ally.”

More recently, the U.S. has threatened to back out of peace-keeping missions unless its personnel are exempted from the ICC’s jurisdiction. The U.S. wants the Security Council to endorse a blanket exemption from prosecution by any court other than its own for all peace-keeping missions, but the Security Council has so far refused to oblige. The U.S. is threatening to pull out its peace-keeping troops from Bosnia; the mandate expired on June 21. It has agreed to an extension only till the end of June pending a formal statement of immunity to forces engaged in peace-keeping. On June 30, the U.S. blocked a vote to continue peace-keeping operations in Bosnia, letting the peace-keeping mandate expire. Most of the members of the Security Council are opposed to the adoption of this disclaimer. But if Britain, which negotiated such a disclaimer on behalf of countries during the war on Afghanistan, were to change its position, there is no saying which way the decision might go.

Even as the ICC came into being, lawyers were busy setting up an International Criminal Bar to fill the vacuum in the defence, and to provide lawyers for witnesses and victims. Meeting in Montreal on June 15, the new body was endorsed by some 350 lawyers representing bar associations from 48 countries. Lawyers who have been working to establish the International Criminal Bar have drawn their lessons from the Rwanda and Yugoslavia tribunal experience. When these tribunals heard their first cases, the defence lawyers were inadequately organised, they say. There was a dependence on the registrar’s office for routine needs such as access to an office or permission to travel for fact-finding. The existence of an International Bar Association would make a difference to the choice of counsel who would be available to the accused, and provide a support structure to attorneys practising in these courts. Reflecting the hybrid nature of the new court, where civil law and common law will be integrated, it has been proposed that the International Criminal Bar should speak for defence lawyers as well as the lawyers for witnesses and victims.

The problem of impunity has been an increasingly visible phenomenon, especially in the last quarter of the 20th century. It has been a period of incessant, and unpunished, bloodshed and those who wielded state power were either complicit in the crime or were the
perpetrators themselves. It is also irrefutable that these crimes largely went unpunished. The difficulty in confronting the brutality that such regimes have unleashed on peoples has made prosecution a largely unworkable option, especially within states where the judicial system has broken down.

Truth commissions have emerged as a device to help deal with the violence that has rent societies. In Unspeakable Truths: Confronting State Terror and Atrocity (2001: Routledge), Priscilla Hayner writes about 20 truth commissions around the world. The South African Truth and Reconciliation Commission is the best known one. The Argentinean Commission, which investigated the ‘dirty war’ that the armed forces waged against the people between 1976 and 1983, and produced the report titled Nunca Mas (Never Again) is also known. But there have been many more. The Report of the Commission of Inquiry into Violation of Human Rights Findings, Conclusions and Recommendations (1994), the Final Report of the Investigative Commission on the Situation of the Disappeared, the Report of the National Commission on Truth and Reconciliation (1991) in Chile, the Report of the Commission in Chad (1992), the Si M Pa Rele (If I Don’t Cry Out ...), which was produced by the Haitian National Commission for Truth and Justice (1996) are just some of the 20 that stand mute testimony to the scale and depth of the violations practised against the people within the state.

There is evidence too of international intervention in tackling the aftermath of crimes against the people. For instance, the Commission on the Truth in El Salvador (1993) was set up as a result of a U.N. brokered peace accord, as was the Guatemalan Commission which gave its report, Memory of Silence, in 1999. The International Commission of Inquiry in Burundi, which submitted its report in 1996, was created by the U.N. Security Council.

The scale of the crimes is horrific. Take the Guatemalan illustration. Hayner cites the commission as having registered a total of over 42,000 victims, including over 23,000 killed and 6,000 disappeared. “Ninety-three per cent of the violations documented were attributed to the military or state-backed paramilitary forces,” she records. “Three per cent were attributed to the guerrilla forces.” The military juntas in Argentina, in the seven years that they held power from 1976, and in their hunt to eliminate communist “subversives” ‘disappeared’ an estimated 10,000 to 30,000 people - “arrested, tortured, and killed, the body disposed of so as never to be found, and the fate of the victim never known by agonised family members”. These have not been exceptions.

Hayner’s work demonstrates rather effectively that truth commissions almost inevitably accompany the change of a regime; and they invariably come with the compromises that a changeover often demands. The difficulties encountered in finding a way to deter such gross abuse of state power are patent in her narrative. The use of amnesty as in South Africa and in Sierra Leone, not naming the perpetrators as was part of the mandate in Chile, and not even revisiting the past as in Mozambique has meant that the guilty often roam free. Often, they have not lost their access to power, and a culture of impunity is discernible. In some jurisdictions, there is also an incapacity which dogs the judicial system, making prosecution a dubious possibility.

The ICC has come into being in the midst of these experiments with tackling state violence in situations where the state itself has been found to be largely responsible for, or complicit in, crimes that cross high thresholds. The inequality of states in international politics lends its weight to impunity - an inequality that the U.S., for one, insists be allowed to remain. The deliberations on counter-terrorism that are currently under way in the Security Council, especially in the context of the extraordinary arming of the state that it legitimises, will have to be understood against the backdrop of these recent, recorded, experiences of state violence. While there are few who would question the need to deal with terrorism, the danger of selectively defining who is a terrorist, and conferring immunity on violations committed in the name of combating terrorism, will need guarding against, and the problem of impunity has to be located within this understanding.

Published in Frontline: Volume 19 - Issue 15, July 20 - August 02, 2002
3

INTERNATIONAL CRIMINAL COURT
AND GENDER CONCERNS

- Saumya Uma

The international community is actively involved in efforts to establish a permanent International Criminal Court (ICC) to prosecute individual offenders for specified heinous crimes.

The ICC is the first permanent forum mooted at an international level to deal with individual perpetrators committing crimes of a heinous nature. It is intended to try individuals who have perpetrated war crimes, crimes against humanity and genocide. The ICC would not supplant the jurisdiction of national courts in any way; it would exercise jurisdiction only in those cases where national legal systems either fail to make such persons accountable, or are unable to do so. The ICC is a statutory body and is not an organ of the UN, though it will be closely linked to it. It would consist of judges elected from 18 of the countries that ratify the Statute, with consideration for equitable geographic representation.

While the creation of this court is significant for all heinous crimes committed by individuals, it acquires added significance in the case of sexual crimes committed against women during conflict situations.

The impact of armed conflict on women has been devastating. There is no dearth of examples of sexual atrocities in the recent history of armed conflict. In World Wars I and II, sexual abuse of women was employed as a conscious military strategy. One cannot forget the Japanese soldiers’ rape of Chinese women in Nanjing in 1937, the American soldiers’ sexual atrocities on Vietnamese women during the Vietnam war, the sexual abuse of an estimated 200,000 Bangladeshi women by Pakistani soldiers during the
Bangladeshi nationalist struggle, the rape of Kuwaiti women by Iraqi soldiers in 1990, the torture, rape and forcible pregnancies caused by Serbian forces on Bosnian Muslim women and the sexual violence in Rwanda, Sierra Leone, Kosovo and East Timor. Closer home, reports of strip searches of women in Sri Lanka and sexual abuse of women in Kashmir, North East and other “troubled areas” are abundant.

In most of these situations, there has been no legal machinery to prosecute the offenders. Violence and torture have been unleashed with impunity. There has been little political will to treat these as serious crimes, warranting prosecution. Often, women’s rights to justice have been bartered away under the pretext of diplomacy and maintenance of friendly relations. For example, the Nuremberg Charter, which set the standard for war crime trials following World War II, did not include sexual abuses when it spelt out the crimes that were punishable. Despite overwhelming evidence of sexual abuse of Soviet women by German soldiers during the Nuremberg trials, sexual abuse does not appear even once in the 179-paged judgment of the International Military Tribunal. A few gangrapes of Vietnamese women by American soldiers, under immense public pressure, were followed by a cover up operation in the name of court martial. No prosecutions for sexual atrocities of Bangladeshi women are known to have been initiated by the Pakistani government against its soldiers. The tribunals established to prosecute persons responsible for the atrocities in Bosnia and Rwanda have been exceptions rather than the rule.

Seen in this context, the integration of gender issues within the Statute for establishing a permanent ICC has been unprecedented. It shows a determination to prosecute offenders of gender-related crimes and to make them accountable for their heinous acts.

Prior to the drafting of the Statute, the participation of women in the drafting of the Geneva Conventions and other laws to regulate warfare was minimal. This resulted in a distinct male perspective, derived from a male interpretation of female experiences. The drafters had assumed that the concerns and interests of women would mirror their own interests.

For the first time, the Statute creating the ICC has benefited from the active participation of women, who have weaved distinct gender concerns intricately into the Statute. Women have been able to relate their personal experiences, and articulate and assert their own rights. NGOs that are working on women’s issues, such as the Women’s Caucus for Gender Justice, situated in New York, have intervened and positively influenced all the negotiations leading to the creation of the Statute. The move has been to identify gender-specific crimes, and persecution on the basis of gender, and to incorporate these as crimes within the Statute creating ICC. The effort has clearly been to situate gender concerns squarely within the framework of law. Efforts have also been directed towards achieving international consensus for the serious nature of these crimes and the need to end impunity to the offenders.

Some of the acts defined as crimes against humanity in the Statute include torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, and persecution against any identifiable group or collectivity on the ground of gender. These categories of crimes are broad and all-encompassing, and include gender-specific violence perpetrated on women during wartime and peace time.

In addition to recognition of gender-specific crimes, the Statute has incorporated other principles that are exemplary and historic. The establishment of Victims and Witnesses Unit is significant, and participation of victims is allowed at every stage of the trial. There has been an integration of forward-looking principles, such as recognition of victims’ and witnesses’ interests and rights, including counseling, rehabilitation, protection and reparation. Structurally, the bench of 18 judges provides for a fair representation of male and female judges, and the requirement of an expert on gender-related crimes in the Prosecutor’s office. These provisions will pave way for increased participation of women in the functioning of the ICC. These are provisions from which inspiration can be drawn for national campaigns on reform of law relating to sexual abuse.

Gender issues in the context of the ICC have had their share of resistance. China vehemently opposed inclusion of enforced sterilization within “crimes against humanity”. Some countries tried to
introduce the concepts of “consent” and “past sexual conduct”. The US has been making sustained efforts to reduce the independence of the court, and to exempt its nationals from prosecution by the ICC. Several Arab countries were determined to exclude crimes of sexual and gender violence when committed within the context of family, religion or culture. Other countries tried to increase the threshold for “crimes against humanity” so that it would be more difficult to prosecute for these crimes. The resistance by countries has resulted in some amount of dilution to original provisions. Women’s groups and other NGOs have had to fight hard against a justice where crimes against women are bartered away in the name of political compromises.

Some have raised doubts about the efficacy of a justice delivery system that is far removed from the social, legal, political and cultural context in which crimes against women take place. On one hand, the distance would effectively curb exertion of political influence over the criminal trial. On the other hand, while admitting that sexual abuse in Kashmir may differ in its specificities from those in Rwanda, the underlying misogyny, power and domination of men, reinforcement of gender identification of men and the patriarchal power structure remain the same, thus providing a rationale for supra-national prosecution of gender-related crimes.

Similar to the national courts, the International Criminal Court is not intended to stop all crimes against women; neither is it intended to punish all wrongdoers. The existence of a supra-national machinery to prosecute offenders will hopefully result in a certain degree of deterrence. In situations where national courts are unable to or unwilling to prosecute offenders of heinous crimes, including gender-specific crimes, the ICC will act as a safety net to end impunity.

In short, the integration of a gender perspective within the Statute for ICC conveys a powerful message - that sexual abuse of women committed time and again as a war strategy – will neither be tolerated nor exonerated.

*This article was published in Gender Just Laws Bulletin, July 2000*

4

**GIVING VICTIMS A VOICE**

- Vahida Nainar

Justice traditionally implies prosecution and punishment of the guilty. The July 1998 Rome Statute of the International Criminal Court (ICC) has embodied a concept of justice that goes beyond this; it gives victims a voice – a voice not only to testify and tell their story, but also to participate in court proceedings, with measures to protect their interests and identity. The Court also can award reparations to the victims; this is almost unprecedented. It will be able to prosecute crimes committed on a widespread and systematic scale, which often leave a whole class of victims and survivors who can come forward to tell their stories. They would do so for a variety of reasons: the desire for the truth to be known, to speak for the dead, to demand accountability and to demand justice. For many, real justice will be done only when somehow the harm, be it physical, psychological, material or other, caused by the crimes is repaired even if the reparation is symbolic. Testimonies of victims of sexual violence are most difficult to come by, making such crimes difficult to prosecute. Such broad participation of victims in court proceedings is unheard of in many national judicial systems, both in civil and common law.

Enormous questions of practical significance on the implementation of certain articles arise. Some do emanate from reluctance to accept the broadening of the objectives of a criminal justice system with inclusion of principles of social welfare and justice. Who can be the legal representative of the victims? What if hundreds of victims claim the right to have hundreds of counsels? How will the court decide on reparation, and on what basis? Where will the funds for reparation come from? Should a criminal court provide
counselling and therapy? Preparatory Committee meetings for the Court will continue to draft the operative instruments of rules of procedure and evidence which will be vital for the interpretation and implementation of these articles.

The ICC Statute reflects how international humanitarian law has evolved. The principles it enshrines, the experiences the Court may encounter and the continuing development in the field of international humanitarian and criminal law have scope for solutions for some of the above problems to evolve over a period of time. By keeping victims’ interests, concerns and rights among its primary objectives, the ICC Statute is poised to do “justice” with a human face and help in the healing process and the recovery of the victims, which is and ought to be the ultimate goal.

**Articles and Provisions**

Provisions of Article 68 of the ICC Statute allow for the victims to have legal representatives, and of Article 19(3), the right to present their views and make submissions when their interests are likely to be affected at all stages of the court proceedings, as long as these are not inconsistent with the rights of the accused. Under Article 54(1), the Prosecutor is bound to respect the interests and personal circumstances of victims and witnesses with respect to investigations. Under Article 15, victims have the right to make representations to the pre-Trial Chamber with regard to any submission by the Prosecutor requesting authorization of an investigation. It requires the Prosecutor to inform all those who requested investigation of any case of her or his decision to continue or discontinue the investigation. Article 43(6) provides for protective and security measures for victims and witnesses who may be at risk on account of their testimony, and provides counselling for those in trauma. Article 75 deals with the award of reparation to the victims, to mean and include restitution, compensation and rehabilitation. The Court’s mandate is not only to establish principles relating to reparations, but also in exceptional circumstances to determine the scope and extent of any loss or damage to the victims.

---

‘Justice is Not Mine’

At a panel discussion organized by the Women’s Caucus for Gender Justice, a potential witness at the Rwanda ad-hoc Tribunal, speaking anonymously, stated that she was never informed that a case had progressed to trial until she was approached over a year after the initial contact with the investigators. She further stated that she refused to participate in the Tribunal because she had no faith in their protection efforts, and the Tribunal staff was not qualified to deal with her case sensitively. Another victim from Rwanda, speaking at the same panel, said that she did not feel justice was “hers”. Experiences of victims at the ad-hoc Tribunals must be taken into account and the shortcomings of the existing systems must be rectified. Participation, protection and right information at the right time are important to build faith in the victims and witnesses, particularly of crimes of gender and sexual violence, to come forward and testify. The ICC Statute has rightfully recognized the magnitude that such crimes have taken in recent times and qualified many articles and provisions with specific reference to crimes of gender and sexual violence.

This article was published in UN Chronicle, No. 4, 1999
5

INDIA AND THE ICC

India, along with a few other countries, is for now holding out against the ratification of the Rome Statute for the establishment of an International Criminal Court. A discussion of the concerns and imperatives in this regard.

- Usha Ramanathan

The Rome statute for the establishment of an International Criminal Court (ICC) was voted in, in July 1998, by 120 states; seven states voted against it and 21, including India, abstained (Frontline, August 14, 1998). Since then 139 countries have signed on and 29 states have ratified the statute. The United States, which resisted the statute through the negotiations, admittedly worried that its armed forces could be hauled up before the ICC, did a near about-turn when it signed the statute on December 31, 2000. Ratification, though, is not in sight. India continues to boycott the statute. The ICC will be established after the deposit of the 60th instrument of ratification, acceptance and approval or accession with the Secretary-General of the United Nations. The Indian state’s concern revolves around the role of the Security Council as a trigger for investigation and prosecution and in the matter of deferral of prosecutions; the inherent jurisdiction of the ICC; the office of an independent prosecutor; and the inclusion of internal armed conflict as a crime that the ICC can try.

The Rome statute provides for three triggers: a State Party to the statute, the Security Council, and the Prosecutor on his or her India and The ICCown initiative. This privileging of the Security Council was resisted by many states, including India, during the run-up to the Rome conference. There was an illogicality in vesting this
power with the Security Council when its permanent members appeared less than enthusiastic about a criminal court with universal jurisdiction. The U.S., particularly, was categorical in its opposition to the ICC, which was projected as a threat to its armed forces which act as policemen around the world. The difficulty in keeping the Security Council out was, however, that the ICC was jostling for jurisprudential space that would not conflict with the U.N. statute. Chapter VII of the Statute, which authorises the Security Council to take “action with respect to threats to peace, breaches of the peace and acts of aggression”, could not be wished away; nor could the ICC override the provisions of the U.N. statute. Granting the role of a trigger to the Security Council then was a compromise - an uneasy compromise, unacceptable to some states, but almost inevitable.

The inevitability also arose from recent experience with tribunals that were established to try the cases of violence and bloodshed in Rwanda and Yugoslavia. The International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for Former Yugoslavia (ICTFY) are ad hoc tribunals set up by the Security Council. Both were set up after the events and they were to try the kind of offences that were specifically witnessed in those arenas. The need for such ex post facto intervention could be obviated by encouraging the Security Council to use the ICC rather than set up tribunals of competing jurisdiction.

The opposition to the Security Council operating as a trigger also loses its singular acridness when it is recognised that the Prosecutor may initiate action upon receiving information from any quarter. But this too is a bitter pill for India. The power of the Prosecutor to take a case to trial is tempered by the intervention of a pre-trial chamber which will decide whether there is a case to be investigated and tried. Yet the potential for receiving complaints and investigating into their genuineness resides in the Prosecutor and that was stoutly, if unsuccessfully, resisted by India.

The Rome statute envisages the Prosecutor initiating investigation “on the basis of information on crimes within the jurisdiction of the court” (Article 15). The office of the Prosecutor is to be an independent organ with the court “responsible for receiving referrals and any substantiated information on crimes within the juris-


diction of the court, for examining them and for conducting investigations and prosecutions before the court” (Article 42). And no member of the office of the Prosecutor may “seek or act on instructions from any external source.” This power to act on information received opens the field for initiating the process before the ICC upon receiving a complaint from any person, not merely a State Party or the Security Council. For India, doubts about how independent an independent Prosecutor would be, or even could be, were therefore interspersed with a rejection of the potential for individuals and organisations getting the wheels of the ICC moving.

There are significant differences between the ICC and other international institutions such as the International Court of Justice (ICJ) and the Committee for Human Rights. The ICC will try individuals, and not states. Further, being a criminal court, there will be an accused, fair standards in the trial of the accused, a threshold for evidence to constitute proof, punishment of imprisonment or and fine, and reparation and compensation to the victims of the crime.

The theme running through the statute, and which informed the proceedings all the way up to the signing of the statute in Rome, was that of impunity. In countering impunity, exclusive reliance on State Parties or the Security Council could be fatal. More over, in criminal law everywhere (with exceptions only in cases such as bigamy, for instance) it is not who reports the crime, but the fact that the crime has been committed which is the starting point for bringing a perpetrator to justice. The prosecutorial power to investigate and initiate prosecution is, in the meantime, hemmed in by the statute, by making the Prosecutor bound by the decision of the court at every stage of the proceedings.

The potential for interference by the Security Council is pronounced in its power to defer investigation and prosecution. Under Article 16, the Security Council, through a resolution adopted under Chapter VII of the U.N. Charter, may request the court that no investigation or prosecution be commenced or proceeded with under the statute for a period of 12 months; and such a request may be renewed by the Security Council. The Security Council's designated role as a peacekeeper under Chapter VII was used to incor-
porate this provision into the statute. That all five permanent members of the Security Council would have to agree to such deferral is the one insurance against any indiscriminate use of this power. For India, which has been worried more about being hauled up before the ICC than the effectiveness of the ICC itself, this should cause little concern, though it opposes this provision in principle.

What does worry the Indian state is the inherent jurisdiction of the ICC. In fact, opposition on this ground seemed so obvious that delegates at the Rome conference were caught by surprise at the widespread acquiescence with the proposal to give the court the authority to determine its own jurisdiction. The ICC statute is premised on the principle of complementarity; that is, the primary responsibility for investigation and trial rests with the state. It is where the state is unwilling or unable to carry out investigation or prosecution that the ICC steps in (Article 17).

The Indian position has been that this inherent power of the court to decide whether a state has acted, and acted in a manner that is consistent with justice, impinges on the sovereignty of the state. An Indian official was quoted as saying: “India has its own laws to deal with human rights abuses; we have the Human Rights Commission, an active judiciary and a free press. We don’t need the ICC to bring offenders to justice, we do it ourselves.” This, of course, is an exaggerated claim, which is belied by statistics presented in the Jammu and Kashmir Assembly. On February 26, 2001 Mohammad Yousuf Tarigami of the Communist Party of India (Marxist) alleged in the Assembly, without being effectively countered, that the number of persons missing from the custody of the security forces and the police had risen to 2,174 in Jammu and Kashmir, 76 cases had been registered and only one person had been channelled. Similar is the case of disappearances in Punjab; the Central Bureau of Investigation confirmed that 2,097 bodies were treated as “unidentified” (even where they were in fact partly identified in some cases) and cremated in three districts of Punjab during the period of disturbances. The National Human Rights Commission, which was authorised by the Supreme Court to act, declined to consider that these were symptomatic of what had happened in Punjab and not just in the three districts where the investigative officers had managed to obtain information, and rejected the plea that the phenomenon of disappearances be investigated. The issue has been reduced to one of paying compensation to individual claimants. The Punjab government has agreed to pay a compensation of Rs.1 lakh each in 18 cases of disappearance, but without admitting the justness of the claims being made or without suspecting any culpability on the part of its officers.

That there are systemic blind spots is hard to dispute. What worries the Indian state, however, is that the ICC may be used by adversaries, or states inimical to India, to embarrass it. In advancing this as a reason for rejecting the ICC, there is a deliberate underplaying of the high thresholds that have been built into Indian laws for investigating a crime and launching prosecution. Legal definitions of crimes are peppered with words such as ‘widespread’, ‘systematic’ and ‘large-scale’. It is difficult to reconcile the Indian state’s confidence in its human rights record with this diffidence. The rejection of cases filed before the ICC would, in fact, be a feather in India’s cap.

In working out what would constitute an internal armed conflict, the Rome statute specifically excludes “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature” (Articles 8(d) and (e)). It would be in India’s interest to engage constructively in the manner in which these provisions of the statute evolve.

India has not questioned the need to bring to justice perpetrators of large-scale violation of human rights. The experiences with Augusto Pinochet of Chile and Pol Pot of Cambodia and in Sierra Leone, Rwanda and Bosnia, the disappearances, detentions and deaths under the military juntas in Central America, apartheid, and so on are too recent to forget. Universal jurisdiction is the emerging principle that is expected to ensure that perpetrators of mass outrages are punished and, hopefully, deterred. Also, the potential for misuse of political and armed power, cynically represented as moves for peace, has been repeatedly demonstrated; for instance, in the recent air strikes over Iraq. And, the Security Council’s authority to establish ad hoc tribunals has gained respectability with none having openly challenged this exercise of discretion; there is no denying that this could be selectively invoked. It is in this context that the statute for an ICC has been constructed. It is, there-

Combating Impunity

India and the ICC

24

25
fore, to be a permanent court, with regional representation and a prospective mandate. Its credibility and the cooperation of participating states will depend considerably on the precedents that are set and the consistency of the institution. The international human rights and legal communities are not unaware of this.

Since July 1998, many positions have changed. A significant step was taken when France, one of the permanent members of the Security Council, ratified the statute. There have been debates in the House of Lords to bring national legislation in conformity with the ICC statute. The U.S. has signed it. Bangladesh, whose attempt to try war criminals after the war of liberation in 1971 was thwarted by its inability to reach the perpetrators, has signed the statute.

The problem in refusing to be party to the statute is that it reduces the potential for making a difference to the development of a law around the ICC statute - there would be no Indian representation among the judges, in the Prosecutor’s office, in the Registry and in the Assembly of State Parties. Yet, if the state where the offence is committed or the accused belongs to a nation which is a State Party to the statute, or the Security Council decides to refer the matter to the ICC, India would be caught in a bind: there would be no obligation to cooperate, but refusal would inevitably cause extreme awkwardness.

The urgency does not appear to have lessened in the pursuit of procuring ratifications. It seems it is only a matter of time, and that not too much, before the 60th ratification will be in. India will have to decide whether it will continue its sullen silence or opt for the pragmatic route of participation.

This article was published in Frontline dated March 31- April 13th 2001. Volume 18 - Issue 07.

6

WHY INDIA SHOULD SUPPORT THE INTERNATIONAL CRIMINAL COURT

- Saumya Uma

The international community is actively involved in efforts to establish a permanent International Criminal Court (ICC) which would try individual offenders for specified heinous crimes. While the Indian government has resisted the international efforts, the layperson in India is blissfully ignorant of the same. Even politicians’ and bureaucrats’ knowledge of the issue is dubious. This is reflected by the fact that Subramaniam Swamy, the Janata Party president, had recently stated that Vajpayee should be tried before the ICC for “treasonable irresponsibility” in Kargil (“Swamy seeks trial of PM, Fernandes” The Hindu, September 8, 1999), ignorant of the fact that the ICC is yet to be established, and will have no retroactive effect once established.

The Concept of ICC

The proposed International Criminal Court (ICC) will be a permanent court that will investigate and bring to justice individuals who commit the most serious violations of international law, namely war crimes, genocide and crimes against humanity, including widespread murder of civilians, torture and mass rape. The ICC will be a global judicial institution – with an international jurisdiction complementing national legal systems.

The Need for an ICC

It is estimated that more than 86 million civilians have died, been disabled or been stripped of their rights, property and dignity in the post-World War II era. During this period, the world has wit-
nessed the slaughter and torture of innocent millions with impunity. The recent violence which has been unleashed on a massive scale by authoritarian regimes to crush separatist movements – such as in East Timor (Indonesia), Chechnya (Russia), Tibet (China) and Afghanistan – has resulted in large-scale human rights abuses. These are evidence of the ineffectiveness of the national legal systems in deterring such atrocities, and a reminder that political leaders can continue to perpetuate human rights abuses with impunity only because of the absence of an international legal system to which they would be criminally accountable. Until the recent arrest of former Chilean dictator Augusto Pinochet, and the indictment of Serbian leader Sloban Milosevic by the Yugoslavian Crimes Tribunal, hundreds of officials in the higher echelons of power, who perpetuated human rights abuses in former dictatorial regimes, have enjoyed immunity. The ICC is intended to give reprieve in such situations.

The ICC is important not only to enforce international criminal law but also to serve as a model criminal court for nations. The function of the ICC is not intended to supplant the jurisdiction of national courts. However, it would play a crucial role in prosecuting offenders where such prosecutions by national systems is either unlikely, or would be a sham. This assumes special significance in the context of crimes such as sexual abuse of women, which have traditionally been relegated by minor crimes and ignored by States.

The ICC has distinct advantages over the International Court of Justice (ICJ) and ad-hoc tribunals presently in existence. Unlike the ICJ, whose jurisdiction is restricted to States, the ICC will individualize criminal responsibility. This avoids blaming groups / nations / states, thereby minimizing hostility among nations and groups, while singling out and penalising the actual perpetrators. Unlike the Rwandan and Yugoslavian War Crimes Tribunals (ICTR and ICTY respectively), its jurisdiction will not be chronologically or geographically limited. Further, it is pertinent to note that the ICTR and ICTY came into being only because the five permanent members of the Security Council arrived at a consensus on their establishment. The ICC, as a permanently constituted body, would be unaffected by any political or logistical reasons that could ob-

struct such a consensus among the permanent members in future.

**Chronological Development of the Concept of ICC**

The concept of ICC itself is not new, as it was first mentioned in the 1919 Paris Peace Treaty. After World War I, the efforts to establish an international tribunal were unsuccessful. The establishment of an International Criminal Court was part of the same humanitarian agenda that crystallised in the post-World War II era, in the form of the creation of the United Nations and the adoption of instruments such as the Universal Declaration of Human Rights, the Convention Against Genocide and the Geneva Conventions.

The establishment of the International Military Tribunals at Nuremberg and Tokyo after World War II inspired the efforts to create a permanent international court. In 1946, an international congress met in Paris and called for the adoption of an international criminal code prohibiting crimes against humanity and the prompt establishment of an international criminal court (ICC). Two years later, the Genocide Convention (in Article VI) provided for prosecution before an international penal tribunal if and when one was established. Members of the UN also asked the International Law Commission to examine the possibility of establishing an ICC. The International Law Commission (ILC) responded to the same by drafting statutes for an ICC in 1951 and 1953. However, with the ideological and political tensions during the Cold War and the consequent polarisation of interests, the establishment of such an international body became a distant reality.

In 1974, the General Assembly agreed on a preliminary definition of aggression. In 1981, it asked the ILC to return to the question of establishing a Code of Crimes. Trinidad and Tobago revived the proposal for a permanent ICC in 1989 with a view to fighting international drug trafficking crimes through the same. The establishment of ad hoc tribunals for Bosnia-Herzegovina and Rwanda in 1993 and 1994 respectively strengthened the discussion for a permanent ICC. In 1993, the ILC also submitted another draft statute for an ICC to the General Assembly. The Vienna Declaration and Programme of Action, formulated in June 1993, affirmed
its support for the establishment of an ICC. In 1994, the General Assembly appointed an ad hoc committee to review the draft statute. In 1995, it appointed a Preparatory Committee (PrepCom) to finalise the text. This text was then presented at the UN Diplomatic Conference on the ICC in Plenipotentiaries, Rome, in June-July 1998, wherein 160 countries participated.

At the Rome Conference, after prolonged discussions and negotiations, an overwhelming majority of the countries voted in favour of the Rome Statute of the ICC – 120 countries in favour, 7 against, with 21 abstentions. The statute will come into force after 60 countries have ratified it. This process usually requires the approval of the national legislature. The statute has already been signed by about 86 countries. It will remain open for signature until 31 December 2000. In February 1999, Senegal became the first country to ratify the Rome Statute, followed by other signatories.

**Details of its Creation and Functioning**

The ICC will be created on the basis of the Rome Statute. The Court will be established with its headquarters at The Hague, Netherlands, but will be authorized to try cases in other venues when appropriate. It will have jurisdiction only over crimes committed after the Rome Statute enters into force. There will be no retroactive jurisdiction. The ICC is a treaty-based body and will therefore not be an organ of the United Nations. It will, however, be closely linked to the UN by means of various formal agreements. Crimes within the jurisdiction of the Court are genocide, war crimes and crimes against humanity, such as widespread or systematic extermination of civilians, enslavement, torture, rape, forced pregnancy, persecution on political, racial, ethnic or religious grounds, and enforced disappearances. The statute has found a way out of the ambiguity arising out of the concepts of “genocide” and “crime against humanity” by clearly listing the acts which would comprise such offences.

The Court will initially consist of 18 judges elected to non-renewable nine-year terms by a two-thirds majority vote of the States parties to the statute. Only citizens of countries that are parties to the statute can be judges of the court, and no two judges may be citizens of the same country. The judges will be distributed among three divisions: pre-trial, trial and appeals.

Prosecution may be initiated by three means: (a) by member states; (b) by Security Council; or (c) by the Prosecutor. Given the almost complete absence of inter-state complaints before the international human rights treaty bodies, it is unlikely that States will have the political will to initiate proceedings in the ICC against the nationals of other States. Political and diplomatic ramifications would hinder the process. The Security Council, being a politicised body, is not likely to trigger the court’s jurisdiction in a majority of cases, especially in the light of the fact that some of the permanent members had intended that the ICC’s jurisdiction be excluded with respect to all situations on the Council’s agenda. Hence an independent and powerful Office of the Prosecutor is crucial to the effective functioning of the ICC.

An absolute majority of the States parties to the statute will elect the ICC Prosecutor and one or more deputy prosecutors to non-renewable nine-year terms. The Prosecutor will be authorized to initiate investigations upon referral either by the UN Security Council or by a State party to the statute and, subject to appropriate safeguards, on his or her own motion (proprò motu).

One area of concern for several States has been the possibility of prosecuting persons based on political motives. However, safeguards are built into the process in this regard. The Prosecutor cannot even start an investigation without permission from a pre-trial chamber of three judges. The suspect and the States concerned also have the right to challenge the investigation by the Prosecutor. In addition, States and the accused can challenge the jurisdiction of the Court or the admissibility of the case at the trial stage. These measures will ensure that cases are substantial and deserve investigation and prosecution by the Court.

Another area of considerable contention during the Rome Conference was the extent to which the permanent members of the Security Council will influence / interfere with the court proceedings. Initial French and American proposals that the Security Council serve as a filter for all complaints to be submitted to the ICC,
and that the ICC should require the Council’s approval before starting proceedings, were opposed by a majority of States. In consequence, such provisions have been omitted from the Statute. However, the Security Council can delay the proceedings before the ICC by requesting it not to open proceedings, or to suspend proceedings already underway, for a renewable period of 12 months by means of a resolution under Chapter VII of the UN Charter. Such a request for delay would be on the grounds that the issue is under consideration by the Council. The adoption of such a resolution requires nine votes, including the votes of all five permanent members of the Security Council. A veto by one permanent member would thus, instead of stopping the court, enable it to move forward.

The significant point to note is that the ICC is not intended to punish any State; only individuals, irrespective of their official position, who unleash human rights abuses on persons. Heads of State and other government officials, members of armed forces and of paramilitary groups, who abuse their power and inflict human suffering, will be held accountable and criminally responsible for their deeds, and no plea of immunity will be permitted. Such persons will be held responsible, both for acts directly committed, as well as for acts committed by subordinates.

The procedural provisions of the Rome Statute are based on international standards of fair trial and due process embodied in international conventions and UN standards on the right to a fair trial. Defendants’ rights are guaranteed at all stages of the proceedings up to and including appeal. The right to counsel – including the right to assignment of counsel in case of indigency – is guaranteed to both suspects and accused. The statute incorporates the presumption of innocence and does not permit trials in absentia. In conformity with current legal trends, the death penalty is not provided for.

In addition, elaborate provisions have been drafted to protect the safety, physical and psychological welfare, dignity and privacy of survivors and witnesses. The statute incorporates protective measures, security arrangements, counselling and other appropriate assistance. This would make the procedure less intimidating. Special emphasis has been given to protection of survivors of sexual violence and crimes against children. Reparations, that include compensation and rehabilitation, are also provided for.

**Standpoints of Various Countries**

The United States was initially enthusiastic about establishment of the ICC. However, it tried to push forward a proposal to tie the court’s powers to the veto of the UN Security Council, which would have made it a mere political tool of the great powers. When this was opposed by a majority of States, it started lobbying hard against the establishment of the ICC, even though dozens of countries, including all America’s NATO allies except Turkey, have indicated that they will ratify the treaty setting up the court. It has pleaded that, as the sole remaining superpower, its soldiers and officials would be the target of politically motivated prosecutions, hampering its peacekeeping efforts around the world. Restriction of the powers of the court and the prosecutor, and attributing to the court the right to indict individuals only if national authorities themselves refuse to investigate or punish alleged atrocities, have had no positive effect on the US position. During the Rome Conference, it voted against the establishment of the ICC.

China voted against the establishment of the ICC. It was opposed to the inclusion of abuses during domestic armed conflicts within the Court’s jurisdiction. It believed that offences listed in the Statute had a “heavy dose” of human rights law, and hence the ICC would become an international human rights court, instead of being a criminal court that punished international crimes of exceptional gravity.

The views and comments of some Asian governments during and after the Rome conference are perhaps more pertinent to Indian interests. In South-east Asia, Indonesia deplored the fact that it had been necessary to resort to voting, and abstained on the ground that it was in favour of the universal character of the court. Malaysia abstained too, though it supported the expeditious establishment of a truly independent international criminal court. The Philippines voted in favour. Singapore abstained, on the grounds that the statute contained provisions in whose drafting only a small group of countries were involved, that the statute excluded the
misuse of chemical and biological weapons from the purview of the court’s jurisdiction, and excluded the death penalty. In the Far East, both Korea and Japan voted in favour. Meticulous study on the necessity to enact enabling legislation prior to signature and ratification is being conducted in Japan. In Central Asia, Kyrgyzstan and Tajikistan have already signed the treaty, which indicates their favourable political will towards future ratification.

In South Asia, Afghanistan voted in favour and felt that if such a court existed 20 years ago, it would not have been a victim of several aggressions. Bangladesh, which was unable to make Pakistani officials criminally responsible for genocide and mass rapes perpetrated on its citizen during its liberation struggle against Pakistan, also voted in favour. Pakistan, while voting in favour, believed that it was essential to permit reservations to the statute, with a view to ensuring that States were not initially deterred from becoming parties to it and that States which were already parties did not later withdraw. Sri Lanka, whose chief concern is the containment of the LTTE, abstained on the ground that the crime of terrorism had not been included in the statute. India abstained, for several reasons, some of which are discussed below.

**Relevance of ICC for Asia**

Out of 86 signatories at the Rome Conference, only three were from Asia. This is despite the fact that some of the worst atrocities have taken place in this region of the world. Cambodia struggles with the legacy of genocide committed during the Khmer Rouge regime. The Bangladeshis suffered from genocide and mass rapes during their independence struggle. The Tibetans have experienced decades of torture, summary executions, destruction of their culture and other human rights violations by Chinese pro-unification forces. Rampant human rights abuses by the armed forces continue in the Kashmir valley in a bid to control terrorism. The brutal persecution of ethnic Chinese in Indonesia a year ago cannot be forgotten. The East Timorese have had to pay the price through torture and mass killings, for decades of wanting independence from Indonesia. In all these situations, where atrocities are committed either under instruction of or with the cooperation of political leaders, national legal systems have failed to cope with the enormity of abuses and to make the individuals criminally responsible. Hence the arguments of sovereignty, independence of judiciary and efficiency of national legal systems are myths created by the governments with the motive of shielding their leaders from an effective mechanism which might attribute criminal responsibility.

The situation is exacerbated by the fact that unlike Europe and the Americas, the Asian region has no judicial system over and above the national system. Asia is the only continent where governments have not been able to produce a comprehensive human rights declaration and the institutions to uphold it, such as a Commission or a Court. Both the SAARC and ASEAN are political and diplomatic forums that focus, inter alia, on multilateral trade cooperation. No mechanism exists to check the human rights and humanitarian abuses that take place at the national level in the member countries. Hence, the need for an ICC, which would have jurisdiction over and above the national jurisdiction, is imperative, as a check and balance against the commission of blatant atrocities.

**Critique of India’s Official Standpoint on the ICC**

India, the largest democracy in the world, abstained from voting at the Rome Conference. The Indian government’s demands during the conference centred around four issues:

a) That first use of weapons of mass destruction (particularly nuclear weapons) ought to be considered a war crime and to be adjudicated in the ICC;

b) That terrorism – particularly cross-border terrorism and terrorism externally inspired, aided and abetted – ought to be included within the jurisdiction of the ICC;

c) That provisions facilitating the Security Council to refer cases which constituted a threat to international peace and security to the ICC, ought to be omitted; and

d) That the ICC’s jurisdiction ought to be restricted to exceptional circumstances.

It is pertinent to closely examine each of these arguments. While admitting that nuclear weapons do have dangerous repercussions...
both on human lives and property, the ICJ is yet to take a unanimous decision declaring the use of nuclear weapons illegal. There is neither a legal authority nor an international consensus on the issue. Moreover, though the misuse of nuclear weapons was not explicitly included, the same was covered under the ambit of ‘weapons that have the effect of mass destruction’ – which was included within the ambit of the ICC.

India’s position of wanting to include terrorism within the jurisdiction of the ICC is both surprising and contradictory, for has it not been India’s position for the past several decades that the problem of terrorism in Kashmir should be solved by bilateral means and not through intervention / mediation of any third party or in the international forum? Moreover, the definition of a terrorist itself is subjective. The Bangladeshis were considered terrorists by the Pakistani government at the time of the nationalist struggle in 1971; yet, after independence, they were considered freedom fighters. The erstwhile government of Nawaz Sharif was democratically elected and internationally recognised. Yet, the present rule has seen legal action being taken against those political leaders under laws dealing with terrorism. The Indian state considers members of ULFA and Kashmiris demanding autonomy and independence terrorists; yet they consider themselves freedom fighters. Further, the human rights ramifications of enacting and implementing provisions of TADA need no explanation. The question of state-sponsored terrorism further adds to the complication. Hence terrorism raises complex (though important) considerations on which the international community has arrived at no consensus. Thus it was perhaps an issue raised prematurely by the Indian delegation at the Rome Conference.

India’s fear that Pinochet-like abusers of human rights in India may be made accountable through the ICC, has motivated it to insist on restricting the ICC’s jurisdiction to exceptional circumstances such as the breaking down of national legal systems. However, such a fear is unfounded since the jurisdiction of the ICC extends only to such situations where the national courts are unable to or fail to function.

India’s apprehensions of the possible interference of the Security Council with the functioning of the ICC are totally justified and real. The Human Rights Watch (in June 1998) and the Hague Appeal for Peace (May 1999) have expressed a similar concern. It is undesirable that the Council should have the power to delay proceedings before the court for a maximum period of 12 months. While the susceptibility to misuse is minimised by the provision that no member of the Council will have the power to individually veto the Court’s actions, concerns about its possible repercussions on the independence of the court do persist.

Moreover, India’s objection to the role of the Security Council in the ICC extends to the provision allowing the Council to refer cases to the ICC under Chapter VII of the UN Charter, when the alleged acts constitute a threat to international peace and security. India’s contention that such a provision binds non-member states to the jurisdiction of the ICC is not without substance. However, the manner in which the crime tribunals for Yugoslavia and Rwanda were created through the Security Council’s resolutions under Chapter VII of the UN Charter are a powerful reminder that opposing the Council’s power to bind a non-member is a losing battle unless democratisation of the structure of the UN were to be achieved.

There is no doubt that, like other statutes, the Rome Statute is not perfect and that areas of serious concern do persist. However, the solution does not lie in abstention from the statute, and in opting out of the process of creating an independent and efficient judicial system. If India were to become a signatory to the statute, it would gain the right to review the statute, raise pertinent issues and propose amendments to it along with other member states, in accordance with Part 13 of the Rome Statute. Hence, all avenues for ensuring a fair, impartial and independent court are not closed.

In conclusion, India ought to realise that true and lasting peace cannot exist without justice. Failure to bring the perpetrator to justice facilitates a perpetuation of these abuses. Justice entails ending impunity and redressing victims – precisely the philosophy behind the creation of the ICC.

This article was published in Humanscape, May 2000
7

INDIA’S FAILED TRYST WITH JUSTICE & THE NEED FOR AN INTERNATIONAL CRIMINAL COURT  
- Saumya Uma

India projects itself as a peace-loving nation, which does not provoke any kind of conflict. Further, lofty claims are made that we have an impeccable and efficient legal system (which implies that every crime is effectively prosecuted), thereby undermining the need for India to “go international” and be a party to the ICC Treaty. This nationalist assertion is made both for domestic and international consumption.

This paper attempts at challenging some of this propaganda, by illustrating briefly India’s role in history of international and non-international conflicts, where little accountability has existed for grave human rights violations. The paper further seeks to illustrate how the Indian legal system has failed to effectively prosecute perpetrators of grave human rights violations within the country – violations that clearly are crimes against humanity. It concludes that the failure of the justice delivery system within the country is reason enough for us to have an international mechanism in place, through the International Criminal Court, to ensure that the perpetrator does not escape with impunity.

PART 1: INTERNATIONAL & NON-INTERNATIONAL CONFLICT IN INDIA: A BRIEF HISTORICAL PERSPECTIVE

A. Situations Of International Conflict

India – Pakistan Partition 1947

We are all well aware of the fact that partition – the tearing apart, the dislocation, the breaking up of homes, the reconstitution of the
not keen to be repatriated, would be sent to Pakistan for one month as a trial period, and after that, the woman would have the option of returning to India.

Similarly absurd agreements were made with regard to children of Muslim women and Hindu fathers. In the case of one group of “recovered” Muslim women, the agreement was that they could take their children as far as Jalandhar, where they would keep the children with them for 15 days, and then a final decision would be taken as to whether the children should stay in India or go to Pakistan.

These decisions would be taken by the nations with the concerned women and children figuring nowhere in the decision-making process. No tribunal is known to have been set up to enquire into the human rights violations committed during the Partition. No justice was rendered to affected persons, especially the women and children. Women and children’s rights were swept under the carpet under the garb of nation-building.

India – Pakistan (Bangladeshi War of Independence)1971

Thousands of Indians, Bengalis & Pakistanis lost their lives. One authority states that a genocide of about 3,000,000 people happened.4

India retained about 200 Pakistani prisoners of war (POW) who were suspected of committing gross human rights violations on Bengalis, including mass rapes on women. India’s position was that the retention of these POWs was necessary to enable the newly-created Bangladesh to prosecute them for war crimes & crimes against humanity within their territory. Pakistan instituted proceedings before the International Court of Justice (ICJ) for a return of the POW.5 India disputed the jurisdiction of ICJ. Subsequently after prolonged negotiations, a tripartite agreement was concluded, that allowed the return of the Pakistani POWs to Pakistan.6 These POWs were therefore, neither prosecuted in India nor in Bangladesh but were allowed to return to their country, where very little effort has existed to prosecute them.

India-Pakistan (Kargil) 1999
In May 1999, after Islamic militants crossed from Pakistan to Indian Kashmir near the town of Kargil, armed clashes between India and Pakistan started. It continued for about eight weeks, until Pakistan agreed to withdraw the militants (on July 4, 1999), and both countries agreed on a process of “disengagement”. During this period, India’s consistent stand was to exclude the involvement of the United Nations in any mediation / dialogue for a peaceful settlement of the issue.

In the course of these clashes, over 1200 people, many of them civilians, were killed. Communal violence escalated. Indian security forces in Jammu & Kashmir continued to violate human rights with impunity. The J & K Disturbed Areas Act & the Armed Forces (Special Powers) Act, remained in effect in the state. Military-led cordon & search operations in Muslim neighbourhoods resulted in violation of human rights, through acts such as detention, torture & summary execution of suspected militants.7

Neither Pakistan nor India has been condemned forthrightly for the Kargil incident, either by the United Nations or by any country. The statement by the US State Department that Pakistan should withdraw infiltrators is diplomatically damaging but from the standpoint of international law, it still falls short of condemnation.

While Pakistan called for UN mediation in the Kashmir dispute, India rejected an offer by the UN secretary-general to send an envoy. Pakistan came up with a very fair suggestion that the UN Observer Mission should be allowed to monitor the LOC to prove or disprove the allegation that the mujahideen are Pakistan-backed. India disagrees, but continues with its allegations. The UN Observer Mission, set up under article 29 of the UN Charter, is confined to observe and receive reports of violations from both sides of the LOC before passing them onto the Secretariat of the Security Council. Its effectiveness has been reduced since 1971 as only Pakistan reports the violations and India does not. The reason India opposes the UN Observer Mission because of its emphasis on bilateralism under the Simla Agreement. It, therefore, does not want to involve the United Nations in the issue.8

B. Situations Of Internal (Civil) Conflict

The situations stated below are not exhaustive, but are meant to give a general overview of conflict situations within the country. Moreover, due to paucity of space and time, I refrain from an in-depth analysis into the causes of each situation of conflict, and am focusing on the human rights violations that have taken place.

I. Kashmir – from 1947 onwards

The main thrust of the Indian policy on Kashmir has been to project that the popular disaffection in Kashmir as Pakistan-inspired & characterizing the Kashmiri aspirations as Islamic fundamentalist. With increased international pressure on India’s human rights records in Kashmir, India has sought to negate the need for ascertaining the opinion of the people by claiming that several elections held since 1948 are enough to reject the right of self-determination. The real problem of alienation of Kashmiri people has not been addressed. Short-sighted confrontationist approach has been adopted by the Indian government. Militaristic response, which has, far from crushing the militants, has crushed the non-combatant populations.

Several reports by international and Indian NGOs point out the gross violations of human rights committed by army personnel as well as militants in the Kashmir valley. These reports state that indiscriminate killings, rape and sexual abuse of women, torture, enforced disappearances and many other such violations have been consistently taking place, and that the violators, in many cases, have been personnel of the Indian army.9

The Indian government’s response has been one of consistent denial of these reports. It has also continued to refuse permission to any international agency, including the the UN Special Rapporteur on Torture, to visit Jammu & Kashmir to conduct investigations into the violations reported.

II. Punjab – 1980s onwards

Growing alienation from, and claims of exploitation by, Indian authorities spawned a powerful militant movement in the early 1980s, calling for the creation of an independent Sikh state of
Khalistan. The movement turned violent, with militant Sikhs embarking on a campaign of terror. In 1984, the Indian army stormed the Golden Temple in Amritsar, the Sikhs’ holiest shrine, which had been turned into an armed fortress by the militants. At the Golden Temple, “Indian government forces were guilty of outrageous violations of fundamental human rights — deliberately attacking the temple at a time they knew thousands of religious pilgrims were inside, not offering an opportunity for surrender, and summarily executing those it captured.” 10 Many children and women were killed in the assault, along with a preponderance of Sikh men.

In October 1984, Prime Minister Indira Gandhi was killed by Sikh bodyguards. This was followed by a communal attack on thousands of Sikhs in Delhi & other cities. Since then, security forces have adopted increasingly brutal methods to stem the insurgency. Arbitrary arrests, torture, prolonged detention without trial, disappearances and summary killings of civilians & suspected militants. By end of 1990, violence in the state had surged to unprecedented levels, with atleast 4000 people reported killed. In Nov 1991, Director General of Police K.P.S. Gill launched ‘Operation Rakshak’, implementing a “catch and kill” policy for suspected militants. Most of the militants were killed by the police force by mid-1993. The police has continued to use such terror tactics against the civilian population subsequently, and is engaged in disappearances, torture and extra judicial killings. 11

III. Communal Attacks on Sikhs

On October 31, 1984, the Indian Prime Minister, Indira Gandhi, who had ordered Operation Bluestar, was assassinated in a revenge attack by her two Sikh bodyguards. Over the following five days, one of the worst massacres of modern times took place in the Indian capital, Delhi. The victims were Sikh males of all ages. The widespread killings were apparently organized by the Hindu extremist parties that have become prominent players in Indian politics. Between October 31 and November 4, more than 2,500 men were murdered in different parts of Delhi, according to several careful unofficial estimates. According to the Indian feminist Madhu Kishwar, the nature of the attacks confirm[s] that there was a deliberately plan to kill as many Sikh men as possible, hence nothing was left to chance. That also explains why in almost all cases, after hitting or stabbing, the victims were doused with kerosene or petrol and burnt, so as to leave no possibility of their surviving. 12 While few, if any, Sikh women were intentionally killed, hundreds, if not thousands, were raped, sometimes repeatedly, by Hindu men.

According to a number of civil rights groups the killings were almost entirely political and carried out by coordinated gangs of hoodlums organised by a section of the ruling Congress (I) with the help of the local police. Local Congress (I) party workers, councillors and even MPs were involved. Many were later rewarded with government office for their part in the carnage.

Throughout the massacre, Indian police and security forces stood by or assisted in disarming Sikhs, rendering them defenceless. An Indian Supreme Court Justice, V.M. Tarkunde, stated in the aftermath of the slaughter that “Two lessons can be drawn from the experience of the Delhi riots. One is about the extent of criminalisation of our politics and the other about the utter unreliability of our police force in a critical situation.” 13

IV. North Eastern states

The North Eastern states consist of Assam, Nagaland, Manipur, Mizoram, Tripura, Meghalaya and Arunachal Pradesh. They largely consist of tribes and communities such as the Ahoms, Bodos, Nagas, Khasis, Garos, Mizos, Meiteis, Tripuris, Kukis etc. The Indian state has held on to these states for strategic reasons as otherwise it would have been the gateway of the subcontinent to south-east Asia.

The Indian state has failed to address the local needs and aspirations. The north-eastern states are alienated from the rest of the country. It was only recently that languages of Tibetan-Chinese origin were recognized as Indian languages in the VIII Schedule of the Indian Constitution. In economic terms, the region lags far behind the rest of the country; its natural resources are freely exploited for the benefits of the country as a whole without a corresponding development within the region.

The assertion for self-determination among various communities
in the region range from seeking greater autonomy within the existing system, to a separate state within the Indian Union, to complete independence. However, the Indian state has ignored the real political, social and economic reasons for the peoples’ disillusionment. It continues to treat the resistance in these states as a “law and order” problem, to be dealt with through excessive and unbridled use of force by armed forces, through powers derived from the Armed Forces (Special Powers) Act. False encounters, illegal detention, enforced disappearances, summary executions, indiscriminate firing, dubious methods of interrogation, torture by the army, rape and sexual abuse, and other atrocities continue to be unleashed by the armed forces upon civilians.  

V. Communal Attacks Against Muslims in Mumbai: 1992-1993

Subsequent to the demolition of Babri Masjid mosque in Ayodhya, Muslims in several parts of the country were attacked, tortured and killed indiscriminately. Muslims in Mumbai were objects of indiscriminate attacks. More than 1,000 people died in Bombay’s worst communal violence since independence. Widespread incidents of torture, indiscriminate killings, sexual assault of women, arson and other means of destruction of property were reported. The “riots” were in fact orchestrated events that depended on the connivance or outright participation of police and other officials and political leaders.

VI. Communal attacks against Christians:

In Jan 1999, an Australian missionary, Graham Stewart Staines, was burnt to death along with his two sons as they slept in their car in a district in Orissa. Staines had worked for over 30 years in a leper colony in Orissa, and was accused of conducting mass conversions to Christianity.

Since 1998 Christians in many parts of the country have been attacked; churches, cemeteries and Christian schools have been destroyed. There have been several attacks on nuns. There has been more number of attacks on Christians in the past two years than in the whole history of independent India. Attacks have occurred primarily in the tribal regions of Gujarat, Madhya Pradesh, Orissa as well as parts of Maharashtra & Karnataka. In many cases, Christian institutions and individuals targeted were singled out for their role in promoting health, literacy, and economic independence among Dalit and tribal community members. A vested interest in keeping these communities in a state of economic dependency is a motivating factor in anti-Christian violence and propaganda. The attacks have been with the active involvement of Bajrang Dal (a militant Hindu extremist group), Vishwa Hindu Parishad and the Rashtriya Swayamsevak Sangh (RSS). RSS and BJP (the major party leading the alliance at the Centre) are intimately connected to each other, and are like body and soul.

It is said, in defence of the attacks, that these attacks were a retaliation for and reaction to a conversion campaign by Christian missionaries in the country.

PART II. EXISTING LEGAL FRAMEWORK & JUDICIAL RESPONSES TO THESE VIOLATIONS

A. The Legal Framework

International human rights law prohibits the arbitrary deprivation of life under any circumstances. The government of India is a party to the International Covenant on Civil and Political Rights (ICCPR). Article 6 of the ICCPR expressly prohibits derogation from the right to life. Thus, even during times of emergency, “[n]o one shall be arbitrarily deprived of his life.” The ICCPR also prohibits torture and other forms of cruel, inhuman and degrading treatment. Articles 4 and 7 of the ICCPR explicitly ban torture, even in times of national emergency or when the security of the state is threatened. India has not ratified the U.N. Convention Against Torture. The Indian government has ratified, in August 1959, the UN Convention on the Prevention and Punishment of the Crime of Genocide, 1948. However, it has not included genocide as a crime within the Indian Penal Code or any other criminal legislation within the country.

International humanitarian law, also known as the laws of war, apply when there is a situation of international and internal “armed conflict.” The international humanitarian law applicable to non-
international conflict is found in Article 3 common to the four Geneva Conventions of August 12, 1949-known as “Common Article 3.” Common Article 3 provides that:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Within the Indian legal framework, all citizens are guaranteed fundamental rights under the Indian Constitution. These include the right to life (with dignity), right to privacy, rights against the police, and the right to equality and equal treatment by law. Murder, causing grievous hurt, rape and sexual abuse, incitement of hatred, among other acts, have been criminalized.

The Protection of Human Rights Act was enacted in 1993. The National Human Rights Commission (NHRC) has been constituted under this Act to enquire into human rights violations within the country. However, Section 19 of this Act prevents the NHRC from investigation of alleged human rights violations by members of the armed forces & paramilitary forces. Moreover, Section 36(2) debars the Commission from investigating cases that are more than a year old. These provisions together contribute to a climate of impunity. Section 19 has met with severe criticism from Amnesty International and other international agencies. A high level Advisory Committee was set up by the NHRC to look into the provisions of the Act including S. 19. There has been no known outcome subsequently.

After harsh criticism about the infamous Terrorist and Disruptive Activities Act (TADA), the same was allowed to lapse in 1995. TADA had been a failure. Very few people were convicted under this law but a large number of innocent people and their families suffered immensely. The present BJP government has shown determination at legislating another anti-terrorism bill, with unchecked and arbitrary powers to the police. This trend is disturbing as such a law is likely to lead to further human rights violations of an unimaginable scale.

B. Legal Responses to the Human Rights Violations

Violations in Kashmir

The Indian army, Special Task Force, Border Security Force, and state-sponsored paramilitary groups and village defence committees—the principal government forces operating in Jammu and Kashmir have systematically violated these fundamental norms of international human rights law. Under international law, India’s state-sponsored militias are state agents and therefore must abide by international human rights and humanitarian law. The government of India is ultimately responsible for their actions.

In Kashmir, lawyers have filed more than 15,000 habeus corpus petitions since 1990 calling on state authorities to reveal the whereabouts of detainees and the charges against them. However in the vast majority of cases, the authorities have not responded. Petitions remain pending in courts. A large number of bail applications are also pending. State officials have also refused to comply when the High Court has ordered state authorities to produce detainees in court or release those against whom no charges have been brought. Lawyers have also filed petitions charging officials with contempt for non-compliance, but these petitions have again met with no response. The only remedy available for the families of those who have disappeared is to file a habeas corpus petition. Between 1990 & 1994, only 39 army personnel have been punished for excesses. This is taken from an action-taken report issued to the NHRC by the army.
Rape, especially of women relatives of suspected militants or dissidents, has also been commonly employed by both security forces and their paramilitary allies. “In the past, the Indian government has made public a number of prosecutions of members of security forces for rape. However, even these cases amount to no more than a handful; many other incidents of rape have never been prosecuted, and reports of rape and other sexual assaults in Kashmir persist.”

Torture, hostage-taking, and rape have all been prominent abuses in the Kashmir conflict, and it is evident that Common Article 3 forbids each of them. Rape also violates the ICCPR and Common Article 3 prohibitions on torture. Common Article 3 does not prevent the government of India from punishing persons for crimes under the domestic laws. Indeed, it is the Indian government’s duty to do so. Thus, the perpetrators may be tried for murder, kidnapping or other crimes, so long as they are afforded the rights of due process. However, the Indian state has failed to adequately and effectively prosecute perpetrators for the heinous crimes.

Violations in the North Eastern states

In the North Eastern states, due to public pressure, a few such incidents were investigated by the armed forces themselves under the Army Act. While a few accused persons were court martialled, it is widely & strongly believed that such court martials by the armed forces are a mere eyewash, intended to appease the civilians. A high majority of the accused persons escape without any prosecution, and are retained in service. Many investigations/ independent enquiries are ordered but due to the delay, they are lost in public memory.

NHRC has not directly addressed the human rights violations in the troubled regions of Kashmir & the north-eastern states. While the NHRC has passed guidelines for awarding compensation to persons affected by police excesses, and guidelines to put a stop to the rising custodial deaths, the effort has not been very successful. Security forces have remained untouched.

Human Rights Violations in Punjab

In December 1996, after receiving a CBI report on allegations that police had illegally cremated over a 1500 of bodies of people they had shot dead, and in response to petitions filed in the court stating that a pattern of human rights violations were carried out in Punjab between 1984 and 1994, Supreme Court directed the National Human Rights Commission (NHRC) to investigate past human rights violations in the state. The union and state governments have been obstructing the path of justice from the very beginning by challenging the involvement of NHRC in investigating the human rights violations.

NHRC’s investigations were very slow and protracted. The Punjab Committee for Coordination on Disappearances, consisting of a network of lawyers in Punjab, was established in recent years to pursue the issue of redress for “disappearances”. But persons supporting it, including key witnesses, were illegally arrested and harassed and threatened.

In January 1999, NHRC passed an order indicating that it would limit its role to seeking monetary compensation for people in Amritsar district of Punjab who could prove that their relatives were illegally cremated by the police. Though the Supreme Court order gave the NHRC full responsibility for investigating the patterns of human rights violations throughout the state, and for bringing those responsible to justice, NHRC failed to make use of this opportunity to protect fundamental rights and ensure justice for the victims. Subsequently, the state of Punjab agreed to pay compensation of Rs. 1 lakh (without admitting liability) to the families of 18 persons who had been disappeared. NHRC shockingly agreed to this stand of the state.

The Punjab disappearances were brought into the open by two human rights defenders, Khalra and Kumar. Subsequently Khalra himself was “disappeared” even while the matter was pending in the Supreme Court – which reflects the climate of impunity in existence. Only a small minority of the police officers responsible for a range of human rights violations - including torture, deaths in custody, extra-judicial executions and “disappearances” during the militancy period have been brought to justice so far.
Communal Attacks against Sikhs

Since 1984, some of the women survivors of the massacre have pressed for justice in the killings, and finally achieved some success in 1996, when “a magistrate ... imposed a death sentence on a butcher found guilty of two Sikh murders in the riots. Evidence presented in court indicated he was also involved in at least 150 other killings.” The justice in question, Shiv Narain Dinghra, has led a “personal crusade” of his own, sentencing dozens of rioters to five years’ “harsh imprisonment.” Nonetheless, official Indian attitudes toward the slaughter reflect a belief that “the massacre was necessary to teach a lesson” to the Sikhs, according to Dinghra.21

Several complaints of the attacks were not registered by the police. FIRs were registered only after directions were obtained from the relevant court by some widows of the victims. It is widely believed that the delay in registration of the FIRs and the subsequent delay in the investigations would work to the advantage of the perpetrators.

Sixteen years after the communal violence, on 10 May 2000, the National Democratic Alliance government appointed the Justice G.T. Nanavati Commission to investigate the 1984 violence. The Commission was asked to look into the causes of and the manner in which the riots occurred. It was asked to fix the responsibility for any lapses or dereliction of duty on the part of the authorities in taking steps to prevent the incidents. An interim report was not made mandatory; the Commission was asked to make a decision as and when it deemed it fit. The Home Ministry’s lethargy has now ensured that the decision will be delayed indefinitely.

Most of the individuals who have been deposing before the Commission admit that they are doing so only out of a sense of duty to their family members who died in the riots. They know that the politicians who were behind the riots have long been acquitted by the courts for lack of evidence or because witnesses turned hostile. The culprits are still at large and there is widespread disillusionment among the victims about the process of administering justice.

Communal Attacks in Mumbai

Soon after the communal attacks against Muslims in Mumbai, the Srikrishna Commission of Enquiry was established in 1993 to identify causes and responsibiliti in the violence. The Commission sat and meticulously recorded testimonies of witnesses on a day to day basis. Three years later, the Maharashtra’s Shiv Sena-BJP government, led by Chief Minister Manohar Joshi, unexpectedly terminated this inquiry. The attempt was to derail the inquiry, which was set up by its Congress predecessor. Under pressure from the BJP’s national leadership, and after a national public outcry, the commission was revived.

The report was tabled in the State Assembly on August 6, 1998. Joshi rejected its findings and announced that only a handful of its recommendations, pertaining to police management, would be implemented. Apparently to the surprise even of his BJP allies, Joshi choose to attack the report in communal terms, castigating it as “pro-Muslim” and “anti-Hindu.”

The report was released in June 2000. It pointed to communalization of the police force which led to discrimination against the Muslim minority, and also clearly stated the incitement to riot by members of the Shiv Sena political party. The report recommends that action be taken against 31 policemen responsible for killing innocent people, acting in a communal manner, being negligent or themselves rioting. Seventeen of these officers were formally charged in mid-2001, but none of them has been tried or convicted as yet and all are presently free. Some of them have reportedly been promoted to higher posts. Others were subject only to internal disciplinary action.

The Shiv Sena led government of Maharashtra dismissed the findings in the report. The report has not been implemented till date. The police officers indicted in the report have not been promoted. Subsequent governments in the state have taken no significant steps to implement its recommendations, and have therefore buried the report with silence. This has shattered public confidence in justice, and has disproved the Indian government’s lofty claims of having an efficient justice delivery system within the country.
A petition filed in the Supreme Court on behalf of Mumbai residents challenged the inaction of the authorities with respect to the police officers indicted by the Commission. The petition remains pending in the Supreme Court.

Communal Attacks against Christians

In 1999, the government appointed a judicial commission - Justice D P Wadhwa Commission of Inquiry – to probe into the murder of Graham Staines and his two young sons, as well as the attacks against Christians. In August 1999, the report of the commission was released. The Commission has vindicated Hindu fundamentalist organisations—including the Bharatiya Janata Party (BJP)—despite strong evidence of their complicity, and sought to downplay attacks against Christians by deeming them a media fabrication.

While the Commission states that the Staines’ murders cannot be termed an isolated incident, the Report never once refers to the widespread anti-Christian violence which occurred one month earlier in the Dangs district of Gujarat. Indeed, the Commission does not mention the fact that there were more attacks against Christians in 1998 than in the 51 years since Indian independence combined. Nor does the Commission mention that, at the time of the killings, India was in the throes of a national debate on conversions at the behest of the BJP Prime Minister A.B. Vajpayee.22

The Report held Dara Singh guilty as an individual for the murder of Staines and his sons, but brushed aside Dara Singh’s strong ties with the Bajrang Dal despite evidence to the contrary. The report therefore fails to assess the Staines’ killings as part of the growing problem of violence against Christians in India. To the contrary, the Commission analysed four alleged anti-Christian incidents that occurred in areas near the Staines’ murders and concluded that these events were either fabricated, or were not religiously motivated.

The Commission’s findings have nothing to reassure minorities that their rights will be protected in accordance with international law and the Constitution of India. Instead, the Hindu fundamentalist instigators and perpetrators of anti-Christian violence have escaped with impunity, yet again. There have been no known convictions of perpetrators of the communal attacks against Christians.

CONCLUSION

From the various situations discussed above, it is obvious that the perpetrators of heinous crimes have not been made accountable for their crimes under the Indian legal system. This has led to a lack of confidence in and widespread disillusionment among the victims about the process of administering justice.

One favourite formula of the Indian government is to set up commissions of inquiry, whose findings and recommendations, made several years later, are not made binding on the government. The setting up of commissions serve only a cosmetic purpose, and is intended at nothing more than an appeasement of the public in the short run. The establishment of the Nanavati Commission 16 years after the communal attacks on Sikhs in Delhi is a clear example of the lack of government’s commitment at ensuring justice and respect for rule of law.

The communalisation and insensitivity of the police play a major role in weakening investigations and sabotaging efforts at prosecuting the perpetrators. Political pressures, interests and motivations also severely obstruct the path of justice, as is obvious from the fate of the Srikrishna Commission report. In situations such as Kashmir and the North Eastern states, the use of draconian laws with unchecked arbitrary powers to military and para-military forces have only facilitated human rights violations by agents of state. The National Human Rights Commission’s wings have been clipped – to ensure that these violations are not investigated into. Further, as in the case of the Punjab disappearances, the NHRC has needlessly restricted its own role in investigating human rights violations, thereby abdicating its responsibilities, and defeating the purpose for which it was established in the first place.

Given this state of affairs, what exists in India at present is a campaign to subvert the process of justice, leading to a climate of impunity. The legal and judicial structures presently in existence promote this climate. As defenders of human rights, it is our duty to
ensure that our legal system responds effectively to gross violations of human rights. There is no doubt that improving the law enforcement and justice delivery systems from within the country is of prime importance, for ensuring greater accountability from the perpetrators.

Simultaneously it is necessary to invoke international standards of human rights and facilitate an access to international legal mechanisms. It is in our interest to persuade the Indian government to live up to its commitment under international law, and to make further commitments in the arena of international human rights. India does not live in a political vacuum. Resorting to an international mechanism can pressurise the government to improve the legal structures and justice delivery system within the country, and to initiate effective prosecutions within the country as no country wants its citizens to be dragged to an international forum.

As human rights defenders, our responsibility to the victims entails us to develop a safety net above the national legal system for those cases that escape prosecution under national law. The International Criminal Court provides this safety net. Our commitment to justice also requires us to use all possible mechanisms, at the local, national and international levels, to ensure prosecution of individuals committing heinous crimes.

The Indian government opposes the ICC on the ground that it infringes with the sovereignty of the country. It is not clear how the ICC violates sovereignty since the ICC Statute clearly acknowledges the primary responsibility of national legal systems to prosecute the perpetrators. Indeed, the sovereignty argument has whipped up nationalist sentiments to such an extent that some legal activists within the country are convinced of the same. It is time we realise that by supporting the sovereignty argument, we would only be playing into the hands of the perpetrators, furthering their interests and ultimately obstructing the cause of justice.

This is an extract from a paper prepared for the South Asian Regional Consultation on the ICC, held at Colombo in October 2000.

NOTES

3 Ibid
4 Compton’s Encyclopedia
5 Pakistani Prisoners of War case ICJ Reports 1973 p. 328.
7 Report of Human Rights Watch, 2000
8 Executive Summary of the Kargil Review Committee Report, dated 25 February 2000
13 Quoted in Khalsa Human Rights, “The Delhi Massacre: An Example of Malicious Government”.
14 “Where Peacekeepers Have Declared War”: Report on Violations of Demo-

16 Human Rights Watch World Report 1999
19 State of Human Rights in India 1996, by Legal Resources for Social Action
20 Human Rights Watch, “India: Behind the Kashmir Conflict”.
21 Burns, The Sikhs Get Justice

8

THE INTERNATIONAL CRIMINAL COURT & ITS IMPLICATIONS FOR INDIA

- Saumya Uma

11 April 2002 is a significant day in the international human rights calendar. It is the day when the Treaty creating the International Criminal Court (ICC) came into force at a historic event in the UN headquarters in New York. On this day, it surpassed the sixty ratifications required for bringing the Treaty into force, which is evidence of the overwhelming international support that ICC has received. This Treaty will establish the jurisdiction of the Court on 1 July 2002. This court will probably begin to hear cases a year later.

About the ICC

The ICC is the first permanent forum mooted at an international level to deal with individual perpetrators (not states) committing the most serious breaches under international humanitarian and human rights law - crimes against humanity, war crimes and genocide. While the crimes in the ICC Statute have, for decades, been defined under international law, the lack of an enforcement mechanism resulted in the provisions being paper tigers. This led to a climate of impunity, where most of the perpetrators, including heads of state, used their political clout and were never brought to justice. The ICC seeks to try individuals committing the named crimes, irrespective of their position.

Responses of the Indian Government

At the Rome Conference in 1998 where the statute establishing the ICC was formally adopted by 120 countries, India, along with 20 other countries, abstained from voting on the same. Subsequently, there has been no apparent move towards ratifying the
treaty. At the Preparatory Commission meetings held subsequently in New York under the United Nations auspices to formulate rules of procedure, evidence and rules for administration of this court, Indian delegates acted more as silent spectators than as active participants.

A principal objection to ICC is that it impinges on the sovereignty of India. The argument is that the ICC’s inherent jurisdiction/ability to decide whether a state has acted in a manner that is consistent with justice, impinges on the sovereignty of the state. Further, on the premise that we have efficient law enforcement machinery and an active judiciary, our actions should not be open to scrutiny by an international institution. This argument is powerful and emotive enough to persuade even persons committed to human rights. The response to this argument is five-fold:

a) The ICC would prosecute only individuals, not states.

b) The ICC would work on the principle of complementarity—that is, 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. The ICC’s jurisdiction being residual in nature, the sovereignty of the state is not undermined.

c) India does not and cannot live in a political vacuum. By way of becoming a member of the United Nations, signing and ratifying several important Treaties, and submitting regular reports to UN committees and sub-committees, India has not retained absolute sovereignty anyway. This fact is further reiterated by India’s receipt of and response to memoranda from international organisations such as the Amnesty International and Human Rights Watch with regard to human rights violations committed within the country.

d) In this age of economic globalisation, we are willing to compromise on our economic sovereignty through privatisation and liberalisation policies. Reluctance to globalisation of human rights is therefore without any justification.

e) The sovereignty argument indicates that in situations where the legal machinery has failed, we would rather allow a climate of impunity to prevail within the country than take the help of an international mechanism to effectively prosecute offenders. This is contradictory to India’s faith in justice and rule of law.

The other concern of the Indian government is that the ICC may be open to political manipulation by its adversaries in order to embarrass it. For this reason, it sought the restriction of ICC’s jurisdiction to truly exceptional circumstances – only in situations of a total breakdown of the legal machinery and not when there is political unwillingness to prosecute the offenders. India’s fear can be alleviated if we look at the checks and balances built into the process of taking a case to the ICC:

- When the Security Council or a State Party refers a case, the prosecutor has the discretion to decide whether to seek authorization to open an investigation.
- The Prosecutor cannot even start an investigation without permission from a pre-trial chamber of three judges.
- The suspect and the States concerned have the right to challenge in vestigation by the Prosecutor.
- The states and the accused can challenge the jurisdiction of the Court or the admissibility of the case at the trial stage.
- The Prosecutor is obliged to defer the case to States able and willing to pursue their own investigations.

Implications for Human Rights in India

The argument being made time and again is that India has effective laws to deal with human rights abuses, an efficient law enforcement machinery and an active judiciary, hence dismissing the need for an ICC. However, India’s human rights history indicates that political unwillingness has been a vicious obstacle in the path of justice.

The fact that the wrong-doers in the Mumbai communal riots of the last decade are yet to be tried in any court of law and punished according to the law of the land substantiates this. The painstakingly prepared report by the Sri Krishna Commission has gone into cold storage on the basis of claims by the state government that its recommendations are not binding on it. The police officers who were responsible for mass killings have now been promoted.
and continue to wield more and more power against vulnerable citizens.

Similarly, in the ongoing communal carnage in Gujarat, the police force which has to carry on investigations into the violence for effective prosecutions to take place, is biased, communal, has acted in a partisan manner, and is itself guilty of participating in the attacks. Hence conviction of the offenders and ensuring justice for the victims are doubtful. Had the recommendations of the Sri Krishna Commission been implemented, we may have been able to avert this situation.

The “disappearances” in Punjab in the last decade, the continued atrocities against civilians in Jammu & Kashmir, the excesses of the armed forces in the North Eastern states, the attacks on Christian minorities a few years ago and the sexual violence unleashed on women in all communal attacks (ranging from the Partition to the Gujarat carnage) are permanent blotches in our history. These are glaring instances where the legal machinery has succumbed to political pressure and has failed to make the perpetrators accountable for their crimes. These indicate a disturbing trend of impunity.

Just as no one is above the law, no legal system, including ours, is perfect either. The needs of the hour are the courage to admit that our legal system (especially the law enforcement machinery) is not flawless, the sincerity to strengthen it and the commitment to justice to facilitate the ICC to act in those few cases which escape state prosecution.

9

SHOULD INDIA VIEW
THE INTERNATIONAL CRIMINAL COURT WITH DOUBLE-TINTED SPECTACLES OF SUSPICION?

-Saumya Uma

India, the largest democracy in the world, abstained from voting at the Rome Conference, which adopted the Statute on the International Criminal Court (ICC). This article seeks to critiques the approach of the Indian government to the ICC.

The Indian government’s demands during the Conference centred around four issues:

(a) That first use of weapons of mass destruction (particularly nuclear weapons) ought to be considered a war crime and to be adjudicated in the ICC;
(b) That terrorism – particularly cross-border terrorism and terrorism externally inspired, aided and abetted - should be included within the jurisdiction of the ICC;
(c) That provisions facilitating the Security Council to refer cases which constituted a threat to international peace and security to the ICC, ought to be omitted; and
(d) That the ICC’s jurisdiction ought to be restricted to exceptional circumstances.

However, the principal reservation of the Indian government (which was, of course, not voiced) was its anxiety that its sovereignty would be infringed upon, and that its political leaders might be held internationally accountable for the abuses committed within the nation.

India has a proclaimed legacy of pursuing and promoting international peace. Several centuries ago, Kautilya emphasised the im-
portance of ensuring international peace in his treatise on political governance – Arthashastra. Mahatma Gandhi’s concept of *ahimsa* (non-violence) was a halfway house to resisting colonial domination. The Indian Constitution provides for promotion of international peace as a fundamental duty of the State. The Indian philosophy of peace was outlined by the former Prime Minister of India, Jawaharlal Nehru, when he said: Hold your security, hold your principle, but recognise the fact that we have to live in this world together in peace even though we differ from each other. (Lok Sabha Proceedings, 9 April 1958). A proclamation of international peace continues to be made by all subsequent national and political leaders.

However, the Indian government’s miserable failure, in 1971, to make the then Fascist Pakistani military regimes accountable for committing genocide in Bangladesh, raping thousands of Bangladeshi women and also for committing human rights abuses against the Joint Friendship Force, cannot be erased from public memory. (The Joint Friendship Force included thousands of Indian soldiers). Justice became subservient to diplomacy and the two hundred odd Pakistani prisoners of war that were retained in India for the purpose were finally released. The army officials responsible for the brutal abuses continue to roam around freely today as respectable citizens. Perhaps instituting a regional forum for human rights or the ICC would have made some difference.

It is also not possible to turn a blind eye to the human rights and humanitarian abuses that continue to be perpetuated by the Indian armed forces upon innocent civilians in Kashmir and the north-eastern states such as Nagaland and Manipur – under the pretext of ensuring national security and preserving territorial integrity. Domestic legislations such as the Armed Forces Special Powers Act 1958 and the Jammu and Kashmir Security Forces Act not only confer excessive and unbridled powers to the armed forces, but also bar channels for legal redress. Of grave concern is the fact that the National Human Rights Commission (NHRC) has been prevented from investigating military atrocities (through Section 19 of the Protection of Human Rights Act 1993), thus facilitating such abuses to continue with impunity.

The Indian government has engaged itself in the vicious project of camouflaging its abuses from the public eye through a propaganda that it can commit no abuses due to its peace-loving nature, and that such accusations are without substance, and are made solely with political motivations. In the light of the Indian power holders’ reluctance to making the armed forces accountable to a national institution, namely the NHRC, it is perhaps not surprising that they view the creation of the ICC with double-tinted spectacles of suspicion.

Undoubtedly, the Indian concept of peace has been diluted and distorted through the decades. While proclaiming to be peace-loving, the Indian government conveniently forgets the fact that true and lasting peace cannot exist without justice. Failure to bring the perpetrator to justice facilitates perpetuation of these abuses. Justice entails ending impunity and providing redress to victims – precisely the philosophy behind the creation of the ICC.

The Indian government should stop viewing the ICC as a judicial institution that would threaten its own sovereignty, and perceive it as a preventive institution for the perpetrators of heinous crimes of the largest order. In the context of Kashmir, such a preventive institution could ensure that the armed forces as well as the terrorists adhere to a minimum, internationally recognised standard of human rights and humanitarian law.

As the largest democracy in the world, India should play an active role in sustaining world peace by supporting the ICC. It should realise that the ICC has the potential to promote rule of law and international human rights. Instead, by abstaining from voting at the Rome Conference, it has moved two steps backwards. The Non-Aligned Movement (NAM) has supported the need to ensure the establishment of the ICC without any delay. India, which has been perceived as the leader of the Non-Aligned Movement (NAM) since its inception, has now ironically positioned itself against the movement. Secondly, it has also failed to recognise the world pulse by aligning itself with the 21 other countries that abstained, as against 120 countries that voted in favour of the Rome Statute. Further, through its abstention, India has grouped itself with countries whose human rights records are poor – such as China, Israel
and Libya, as well as the United States. This is a negative trend and does not speak well of India's commitment to human rights and international peace.

India's membership in the United Nations, its active participation in UN conferences and its adoption of several important international conventions indicate that the Indian government does not and cannot live in a political vacuum. Though the Indian leadership may deceive itself to the contrary, some amount of accountability to the international community already exists, in the form of international public opinion. Adopting the Rome Statute and supporting the creation of ICC would ensure a more effective mechanism for such accountability, in those situations where even the most independent and far-sighted judiciaries may be unable to function.

With the recent trend of globalisation, India cannot afford to have a rigid approach to the concept of sovereignty and blindly cling to die hard nationalism. India's staunch opposition to the creation of any supranational body, to which it may have to be accountable, is merely an absolutist version of sovereignty. It is time India realises that such an approach is rapidly becoming an anachronism.

*This article was published in the bulletin of Asian Network on International Criminal Court, Issue 1, March 2000*

10

**A CASE FOR THE NATIONS**

The International Criminal Court Can Benefit India

- **Ram Jethmalani**

That there is a need for a supra national tribunal to prosecute and punish grave crimes against humanity was stated most eloquently by United States President Theodore Roosevelt in his State of the Union Message of 1904: “... there are occasional crimes committed on so vast a scale and of such peculiar horror as to make us doubt whether it is not our manifest duty to endeavour at least to show our disapproval of the deed and our sympathy with those who have suffered by it ... in extreme cases action may be justifiable and proper. What form the action shall take must depend on the circumstances of the case; that is, upon the degree of the atrocity and upon our power to remedy it. The cases in which we could interfere by force of arms as we interfered to put a stop to intolerable conditions in Cuba are necessarily very few. Yet ... it is inevitable that such a nation should desire eagerly to give expression to its horror on an occasion like that of the massacre of the Jews in Kishenef, or when it witnesses such systematic and long-extended cruelty and oppression of which the Armenians have been victims, and which have won for them the indignant pity of the civilised world  ...”

That this task should be lodged in a judicial tribunal enjoying confidence across the board rather than left to the vagaries of individual nations has been a favourite theme of international discourse but no tribunal came to exist. The stumbling block to this has been an insane obsession with sovereignty of the State and the arrogance of powerful governments who would not get reconciled to the idea of their own nationals being tried in non-domestic courts,
particularly the US disease of regarding itself above all law.

At the Rome Conference on the Statute of the International Criminal Court, held in June 1998, the attitude of the government of India was baffling and almost idiotic. It first opposed the creation of this court, maintaining this posture throughout the preparatory sessions. When an overwhelming majority voted for its creation, it did an about turn and demanded an extension of the court’s jurisdiction to punish users of nuclear weapons as well. Only a month before that we had had our nuclear explosions and seemingly our representatives calculated that to some extent this will numb international criticism.

Ten months earlier on September 5, 1997 I had spoken at the 41st convention of the Union Internationale Des Advocates at Philadelphia, US, on the role of the lawyer in defence of human rights. In my address, I referred at length to what I regarded as an optimistic development in the field of human rights enforcement which in essence was the concept of the International Criminal Court. This is what I told the distinguished audience:

“ The State and its instrumentalities are the chief menace to human rights whether it be a case of democratic tyranny, internal insurrection or civil war or it be an armed conflict between two or more States. A condition of anarchy and lawless violence are totally incompatible with human rights. It is a matter of satisfaction and pride that the legal community has been working hard on a blueprint for the world’s first truly international criminal court.

“Some way has to be found to deal with (the) terrible mass crimes including genocide and the ethnic and religious massacres that have come to characterise the last few decades. For reasons of domestic politics or the sordid importance of practical diplomacy, many nations are still not reconciled to the creation of one more supranational and transborder institution. The usual bugbear is surrender of sovereignty. Both the large democracies – one mightiest and the other most numerous – are strangely allergic to the proposal. Both seem stuck on abstract sovereignty. I mean no disrespect to the leaders of the two democracies but it does appear to me that they don’t know what they are talking about. International society is not possible without significant surrender of sovereignty.

No federations or confederations can exist without partial surrender. Adherence to the UN Charter is (in) itself (a) surrender of sovereignty. But while the argument of sovereignty is sheer poppycock, one can easily see formidable difficulties and differences on formulating the limits of the court’s jurisdiction, its suo-moto powers of taking cognisance and ordering arrests and investigations, locus-standi of governments and non-governmental organisations, and the court’s relations with the UN Security Council and the nation states ...

“Firstly, if the court is not to sink in public esteem and be denuded of any real authority, the court must have powerful teeth. A toothless tribunal is worse than no tribunal. The court must not depend for exercise of its powers on the politics of the Security Council or the whims and caprice of any government or group of governments.

“Secondly, all members of the United Nations must ipso-facto be under an international obligation to act in aid of the court at all stages of the exercise of the court’s jurisdiction.

“Thirdly, it must have power to accord standing to any State, organisation or even individual whose presence before it will, in the opinion of the Court, advance its purposes.

Fourthly, its jurisdiction will extend to crimes of genocide, violation of the laws and traditions of war, crimes against humanity, international terrorism, organised rape and general assaults on women on a mass scale. The lawyers should instantly engage themselves in alerting national conscience, influencing policy-makers and stimulating worldwide action to stop addition to the mass graves of innocent men, women and children which dot and disfigure the earth’s surface.

“They must use their public clout to bring round reluctant States to support the proposal and speedily give it concrete shape and lively functioning. The International Criminal Court must become operative, latest by the end of the next year.”

By the beginning of the next year I had become a minister for urban development. It was not easy to keep track of the fate of the International Criminal Court, but after I took over the ministry of
law, justice and company affairs, I was disappointed beyond measure when I learnt that our government’s vote was one of the 21 abstentions. What amazed me was the attempted explanation of this muddled international action. Our representative Mr. Dalip Lahiri first started with a major concession in the following words: “Throughout the long process for preparing for this conference, India has negotiated in the expectation that an International Criminal will emerge to which we can be a signatory. We would have wanted to be one of the first signatories of the ICC; equally, it should have been in the interests of the ICC to have a country like India on board . . .”

The rest of the speech frankly does not make much sense to me but he seems to have advanced four reasons a) the court might take on work for which it was not created; b) the Charter does not give Security Council the power to set up a court; c) The statute of the court will not bind non-parties; d) use of nuclear weapons should be declared a crime.

The first was based upon unfounded conjectures and was in any event easily preventable. The second is absurd because the court was not being set up by the Security Council but by an international agreement. The third is an argument which applies to all statutes and is wholly irrelevant. The fourth was not even honest, in the context of the Pokharan explosions. In short by this the national interest of India was sacrificed.

I urged the Prime Minister to reverse our public stand, accede to the statute and ratify it. The elimination of international terrorism required this court. Today we rave that we have neither the means nor the legal rights to apprehend the hijackers who have succeeded in blackmailing us, tarnishing our image and escaping beyond our reach. My communication to the Prime Minister was long and elaborately argued. The reply I got made little sense. Through the Prime Minister the bureaucrats explained that India had strongly pressed for the inclusion of terrorism as one of the crimes within the purview of the International Criminal Court but this was not accepted.

This is actually incorrect. Terrorism is one of the crimes against humanity and these are expressly included in the court’s jurisdic-

tion. (sic)

Since the US had also not supported the creation of this court, I got in touch with the US government and it was heart warming to hear from Ms Madeleine Albright about her country’s change in attitude. In fact the US government requested for Indian help in streamlining the court.

I had also discussed it with the Lord Chancellor of England, the Right Honourable Lord Irvine of Lairg when I called on him in March 2000. Soon after he wrote tome that the UK strongly supported the creation of the ICC: “It is our strong hope that all countries, especially influential democracies such as India will sign up to the statute so that the court becomes a truly global body. The ICC, with India as one of its members, would be all the stronger. And India, by becoming a State party to the court, would be in a better position to influence the ICC’s future evolution and so contribute to this major development in international law . . .”

The UK signed the statute on November 30 1998, and intends to be among the first 60 States to ratify it.

The court will be a permanent court obviating the need to set up ad hoc tribunals like Nuremberg and Rwanda. But its jurisdiction mainly depends on the invocation by the Security Council which is rendered impotent by the veto provision. It will exercise its jurisdiction if the offence is committed inside the territory of a State party. Super criminals who manage to get asylum within the borders of powerful States will remain immune. The paradox is that States which ratify the statute will be civilised enough not to harbour criminals of the kind the court will be dealing with. The court’s jurisdiction extends to genocide, war crimes and crimes against humanity including government- supported terrorism. It would take in the actions of terrorist groups like the one led by Osama Bin Laden. But international aggression will remain beyond its cognisance until it is defined later.

The court is not perfect but nor are other international organisations. We can improve them as we go along. Let us make a beginning and show these international gangsters that we mean business.

This article was published in The Asian Age, 12 January 2001
11

INTERNATIONAL CRIMINAL COURT - NOW A REALITY

- Vahida Nainar

When delegates gathered at Rome to discuss, negotiate and adopt the statute of an International Criminal Court (ICC) in June 1998, it was clear that some version of a the multi-lateral treaty in the form of an ICC statute would be adopted by the end of the five weeks. What was unclear was the estimated period within which the treaty would enter into force. The most optimistic estimated a period at the least of twenty five years, if not indefinite. There were many reasons for such an unenthusiastic estimation. Among them are - one, like the many human rights treaties and conventions, countries pay lip service to issues of human rights and rule of law by participating in discussions, but take years to ratify them. Two, unlike the other treaties and conventions, this treaty not only codified international humanitarian law but is a judicial mechanism to enforce compliance, which some states interpret as interference in national sovereignty. Three, a fear that the Court would be used for politically motivated prosecutions. And finally, a genuine concern that it would be a western court prosecuting only criminals from the so called ‘third world.’

Factors that Contributed to ICC’s Early Entry into Force

It is therefore interesting to explore some of the factors that belied the above concerns and contributed to entry into force of the treaty within an unbelievable period of four years. A significant factor would be the satisfaction among states that the ICC does not have jurisdiction retroactively\(^1\) thereby ensuring that skeletons in state closets, if any, remained firmly locked in the closet. Secondly, there also must be some satisfaction by states that ICC does not prima
facie grab jurisdiction over its nationals or over crimes committed in its territory. In its complimentarity principle, the ICC statute states that ICC will look in matters only when states are unable or unwilling to do so. Another factor is enthusiasm about the ICC in the international civil society. Non-governmental organizations (NGOs) participating in the ICC process such as the Coalition of NGOs for an ICC (CICC) and its members launched a forceful and sustained ratification campaign in coordination with NGOs at the country level, advocacy in the capital cities, exhorting key countries to launch their own ratification campaigns and have bilateral discussions with other countries, education of parliamentarians and other officials, education of human rights and women’s rights groups and providing technical assistance on research and drafting of legislations at the national levels. Some key countries too such as Canada, were proactive in encouraging other countries to ratify and provided technical and other assistance to countries in the process of ratification.

**Issue of Interference in ‘State Sovereignty’**

The principle of state sovereignty evolved during the formation of the United Nations in 1945 and essentially respected the territorial integrity of nation states as many former colonies were emerging as newly independent states. It underscored the importance of equality of all states, big or small and their right to exist free from invasion and aggression. Since 1945, states have, by and large, respected this right, and overt declaration of wars by one state against another has dramatically reduced. It has however been replaced by internal conflicts and strife as a result of covert international support and/or by ethnic or other forms of identity based internal conflicts of proportions equal or surpassing that of international aggression. Since such disputes do not necessarily involve protection of state borders, the principle of sovereignty of states is acquiring a new meaning, one encompassing a responsibility to human security, to citizens internally and to international community. The incredible numbers of ratifications of the ICC treaty and the speed with which this has been achieved, is an indication of acceptance of the evolving meaning of sovereignty. At the very least, one hopes it indicates that states around the world realize the need for the protection of human security afforded by an international mechanism such as the ICC.

**Why get Excited About an ICC?**

The Rome statute of the ICC is a product of difficult discussions, negotiations, and compromise on codification of international humanitarian and criminal laws among the 189 member states of the United Nations. By process therefore it is not an ideal document. In fact, on some issues such as universal jurisdiction, it does not codify even existing customary practice in international law. However, it is a document that for the first time hardens the ‘soft’ international law and puts in place an enforcement mechanism to hold perpetrators of worst crimes accountable. This in itself is reason enough for one to be hopeful and enthusiastic. There are other reasons as well.

* The need for mechanism such as the ICC is felt mainly when those in power and positions of authority abuse their power and commit grave atrocities. Such individuals have so far hid behind the veil of sovereign, diplomatic or other kinds of immunity. The ICC statute recognizes no immunity.

* Collapsing the civil and common law legal systems practiced in different countries, the ICC statute expands the notion of criminal justice beyond investigation, prosecution and punishment to include restitution, compensation and rehabilitation of victims and survivors of the crimes prosecuted. There is a recognition that interests of victims are different from those of prosecution and the statute provides for legal representative of victims to participate in the legal proceedings to protect their interests.

* The Prosecutor has powers to initiate investigation process proprio motto on the basis of information received from individuals and NGOs. Thus for the first time, affected individuals or NGOs on their behalf could move an international judicial institution to action.

* ICC statute has, for the first time, codified laws on a range of crimes against women and has achieved greater levels of integration of gender considerations throughout the statute, elements and rules of procedure and evidence.
ICC on Gender and Victims

While all of the above factors are important, I will dwell here a little more on the significance of inclusion of crimes of gender and sexual violence and on the issues around victim’s rights and representations.

Gender Issues

Historically, rapes of women were considered a common occurrence during wars and such criminal behaviour by soldiers was considered normal and even justified. Rape of women were allowed as a way to boost the morale of the army, rape of women from the enemy camp signified conquering of the enemy and access to women of enemy camp was often the reward for winning the war. The Geneva Conventions of 1949, one of the early conventions that specified laws on conduct of war, called for ‘protection of women from attack on their honor.’ Women were never treated as persons in their own right and therefore attack on their bodily integrity was not considered a crime but attack on their honor was.

The inclusion and endorsement of such patriarchal understanding of a perverse crime such as rape in humanitarian law contributed a great deal in the subsequent neglect of rape and other forms of crimes against women from investigation and prosecution. An example of the most obvious neglect is the crimes against the so-called former comfort women. In the International Military Tribunals for the Far East, 1946 there was enough evidence that emerged during investigation of the systematic nature of establishment of the comfort stations by the Japanese imperial army and the abduction and recruitment of women from all over South East Asia to work as sexual slaves in these stations. Yet no army official was prosecuted for the crime of sexual slavery in these trials.

Thus while there was a recognition that women are worst affected in wars and conflicts, it was not considered a problem and therefore there was no need felt to find any solution. Over the next forty odd years, the international women’s human rights constituency worked hard to have not only the mere fact of crimes against women recognized but also ensured that these are understood as a problem. That having achieved, came the hurdle of translating the recognition in legislation, in policies and in practice.

It was only during the war in the Balkans in early 1990s that systematic use of crimes against women as war weapons shocked the conscience of the world. As a result, the Tribunal that was established included in its statute, rape as a crime against humanity. The statute of the Rwanda Tribunal followed suit and these tribunals set the trend for its inclusion and recognition in the ICC statute. However, it was largely the advocacy by women from around the world coming together as the Women’s Caucus for Gender Justice that is responsible for inclusion of a range of crimes against women such as forced pregnancy, enforced prostitution, enforced sterilization, other forms of sexual violence as war crimes and crimes against humanity in the ICC statute. Inclusion of gender as one of the basis of persecution, itself a crime against humanity, is yet another milestone in the development of international law as far as women are concerned.

Women in different countries have often found it difficult to navigate their respective national legal systems for justice in cases of crimes of sexual violence. The struggle begins right from dealing with the discriminatory attitudes of law enforcers to facing the laws of evidences that often treats victims of sexual abuse as accused and sometimes getting a verdict falling way short of doing any justice. Such experiences formed the basis of advocacy of women from the Women’s Caucus for Gender Justice and ensuring that women do not encounter similar biases in the legal system at the international level was the goal.

The goal has been largely achieved. In addition to inclusion of a range of crimes against women in its statute, the ICC has potential to ensure gender sensitive trial process with progressive rules of evidence, requirement of having staff with expertise on issues of gender and sexual violence in the office of the Prosecutor and of having a fair representation of women and men judges. Such provisions in the documents guiding the ICC are extremely important and are an indicator that justice and accountability for worst crimes
committed against women is within reach.

**Precedents of the Ad-hoc Tribunals**

In fact, the precedents set by the ad-hoc tribunals in the understanding and evolution of definitions of crimes of gender and sexual violence are significant and there is tremendous anticipation that ICC would only improve upon it. In the Foca, 2001 decision of the Yugoslav Tribunal (ICTY) for example, it was decided that physical confinement need not be one of elements of the crime of enslavement and that coercion could take a wide variety of forms including psychological oppression or socio-economic condition which renders consent impossible or irrelevant. This formed the basis for the definition of the crime of enslavement and sexual slavery in the Elements Annex of the ICC. The thoughtful definition of rape given in the Jean Paul Akayesu case of the Rwanda Tribunal in 1998 formed the starting point of discussion from which evolved the definition of rape in the ICC documents. More significantly, this judgment effected a paradigm shift in the way crimes against women are treated and decided for the first time that rape could be a means of genocide. Similarly, in the ICTY judgment of the Delalic case, in 1998, rape and sexual violence as a form of torture was discussed, while the Furundzija case 1998 confirmed that rape is essentially violation of a woman’s sexual autonomy. Such precedents provide ample food for thought for firing the creativity and imagination of women’s rights activists working on issues of violence against women in domestic situations on how to make use of these developments domestically.

**Victims Issues**

The inclusion of wide range of issues dealing with the rights of the victims is yet another highlight of the Rome Statute that departs from a notion of justice that merely investigates, prosecutes and punishes. Victims and witnesses participate in a legal proceeding for a number of reasons – to tell their story, to prevent the crime happening to others, to pray for peaceful rest to the soul of the dead victim, to demand reparations, to have justice and a symbolic sense of emotional and psychological closure of the harrowing experiences they may have had. The premise of a judicial mechanism is victim alleging a crime. Victims are therefore the cornerstones of a justice process and the ICC statute has adequately addressed issues important to the victim community.

The Rome statute provides for protection of the safety, physical, psychological well-being, dignity and privacy of victims and witnesses, it provides for in camera or use of other electronic means for presentation and testimony of victims and witnesses and allows for victims and witnesses to present views and concerns through its legal representatives to protect their personal interests. The importance of these articles cannot be stated enough. The success of the Court in its substantive function lies in victims and witnesses coming forward to testify. Guarantee of a safe and protective environment will encourage victims and witnesses to provide testimony. Any account of victims or witnesses being targeted on account of their testimony will be a great setback. Similarly, one has often come across situations in national legal systems where Prosecutor goes to all extremes to meet his/her objectives of winning the case. In the process, the needs of the victim community are overlooked and their interests neglected. With the presence of a legal representative of victims, it is expected that victim’s interests will be protected and taken care of. The provisions in the statute with regards to victims representative and protection is further elaborated in the Rules of Procedure and Evidence.

Another significant aspect is the provision to make reparation to victims. The Court is authorized to establish principles to make reparation, which includes restitution, compensation and rehabilitation. Such reparations may be made by ordering the convicted person or from the Victims Trust Fund established for the purpose.

There are many critiques of the inclusion of victim’s rights in the statute. The most conservative one being that the job of a criminal judicial mechanism is to do justice and not to provide counseling or dole out reparation. Others claim that the right to legal representation for the victim would considerably complicate the trial process and make it cumbersome. Yet others raised a number of questions regarding the practical aspects of determining and disbursing reparations. Some of these are genuine concerns which solutions will evolve over a period of time as the Court begins its substantive
functions. Others are in the process of discussion, for example the Trust Fund for Victims is in an advanced stage of setting up. Such action restores confidence among those monitoring progress on these issues of the seriousness accorded to victim’s issues.

**Domestic Use of Development in International Law**

The question often asked is how could one make use of developments in international law at the local level and how could ICC, which to many women at the grassroot is nothing more than an alien and abstract entity, be made relevant to their lives. The answer lies in implementing legislation. The ratification or accession to the ICC treaty provides states an opportunity to set in motion a process of drafting legislations to implement their obligations under the treaty and ensure compliance of the treaty. While this is true of other treaties as well, the implication of compliance with this treaty body would potentially result in the firm entrenchment of the rule of law in a society and a relatively greater level of accountability for violations of human rights.

The strength of augmenting existing law reform processes or initiating new ones for violence against women using ICC’s standards is tremendous. In fact the ways in which crimes of gender and sexual violence has been defined, the rules of procedure and evidence for trials of sexual crimes and the requirement to ensure gender sensitive trials are more progressive in the ICC documents than in many national legal systems. By no means can anyone argue that the elements of the act of rape or torture or enslavement could be different in different context and should therefore be defined differently. An act of rape is rape whether happening in war times or in so called peace times. The different context does not negate the existence of the basic elements of the act i.e. physical invasion, sexual nature and coercion of any and all kind. Reform of rape laws therefore can be considered with the definition of rape as stated in the ICC as a basis and certainly improve upon it. Similarly the principles of investigation, evidence and overall prosecution could also be essentially adopted and adapted at the national levels. Having laws that eliminate societal biases and discrimination against women is half the battle won to make justice more accessible to women.

The success of ICC as an institution depends on the ability of states parties to pass the complimentarity standard. The lack of legislation in a state to prosecute crimes listed in the ICC statute may constitute inability and would result in burdening the Court with cases and situations not intended for the ICC. Moreover, justice at local levels is always more accessible to the victims than at an international level where situations are often alien. By having implementing legislation, states avoid ‘interference in their national sovereignty’ and equip themselves with the ability to perform their duty to make justice accessible to its peoples locally.

**ICC Deterring Future Crimes**

ICC is a judicial accountability mechanism but its effective function has potential to deter crimes from happening in future. The Rome statute has codified the existing conventions and standards of humanitarian law like never before. Earlier, it was generally known what behaviour or acts in situations of conflicts and wars were prohibited but it was also known that there was no place, person or institution with authority to prosecute. For perpetrators therefore there was a general security in the knowledge that impunity prevailed even for the most egregious of crimes. With ICC, that security is gone. Even with limited jurisdiction, ICC is a powerful mechanism to send a strong message of no impunity to future criminals. Moreover, non-state actors waging wars in different countries often consider that international humanitarian law binds only state and its officials. They have therefore been engaging in worst crimes with complete impunity. With its emphasis on individual criminal responsibility, ICC is the first mechanism that ensures accountability from individuals irrespective of whether or not they are state actors.

Education about humanitarian laws in army academies around the world will include the new standards set on ICC, which will potentially force change of behavior among soldiers. Dictators and totalitarian regimes will have to be careful not to transgress ICC and commit to providing human security.

**Challenges : United States V/s the ICC**

The biggest challenge to the Court comes from the United States, which has continuously opposed the Court. With the
Bush administration coming to power, the opposition has turned outright hostile. In Rome in 1998, the United States made every attempt to address their ‘concerns,’ the crux of the concern put plainly being how to get exemptions for United States nationals from ever being tried in the Court and how to exert maximum influence on decisions as to who the Court tries, when and for what. They made several efforts to accomplish this. First, the United States tried to subject ICC to the control of the Security Council, they were opposed to giving the Prosecutor proprio motto powers, they were keen that key positions of the Court like that of judges and prosecutors be not restricted to nationals of state parties only and they wanted to restrict the Court’s jurisdiction only to situations where states of the accused had accepted the jurisdiction of the Court. While some of these attempts were rejected forthwith, some compromises were made to accommodate the concerns of the Americans and keep them constructively engaged in the process. The role of the Security Council is restricted only to referring a situation to the court and deferring investigation of any situation referred by other sources for a period of 12 months. Checks and balances were introduced to the proprio motto powers of the Prosecutor and the jurisdictional regime of the ICC was limited as a result of some of the compromises made. Having failed to mould the statute to fully address their concerns, the United States made a last ditch attempt at the Rome Conference in 1998 and called for putting the statute to a vote. This too was defeated as the statute was adopted with an overwhelming support of 120 countries in favor.

Subsequent to their failure to prevent the ICC statute from being adopted, the United States continued its efforts of undermining the Court through its diplomatic channels. The United States scaled up its demarches over the next couple of years to put pressure on small countries not to sign the ICC treaty and on countries already signed not to ratify. The strong-arm techniques of the pressure included threats to vulnerable states to withhold economic aid, to withdraw from peacekeeping operations, to remove overseas troops and to refuse to perform its obligations under NATO charter. The pro-active measures included re-negotiations of Security of Forces Agreements wherever they have troops stationed to include clause preventing the state in which the troops are stationed from surrendering a United States national to the ICC. The hardliners within the Congress in the United States continued its efforts and introduced the American Service Members Protection Act, which legislates all the above threats and prohibits cooperation with the Court.

To be fair, the contributions of the members of the United States delegation in negotiating details of the ICC documents have been tremendous. The signing of the treaty toward the wee end of the last date for signature of the treaty is reason to believe that the Clinton administration had hoped for the United States to be engaged in the process and join the Court some day. These hopes have been belied with the ‘unsigned’ of the treaty in May 2002. Subsequently, the Bush administration has made vitriolic effort to gain exemptions from the jurisdiction of the Court for peacekeepers and have achieved limited success. In July 2002, the term of the peacekeeping mission in Bosnia was scheduled to be renewed. The United States held hostage the renewal of this mission in return for exemption of peacekeepers from ICC’s jurisdiction. With the passing of the Security Council resolution 1422, they were successful in their efforts but for a limited period of one year. This is the first major limited but successful attempt to undermine the Court and states parties need to guard the Court from being similarly undermined in future. While the United States will continue to renew the term by pushing for similar resolution next year, the States parties ought to find ways to prevent it or make it redundant.

Recent attempts at thwarting the establishment of the Court include demarche to state parties not to nominate candidates for the position of judges. It seems however, that all this hostile attention to the Court is having an opposite effect. States parties are looking out for all the criticisms leveled at the Court and making an active effort to ensure that these are proved wrong. It is important however not to confuse the United States government’s opposition and hostility of the Court as backed by the United States people.
There is a very active support in favor of the Court among the American people and the participation of United States based NGOs in the process has been the largest.28

**The Myth of an Infinite Superpower**

The basis for such a strong opposition to the Court by the United States and its insistence on having 100 per cent guarantees that none of its nationals will be tried before the Court comes out of a myth of being an infinite superpower. The argument goes that as the sole superpower, the United States is expected to deploy its troops to hot spots more than any other country and this would trigger politically motivated prosecutions. The fact of the matter may well be true, yet how could that be used to gain an exceptional status from a permanent judicial institutions for all times is incomprehensible. Firstly, the demand for exemption contradicts one of the principles of the UN Charter where all nations, big or small, are considered equal. Secondly, a mere cursory look at history and dynasties show that history and society is ever changing. No empire, dynasty or superpower has or could be expected to last forever. Some dynasties have lasted longer than others but they all have ‘withered’ away or self-destructed. It is only logical to state that the power of any superpower is transient. The United States therefore cannot use its current status to gain privileges for all times to come in future. Or perhaps this is one of the desperate ways of extending its superpower status for as long as it can? Whether or not this should be allowed is for the rest of the world to decide and international civil society will watch its decision in July 2003 when the United States will most certainly ask that Security Council pass resolution similar to 1422 to exempt the peacekeepers from ICC’s jurisdiction indefinitely.

There are other challenges that have come about following the momentous entry into force of the treaty in July 2002. These concern the important and meticulous task of setting up the Court. At the discussions on rules of elections at the first Assembly of States Parties in September 2002, some unease prevailed, as it seemed that for the first time states parties put the interest of having their respective candidates elected to key positions before the goal of having an strong, credible, independent and effective Court.

There are concerns about assessed contributions from states parties not coming in time for the Court to go about setting itself. And then, there is tremendous concern about the need to have just the right type of case being among the first cases the Court would deal with. The right type of case would be such that could not invite the accusation of being politically motivated, such that its initial documents meets the standards required by the Court and such that would establish the credibility of the Court in the eyes of an international community as truly a judicial mechanism going about its job of doing justice and nothing more.

**Conclusion**

Within a period of four years more than eighty countries have become parties to the Rome statute and led to its early entry into force. It very clearly signifies a desire on the part of the international community to leave behind the century cursed with the scourge of war and conflicts and dare to envision a future free of wars, a future with no place for impunity and a future where justice and accountability prevails. Moreover, by keeping gender and victim’s rights, interests and concerns in mind, the ICC is poised to do justice with a human face. Whether it will surmount the odds and challenges presented or succumb to pressures of global politics and economy will have to be seen.

*A version of this article was presented at the International Symposium: The Possibilities and Issues of International Criminal Court, Keisen University, Tokyo, November 9, 2002*

**References**

1. Rome Statute of the International Criminal Court
2. Elements Annex of the International Criminal Court
April 2002.

NOTES
1 Articles 11 (1) and 24 (1) of the Rome Statute of the International Criminal Court.
2 Ibid., Articles 17 (1) (a-c)
4 Ibid., at page 13
5 Universal Jurisdiction is a long-standing and accepted principle of international customary law. It is widely understood as an obligatory jurisdiction that all states have to punish offenses recognized by international community as those of universal concern irrespective of where they happen or who commits them. Some such offenses are war crimes, genocide, hijacking, and slave trade. The ICC’s jurisdiction for crime describes in the statute is limited to territorial and nationality principles. See Article 12 (2) (a & b). See Henry J. Steiner and Philip Alston’s International Human Rights in Context, Oxford University Press, 2000 more on universal jurisdiction.
6 Article 27 (1) of the Rome Statute of the International Criminal Court.
7 Ibid., Articles 46(3), 75, 79
8 Ibid., Article 68
9 Ibid., Article 15 (1) & (2)
10 Ibid., Articles 7 (1) (g) (h), 8 (2) (b) (xxii) and 8 (2) (e) (vi)
11 By requiring that women’s honor (not the woman herself) be protected, it gave credence to the societal bias against women of so-called loose morals or a woman engaged in providing sexual services. Since these women were not considered honorable, attack on them therefore did not constitute a crime. It seems to be the base argument of laws and evidentiary rules of many national legal systems with regard to crimes of sexual violence.
12 The statute creating the ad-hoc International Criminal Tribunal for the Former Yugoslavia (ICTY), 1993 included for the first time rape as a crime against humanity but not as a war crime.
13 The International Criminal Tribunal for Rwanda (ICTR) statute of 1994 went further to reproduce the language of Geneva Conventions and Additional Protocols including rape as a war crime when war is not of an international character. However, it did not improve upon the language of common article 3 of these conventions and retained ‘outrage upon personal dignity, in particular humiliating and degrading treatment, rape enforced prostitution and any form of indecent assault.’ Thus reinforcing understanding of the crime of rape as a form of outrage upon personal dignity and not an invasive form of attack on a person.
15 Article 42(9) of the Rome Statute of the International Criminal Court.
16 Ibid., Article 36 (8) (a) (iii)
17 Rape has been defined as ‘physical invasion of a sexual nature, committed on a person under circumstances which are coercive.’
18 Compilation of background reading materials for Trainers School on Gender and International Justice Mechanisms, Women’s Caucus for Gender Justice, July 2001
19 Articles 68 (1-3) of the Rome Statute of the International Criminal Court.
21 Article 75 (1-2) of the Rome Statute of the International Criminal Court
26 Articles 13(b) and 16 of the Rome Statute of the International Criminal Court.
28 Admittedly one of the reason for this is the fact that most of this discussion
took place at the United Nations Headquarters in New York where participation of individuals and NGOs from outside the country was restricted due to lack of adequate resources.

12

TO KILL A COURT
- Usha Ramanathan

A quiescent India Toes the U.S. Line in the Battle over the International Criminal Court.

The Bush Administration has been straining every nerve to nullify the potential of the International Criminal Court (ICC). 'Impunity agreements' are the most recent tactic it has deployed in its aggressive attempts to derail the ICC, and to keep an exceptional position for the U.S. in any system of accountability and deterrence that may develop in the international arena. These agreements - variously termed 'exemption', 'Article 98' or 'non-surrender' agreements - are bilateral treaties which provide that neither country will surrender any current or former government official or national of the other country to an international tribunal without the express consent of that country. This is not limited to the nationals of the two states, but could include anyone in the pay of either state, including for instance those involved in espionage or undercover operations. The impunity agreement amounts to an express assertion of non-cooperation with the court.

President Bush, speaking to reporters in the last week of September, explained the rejection of the ICC and the pursuit of impunity agreements: “I strongly reject the ICC. I’m not going to accept an ICC. I’m not going to put ourselves in a position where our soldiers and diplomats get hauled into a court over which we have got [no control] - the prosecutors whom we don’t know, the judges - I mean, we’re not going to allow ourselves to do that. And our friends shouldn’t want us to be put in that position. Therefore, we’re seeking Article 98s from our friends.” On December 26, 2002, India became the 15th country to enter into such a bilateral agreement.
with the U.S.
Although the U.S. had voted against the statute in Rome in June 1998, President Bill Clinton signed it on to the multilateral treaty in December 2000: a parting gift before he set down office. The Bush Administration was relatively low-key on the ICC issue until the 60 ratifications needed to establish the court came in in April 2002. There was some effort to bully countries not to sign or ratify the ICC; but this manoeuvre, essayed through U.S. consulates around the world, did not prevent the signatures and ratifications from building up beyond the magic number that would ensure its establishment. Since then, the Bush Administration has shown enterprise and arrogant genius in its efforts to render the ICC redundant even before it is constituted. On May 6, 2002, the U.S. launched its attack on the ICC by ‘un-signing’ itself from the statute. It is a procedure not known to international law. In June-July 2002, it threatened to withdraw from peacekeeping operations in East Timor and in Bosnia and Herzegovina unless U.S. peacekeepers were granted impunity from prosecution. It succeeded in extracting a resolution from the Security Council on July 12, 2002 that would restrain the ICC from starting or proceeding with investigations or prosecutions of peacekeepers and other officials of non-state parties for a period of 12 months. On August 2, 2002, George Bush signed into law the American Servicemen’s Protection Act (ASPA). Acquiring recognition as the ‘Hague Invasion’ Act, it authorises the President to retrieve American nationals “using all means necessary” if they are held in The Hague for trial before the ICC. Dutch protests over this have left the American establishment unperturbed.

The impunity agreements are a continuation of this strategy of intimidation. In the first week of August 2002, the U.S. State Department briefed foreign ambassadors on U.S. opposition to the ICC. They were warned that ASPA prohibits military assistance to countries that are party to the ICC treaty, but allows the President to waive the ban if the state were to enter into an impunity agreement, or where he finds it to be in the U.S. national interest. Since the end of August, the U.S. has been on the offensive, procuring bilateral agreements. Israel, Romania, East Timor, Tajikistan, the Marshall Islands, Afghanistan, Honduras, Uzbekistan, Mauritania, the Dominican Republic, Palau, Micronesia, Gambia, Sri Lanka, India and Nepal have so far signed the bilateral agreement. Pressure has been mounting on other countries too to sign the treaty, and the European Union’s (E.U.) weak protest, which ended in a conciliatory whimper at the end of September, is symbolic of the bulldozing capacities of the U.S. After much hemming and hawing, on September 30 a deeply divided E.U. set down three guidelines to be followed by countries that may decide to enter into bilateral agreements with the U.S. The first guideline was that there should be no immunity for any individual who is alleged to have committed crimes against humanity, war crimes or genocide. The second was that if they were U.S. personnel, and they were not to be surrendered to the ICC, the U.S. was obliged to try them in their courts. And, the E.U. ruled out reciprocity. The U.S., of course, reportedly finds this formula inadequate as this does not provide blanket immunity to all U.S. citizens living or serving away from home.

According to the U.S., Article 98 provides the space within the ICC statute to accommodate these impunity agreements. Legal opinion is not quite so categorical. Article 98 cautions the court against proceeding with a request for surrender that may require a requested state to act in a manner that is inconsistent with its obligations under international agreements. But this, experts point out, was a provision introduced into the statute in the final stages at the Rome Conference, and it was intended to deal with existing Status of Forces Agreements (SOFAs); SOFAs only apply where there is a ‘sending state’ which sends its troops to be stationed in another state under an agreement. The U.S. attempts to extrapolate this provision to mean that all agreements into which it may enter are not in conformity with the statute. It may be a misnomer to term these treaties ‘Article 98 agreements’.

On November 14, 2002, John Bolton, the U.S. Under Secretary of State for Arms Control and International Security and who is leading the U.S. effort to find bilateral signatories, was reported to have said: “In the near future, we will also be holding discussions on the issue with several countries in the Middle East and South Asia.” That was the first indication that the focus was shifting out of Europe and moving southwards. U.S. officials had been avoid-
ing identifying specific countries with which they were seeking immunity deals, evidently in order to avoid pressure being exerted on the governments not to negotiate them.

In India, the signing of this treaty was a closely held piece of information. There was no public information of the impending deal, no discussion which could have elicited public opinion. And, now that the treaty has been signed, sealed and delivered, there is no means of retracting even if the agreement were to meet with public opprobrium. Treaties concluded by the executive do not have to be sanctified by parliamentary acceptance, nor may they be dislodged by parliamentary disapproval. The potential for irresponsible conduct that may tie down the whole polity has no checks when the executive is exercising its treaty-making power. In non-governmental circles, there has been an apprehension for some time now that the U.S. will push through agreements with countries where it plans to base its operations in its future militaristic ventures. The stop-over by two planes on Indian territory in the first week of January this year, while on their way to the Iraq theatre where the U.S. is bent on staging war, tells its own story.

A spokesman for the Indian government talked warmly of the “strongest possible commitment to bring to justice those who commit war crimes, crimes against humanity, genocide” that is shared by India and the U.S., and of the accord being “ emblematic of the strides that continue to be made in transforming India-United States relations”. The claim lacks conviction. Even given India’s opposition to the ICC, it is plain that the initiative for these impunity agreements has come solely from the U.S., and that India has signed it like any of the other countries that have buckled under U.S. pressure. While the U.S. goes about its mission of nullifying the ICC in relation to its officials and citizens, India shares this reciprocity with just the U.S. This, in other words, is a U.S. campaign, with India contributing to the U.S. being able to realise its aims. If, therefore, U.S. personnel commit grave crimes on Indian soil, or are found on Indian territory having participated in such crime, the Indian state would not retain the option of the use of an international tribunal to try and punish the criminal.

As for the claim of commitment to justice, despite the 1984 anti-Sikh riots, and the more recent carnage in Gujarat, the crime of genocide finds no place in Indian law. Nor have the large numbers of disappeared persons in Punjab and in Kashmir given such disappearances legislative recognition. The record of the Indian state in the matter of crimes of grave import is far from impeccable.

Bolton calls the impunity agreements “non-surrender agreements”. The Washington Post has termed it the ‘non-extradition pact’. In effect, by means of these agreements the U.S. is seeking to ensure that the ICC will be unable to set eyes on any accused person over whom the U.S. asserts an interest. From its original expression of concern that its peacekeepers should be protected from any threat of prosecution before an international tribunal, it has now stretched the logic to cover all officials and nationals. And there is no guarantee that they would be tried in the U.S. In entering into these reciprocal treaties with states that have ratified the ICC statute, a conflict of obligation arises; Romania and Tajikistan and East Timor are, for instance, state parties to the ICC statute and have an obligation to cooperate with the court. Cooperation includes the surrender of the accused if found on their territory, and where the court, having applied the principle of complementarity, asks for such surrender. The bilateral agreement would deny the state the right to cooperate with the court thus.

John Bolton said: “Signatories of the Statute of Rome have created an ICC to their liking, and they should live with it. The United States did not agree to be bound, and must not be held to its terms.” What he is also saying is that, especially in getting states parties to the statute to sign the treaty with it, the U.S. is not merely working at providing protection to its nationals and officials, but is actively engaged in undermining the court. Having failed to prevent a multilateral ICC treaty from emerging, the U.S. is attempting multiple bilateralism in order to kill the court. This cynical disdain of the very real problem of impunity is perhaps not surprising at a time when the U.S. is expanding its militaristic horizons.

In the meantime, the number of states becoming parties to the statute has continued to rise, and with Barbados joining up on December 10, 2002, it has reached 87. Israel, which had signed
but not yet ratified the statute, has now chosen the U.S. path. Bolton explained in a speech delivered to the Federalist Society on November 14, 2002: “There seems little doubt that Israel will be the target of a complaint in the ICC concerning conditions and practices by the Israeli military in the West Bank and Gaza. Israel recently (on August 28) decided to declare its intention not to become a party to the ICC or to be bound by the statute’s obligations.”

Between February 3 and 7, 2003, the election of 18 judges to the ICC will be held at the United Nations headquarters in New York. The profile of the court that has been established to deal with impunity will then begin to emerge. Nobody expects the court to provide a cure for all the ills that blight a violent, unequal and often irrational world. But it could be the first steps towards rending the shield of impunity that has protected mass murderers and violators in the past. The U.S. continues to demand an exclusivity which, if it cannot get it by acquiescence, it warrants it can by intimidation. India stands among the quiescent, sharing a distrust of the ICC and a troubling faith in the honourable intentions of the U.S. The tug-of-war between the proponents of the ICC and the U.S. has, plainly, escalated into a battle.

This article was published in The Frontline, Volume 20 - Issue 02, January 18 - 31, 2003

13

BIG BULLY FINDS ANOTHER SLAVE

- Ravi Nair

The recent signing of a bilateral agreement between the US and India — not to surrender each other’s nationals to the jurisdiction of the International Criminal Court (ICC) — once again emphasises the lack of informed Indian foreign policy thinking, if any, on such issues. The South Block’s readiness to sign on the dotted line at Washington’s foggy bottom diktats once again underlines how isolated the present Indian government’s foreign policy is.

The fact is that the European Union has collectively rejected such immunity agreements. With all its arm-twisting, Washington has only been able to enlist 16 acolytes to offer it absolution.

The US has reportedly sent to more than a hundred countries an ‘offer’ of agreement not to surrender its nationals to the ICC or to cooperate with the court, purportedly under Article 98 of the ICC statute. In recent weeks, the Bush administration has approached dozens of governments seeking Article 98 agreements against sending any US suspect to the ICC. To pressure them to agree, Washington is citing newly passed legislation — the American Servicemembers’ Protection Act (ASPA). It authorises the barring of various forms of US military assistance to governments, other than NATO members and specified allies, that refuse to sign Article 98 agreements.

At issue is Article 98 of the ICC’s treaty, which was designed to allow governments to devise orderly procedures to implement the treaty’s preference for prosecutions by national authorities. This provision was premised on the ICC’s ability to take jurisdiction of a case should it find that an investigation or prosecution was not conducted in good faith.
The ICC statute begins by stating that the ICC will be complementary to national criminal jurisdictions. The actual mechanisms of complementarity within the statute are complicated. The operation of the statute is interrelated with the capacity of the States to conduct national prosecutions through their domestic legal systems. In the end, the ICC will only deal with a limited number of cases. The focus will inevitably turn, at various stages, to the national level. Governments need to ensure that their legislation and judicial processes actually enable the executive and the judiciary to genuinely carry out these national prosecutions under the terms of the ICC statute and in conformity with international human rights law.

This is the principal reason why the Indian government has gone along with the Americans. India is one of the few democratic countries which allow a large measure of impunity to all perpetrators of human rights violations. Little does India realise that international law is moving inexorably towards international accountability for all human rights and humanitarian law violations. A case in point is the adoption of the ‘Optional Protocol On Torture’ in the UN General Assembly earlier this month, despite dogged opposition by the US and India. India eventually abstained in the final vote.

Since early 2002, American tactics have included threats of economic sanctions to convince governments to give US nationals exemption from the ICC. Legal experts have expressed outrage at what they consider another US attempt to use its economic power to obtain exemption from a court designed to ensure that crimes as serious as genocide, crimes against humanity or war crimes do not go unpunished. According to many governments, the US is misinterpreting Article 98 of the Rome statute, the provision of the ICC’s governing treaty being invoked to justify seeking such agreements, and resorting to bullying tactics to get signatures.

The threat to cut off military aid, coercive actions undertaken recently in the Security Council to get exemption for peacekeepers, are part of a multi-pronged effort by the US to undermine international justice. US spokespersons say these agreements are allowed under the statute that creates the ICC, but legal experts from leading NGOs and from other governments disagree.

The US is now trying to bully governments into signing these agreements, just as it coerced them to agree to exempt US peacekeepers from the ICC in the Security Council despite consensus that this would be in violation of international law, the UN charter and the Rome statute.

Despite the Indian government’s known hostility to the ICC Rome statute, what stampeded it into signing this agreement, without a parliamentary or national debate, is the explicit US threat to withdraw military assistance from countries that refuse to sign the agreements. Dubbed “impunity agreements” by ICC advocates, they are based on a provision in the American Servicemembers Protection Act, passed in the US Congress and signed by President Bush on August 2, 2002. The ASPA authorises the US government to cut off military aid to countries that support the ICC, with the exception of key allies.

The ASPA bill, however, includes broad presidential waivers that, if used, would overrule such provisions. Even before the passage of ASPA, the US declared the unprecedented “nullification” of its signature of the Rome statute in May 2002, and began aggressive efforts in the Security Council in the months following to obtain exemption for US peacekeepers from the jurisdiction of the ICC.

The jurisdiction of the ICC was established when its treaty entered into force on July 1, 2002. This court will be the first permanent, independent judicial body capable of trying individuals accused of genocide, war crimes and crimes against humanity. An advance team of the ICC is already operating in the Hague and the court is expected to begin hearing cases by mid-2003.

Indeed, the ICC is being set up and paid for by countries that ratify the Rome statute — 87 to date, while 138 States have signed the statute.

This article was published in Hindustan Times, January 16, 2003
The carnage in Gujarat conveys a message of triumph of violence and brutality over law, impunity over accountability, and highhandedness over justice. As in the case of perpetrators of the communal attacks in Mumbai, for the persons who have inflicted violence against the religious minorities in Gujarat, impunity seems probable and accountability seems illusive. It is precisely to end impunity that a judicial mechanism has been created and has gained overwhelming support at the international level – the International Criminal Court (ICC).

The ICC is the first permanent forum mooted at an international level to deal with individual perpetrators committing the most serious breaches under international humanitarian and human rights law - crimes against humanity, war crimes and genocide. The ICC would not oust the prerogative of the national legal system to prosecute offenders, but would come into play only if the government is either unwilling to or unable to prosecute the offender. The primary responsibility for taking action, therefore, vests with the government. The ICC is a safety net to tackle situations where perpetrators escape the clutches of domestic law.

On April 11, 2002, the number of ratifications to the Treaty creating the ICC exceeded the sixty required for it to become functional. The ICC is now a reality and will be here to stay. However the jubilation I felt at the creation of this important international mechanism was whetted by the fact that India has neither signed nor ratified the Treaty. My disappointment was heightened by the fact that the ICC is of great relevance to the situation within the
country, particularly the violent attacks against the minorities in Gujarat.

In Gujarat, though the National Human Rights Commission has swung into action, it is not a court of law. It would make useful recommendations on what need to be done in future to avoid the recurrence of such incidents. However, the task of prosecuting the perpetrators is the task of the state legal machinery.

On the basis of independent reports, it is clear that the violence was a state-sponsored carnage that targets the Muslim community. *(Report on Gujarat by CPI (M) and All India Democratic Women’s Association, March 2002)* The police force which has to carry on investigations into the violence for effective prosecutions to take place, is biased, communal, has acted in a partisan manner, and is itself guilty of participating in the attacks. *(Statement of the Commonwealth Human Rights Initiative on the Gujarat Riots and the Role of the Police, 8th April 2002).* That the state government is itself biased in its approach to the situation, is obvious from the Gujarat Chief Minister’s statement of justification for the attacks on minorities - “Every act has an equal and opposite reaction”. *(Times of India, Delhi Edition, 2nd March 2002)* Therefore, it is unrealistic to expect impartiality in meting out justice to the victims.

In such situations, the possibility of prosecution of such offenders by an ICC could at least persuade the domestic law enforcement agency to act, and act effectively. The ICC is a means of encouraging the national legal machinery to address these crimes, as it will intervene only in cases in which a state is either unwilling or unable to prosecute an offender. After all, no state wants its citizens to be dragged to an international forum for a trial as that would undermine the efficacy of its legal system. If it fails to prosecute, the international machinery would be brought into action to end impunity.

**Crimes against Humanity**

Among the crimes listed in the ICC statute, “crimes against humanity” are among the most serious crimes of concern to the international community as a whole. “Crimes against humanity” is of specific importance, as this is a set of crimes which can be committed not only during war time (as in the case of “war crimes”) but also during “peace” times. Crimes listed under this term include murder, extermination, enslavement, torture, sexual violence, enforced disappearances and other inhumane acts of similar gravity. It includes the heinous crimes committed in the Gujarat attacks. This category of crimes under the ICC is distinguished from ordinary crimes defined under national penal laws in three ways:

- the acts constituting the crimes must have been committed as part of a widespread or systematic attack;
- they must be knowingly directed against a civilian population;
- they must have been committed pursuant to a “State or organisational policy”. The definition is broad enough to include all perpetrators of these crimes, irrespective of the fact that they acted or did not act under the colour of State.

If this yardstick were to be applied to the Gujarat carnage, it appears that all the three requirements are satisfied. There is no doubt that the attacks on minorities were widespread. The use of cranes, shovels and trucks to demolish walls of the Muslim houses and shops, and the recent house checks in the guise of census data collection to identify targets indicate that the attacks were not spontaneous, but were systematic and planned. *(Report on Gujarat by CPI (M) and AIDWA, March 2002)* The attacks were directed against a civilian population. It involved direct attacks on the civilians by agents of the state, as well as a deliberate failure of the state government to take action against the perpetrators, aimed at encouraging / instigating such an attack. However, even if state involvement was absent, non-state actors would be hauled up under the definition provided they were organized in some way.

It addition, the attacks are undoubtedly genocidal in nature, as they are aimed at the destruction of lives and property of a certain group of people on religious grounds. The Gujarat attacks cover the first two of the five prohibited acts stated in the definition of genocide under the ICC statute, namely:

- killing members of the group;
- causing serious bodily harm to the members of the group; deliberately inflicting on a group conditions of life calcu-
lated to bring about their physical destruction in whole or in part;
- imposing measures intended to prevent births within a group;
- forcibly transferring children of a group to another group.

In addition, the intention to destroy, in whole or in part, the religious group would also satisfy the definition of genocide stated in the ICC Statute.

It is apt here to mention that the Indian government ratified in August 1959 the UN Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (which contains a similar definition of genocide). It is therefore additionally duty-bound to prosecute and punish the offenders, irrespective of their position. Further, it is rather ironic that not too long ago, experts from the Ministry of Law helped the Cambodian government draft a law on crimes against humanity and genocide (to facilitate the trial of Khmer Rouge leaders), while being complacent of the adequacy of the Indian legal machinery in responding to similar crimes. This is a case of preaching what we do not practise.

The utter failure of the state law and order machinery in protecting the victims from further violations and taking prompt action against the perpetrators illustrate the fact that our legal machinery is not as efficient as we boast of. It also reminds us of the need for an effective, permanent and impartial international machinery to be brought into action in situations where a prompt and proper prosecution through the national legal system seems impossible.

**A Culture of Impunity**

At present, India has not ratified the Treaty establishing the ICC. The ICC would have only prospective jurisdiction – that is, deal with crimes that are committed after a country ratifies it. Therefore, sadly, the perpetrators of the Gujarat carnage, as in the case of those of the communal riots in Mumbai in the last decade, would never be tried by the ICC. However, the exercise undertaken in this article is not without purpose. It is to illustrate the gravity of the crimes committed in Gujarat from the standpoint of international law, and further to highlight the potential that exists for using an international mechanism to terminate a culture of impunity within the country.

It would be desirable for the Indian government to review its reluctance over acceding to the Treaty creating the ICC. If our human rights record is good, and our legal machinery foolproof, we have nothing to fear from the ICC. But if we are afraid that our dirty linen may be washed in public, it is time we ensure that our laundry system becomes sound.

_A version of this article was published in The Hindu on 14 May 2002_
INTERVENTIONS BY CIVIL SOCIETY GROUPS
15
THE ICC CAMPAIGN IN INDIA
- Saumya Uma

The International Criminal Court (ICC) campaign in India was initiated in the year 2000, based on a conviction that the ICC would be extremely relevant to end the climate of impunity presently persisting in India. The present article outlines the activities and experiences of the campaign from the time of its inception till date.

The Aims & Objectives
The aims and objectives of the campaign are as follows:

- To raise awareness on ICC among members of civil society, including campaigners on women’s rights
- To form a pressure group among civil society members to pressurize the Indian government to accede to the ICC Treaty.
- To strengthen the campaign for introducing laws on war crimes, crimes against humanity and genocide within the domestic legal system, and for enforcement and reform of laws relating to crimes against women within India, including formulation of legal safeguards for state-sponsored violence against women.
- To secure the Indian government’s early accession of the ICC Treaty so that a safety net above the national legal system to ensure that perpetrators of heinous crimes, including gender-related crimes, do not escape with impunity

The Advisory Committee
The ICC-India campaign is guided by an advisory committee, con-
sisting of eminent persons from India and abroad, who have several years of experience in the field of international human rights and humanitarian law. The committee members include:

- Vahida Nairn, Founder, Women’s Research and Action Group & Former Executive Director, Women’s Caucus for Gender Justice, New York
- Henri Tiphagne, Executive Director, People’s Watch - Tamil Nadu, India
- Sitaramam Kakarala, Assistant Professor, National Law School of India University, Bangalore, India
- Dr. Ahmed Ziauddin, Director, Bangladesh Centre for Genocide Studies
- Dino Kritisiotis, Faculty, School of Law, University of Nottingham, U.K.

Activities

- **Research & Publication**: This activity includes formulation and publication of an information booklet on ICC with a specific relevance to India, translation of the same into regional languages of the country, dissemination of the publication to regional nodal organizations for distribution, stimulating research on the relevance of ICC for the women’s human rights movement in India, and writing articles for mainstream journals, magazines and newspapers.

- **Information Dissemination**: Organising regional and national workshops for persons engaged with the women’s movement and the legal/judicial system, to create a better awareness of the issue, delivering lectures and presentations in various educational institutions with a particular reference to law and social work universities and colleges, to evoke interest in the issue among students and academicians, and liaising with the press, and organize press conferences for facilitating information dissemination.

- **Campaigning**: Identifying interested individuals and organizations from various states in India, in particular human rights and women’s rights organizations, and establish, and coordinate a national network among them, working towards incorporating the issue of ICC into the work of interest groups that work on various human rights issues, exploring possible ways in which the civil society and the government could work together on the issue, and dialoguing with the government to facilitate its early accession of the ICC Treaty.

**Its Achievements**

In the last three years of its existence, the achievements of the campaign have been modest. The focus of the campaign so far has been on information dissemination and awareness-raising on ICC. To this end, workshops were held and lectures delivered in Mumbai, Panchgani, Hyderabad, Pune, and Madurai. Some activists, lawyers, journalists, researchers and law students have shown interest in the campaign, as a result of which an informal network has been formed. This network operates by email, since its members are situated in various parts of India. A few persons interested in pursuing the ICC campaign have written persistently in various mainstream newspapers and journals, with the aim of disseminating accurate information on ICC.

One notable achievement is that the campaign managed to capture the interest of a human rights organisation – People’s Watch Tamil Nadu - to such an extent that the organisation published the first book on ICC in an Indian language, namely Tamil. Apart from awareness-raising and publication, ICC-India has campaigned for the ICC through the initiation of a letter campaign soon after the Gujarat carnage, and through the issuance of press notes voicing serious concern about the Indian government’s support to the United States in the months of May and December last year.

**Some Limitations & Challenges Faced**

One constraint that the campaign has faced since its inception was the fact that it was not housed in or backed by any institution or non-governmental organisation. Organisations did not perceive the relevance of the ICC campaign for India, and they were reluctant to adopt it as a project within their organisational mandates. As a result, the campaign did not have a physical existence or a postal address. It had no administrative support of any kind. Hence, organising workshops became difficult and the campaign had to rely on other individuals and organisations to take the initiative and invite the members of the campaign to share information on the
ICC. In November 2002, Women’s Research & Action Group adopted this project. The work of ICC-India will now become enriched and inspired by the support of the organisation.

One challenge to the Indian campaign has stemmed from the recent shift in the Indian government’s approach to the ICC. While the state response to ICC has never been enthusiastic, it had adopted a ‘wait and watch’ policy from the time of the Rome Conference in 1998 to the year 2001. Sources from the Ministry of External Affairs revealed that three ministries are involved in the process of formulating the government’s policy towards the ICC: Ministry of External Affairs, Home Ministry and Ministry of Defence. The latter two ministries have had some reservations. However, the government has now adopted a more aggressive anti-ICC stance from mid-2002. In particular, its support to the American efforts at weakening the integrity of the Court, has shocked many members of the Indian campaign. It has made us realise that achieving the goals of the campaign will definitely be an uphill task.

Yet another challenge faced by the campaign pertains to the Indian mindset. While engaged in disseminating information, the Indian campaign has sensed a natural suspicion and resistance to anything “international”. It can be partly attributed to a spirit of nationalism. However, this has probably been exacerbated by the process of economic globalisation in India and the unfair terms of trade imposed on India by Western superpowers. The prevailing anti-American feeling within the country has led many to presume that anything international is surely in the favour of the United States and against the interests of developing countries, including India. The American hostilities to the ICC have been a blessing in disguise to the Indian campaign, as they have helped convince Indians about the possible effectiveness and independence of the ICC!

Subsequent to the Gujarat carnage, the futility of making perpetrators accountable within the Indian legal system has inspired at least some activists to look to international legal mechanisms and international forums for ensuring justice. Others are now more open-minded and receptive to the need for international mechanisms to complement national legal mechanisms. The ICC as an instrument to end the climate of impunity within India has been talked about and discussed about much more in the last one year. It is now up to ICC-India to utilise this potential opportunity to take the campaign forward, towards fulfilment of its goals.

In addition, much remains to be desired in the Indian media’s response to the ICC campaign in India. The mainstream newspapers have failed to comprehend the importance of the issue – therefore articles on the issue are either sidelined because there are other important articles to be published, or because the ICC campaign has strong political implications. Sustained dialogue with prominent members of the media would definitely result in a more positive response. The campaign would engage itself in exploring such possibilities in the near future.

A final limitation - in the years since its inception, the ICC-India campaign has faced severe constraints due to an absence of funding support for its activities. Indian donors had no idea about ICC and its possible relevance to India. International donors were keen on supporting the ICC campaign in countries that were likely to sign and ratify the ICC Treaty. India was not a likely candidate. ICC-India faced severe limitations in its activities due to this predicament.

Yet, India being the largest democracy, the campaign in India had to continue – and it did. Many of the activities of the campaign were carried out only out of a personal conviction, and the expenses incurred for the activities were paid personally by the members. With the promise of some support this year, the campaign is likely to function more freely and actively.

In short, as in any other campaign, the ICC-India campaign has had its share of teething problems. However, rather than being bogged down by these, the campaign has treated the limitations as challenges and as a test of its tenacity and strength. This positive approach has provided it the capability to work in a determined and consistent manner in future.
16

LET’S POLICE OURSELVES BETTER!

- Saumya Uma

This is a response to the article titled “Policing the Global Cops” by Prem Shankar Jha, that appeared in the Outlook India.com magazine, issue dated 13 May 2002.

The article opines that the attempt to issue an arrest warrant against Narendra Modi, the Gujarat Chief Minister, in a British court, undermines India’s sovereignty and sets a bad precedent. It cautions that this trend can be misused when situated in the global dynamics between the West and the other countries, leading to retaliation and coercion, ultimately ending in war and terrorism.

The article begins by admitting that Modi “undoubtedly” abetted the carnage that continues in Gujarat. It states that however, the attempt to issue an arrest warrant against Modi in a British court is “an issue of law and sovereignty and not of culpability”, as there has been no exhaustion of local remedies, namely approaching Indian courts first.

It is agreed that the ideal response to the violations is the resort to domestic legal and political sanction. However, in the present political climate, with the state and central administrations being controlled by the BJP, efficient investigations and effective prosecutions are unlikely. The state complicity in the carnage and the partisan nature of the police that would be investigating the crimes has undermined the faith in prosecuting the perpetrators through the Indian legal system. Genocide and crimes against humanity can rarely be investigated by state organs because of state complicity in the crimes. What exhaustion of local remedies are we talking about then?
The anti-Sikh violence in 1984 and the Mumbai communal “riots” in 1992-93 illustrate the Indian state’s unwillingness and inability to ensure accountability for the massive crimes committed. Every Indian wishes that history does not repeat itself in the case of the Gujarat carnage. If actions such as those initiated in the British and Belgium courts with regard to the Gujarat violence can inspire and goad the domestic legal machinery to deliver the goods, there is only advantage to be reaped from such acts. If the domestic machinery continues to remain inert despite such acts, a commitment to justice demands that the perpetrators be held accountable in some legal forum for the heinous crimes they commit.

That such legal actions violate India’s sovereignty is an age-old argument used in most cases of international concern over serious human rights violations committed within a country. Let us stop being chauvinistic and accept the fact that India does not and cannot live in a political vacuum. By way of becoming a member of the United Nations and signing and ratifying several important Treaties (including the Genocide Convention), India has opened itself to international scrutiny. Such Treaties indicate that absolute sovereignty of a state can be trampled upon, if that is the only way to ensure justice to the victims. The sovereignty argument is used today merely to shield perpetrators from litigation in foreign soil – the perpetrators who would be protected at home by their position and political clout.

The article further states that the British case would have the effect of punishing Modi without a trial by preventing him from travelling to any country where the arrest warrant could be served. Agreed that Modi would face such a risk when he travels abroad. However, such an instance, as in the case of Pinochet (where he was arrested while travelling abroad), would prove a point – that no one is above international law, even when national laws protect the person from prosecution.

The article also expresses concern over this “disastrous precedent” where leader of any country can be similarly issued an arrest warrant by any other country, especially by developed countries. It is surprising that the article is more concerned about the possible “retaliation by individuals and human rights groups in the dependent nations to the leaders of dominant countries” than to ensure accountability of leaders, irrespective of the country where the crime is committed. If Ariel Sharon has committed genocide and George W. Bush has abetted Israel’s drive into Palestine, is it not just that they be made accountable in some legal forum? Since it is highly unlikely that they will be tried within their own countries, international legal actions seem the only alternative.

A further assertion in the article is: “the end product of prosecution and retaliation against individual members of governments, past and present, will be to drastically reduce the scope for the conduct of international relations through negotiation and increase the resort to coercion. A mounting use of coercion cannot fail to lead eventually to war”. The suggestion made is that individual perpetrators should not be prosecuted (as that amounts to coercion) but that their acts should be disapproved through diplomatic channels in the interests of preventing a war. It is imperative to note that in the name of restoring peace, flagrant violations of human rights have often been swept under the negotiating table, through a grant of amnesties. It is only in recent times that the world has shown determination in ending the impunity of the perpetrators. Prosecuting the perpetrator would not lead to war; indeed, such a prosecution would ensure justice for the victims, without which there can be no true and everlasting peace.

The article finally laments that the movement towards a world filled with “fear, prejudice and hatred” has gathered momentum with the indictment of Slobodan Milosevic, former Yugoslav President. Suffice it is to say that the indictment of Milosevic passes a powerful message to the world – that irrespective of position of the perpetrator, truth and justice will ultimately prevail. The establishment of the first permanent International Criminal Court (ICC) with overwhelming international support, including support from developing countries, marks a further step towards ending the prevailing climate of impunity.

This article was sent for publication to outlookindia.com magazine in June 2002. However, it has not been published till date, to the best knowledge of the author.

114 Combating Impunity Let’s Police Ourselves Better! 115
17

A LETTER CAMPAIGN AFTER THE GUJARAT CARNAGE

14 May 2002

Dear friends,

Sub: Gujarat & ICC: A Letter Campaign

The recent violence in the state of Gujarat in West India, where members of the Muslim minority have been targeted, has shocked the world community and has left a deep scar in the history of secular India.

On Feb 27, 2002, 58 people, including activists and supporters of the Vishwa Hindu Parishad (VHP) died when a bogie of a train, Sabarmati Express, was set on fire in Godhra, Gujarat. VHP is a Hindu fundamentalist outfit. The perpetrators were allegedly Muslims who were provoked and harassed by supporters of the VHP in the preceding days. The Godhra massacres were followed by a spate of violence that has been unleashed on Muslims throughout the state. The violence includes killings, sexual violence, arson and lootings, all aimed at the Muslim religious minority within the state. From the reports prepared by various groups, it is clear that the violence unleashed is the execution of a systematic, planned, state-sponsored programme of carnage. For more details of the attacks, please find attached detailed reports on the violence. The report of the Human Rights Watch – “We Have No Orders to Save You” can be accessed at www.hrw.org/reports/2002/india

The National Human Rights Commission called upon the government of Gujarat to submit a report on the violence within three
days on March 1, 2002. A report was received from the state
government on March 11, 2002 but was rejected by the NHRC as
"perfunctory." A satisfactory report was submitted more than three
weeks later on March 28, 2002. In responding to the blatant
violation of human rights, the Gujarat government has set up an
enquiry commission headed by a retired High Court judge. How-
ever, the secular credentials of the judge are being questioned by
several persons and organisations. Independent reports indicate
that the police force which has to carry on investigations into the
violence for effective prosecutions to take place, is biased, commu-
nal, has acted in a partisan manner, and is itself guilty of participat-
ing in the attacks. The state complicity in the carnage and the
partisan nature of the police has undermined the faith in prosecut-
ing the perpetrators through the Indian legal system.

Many of us within India, who are determined to make the perpe-
trators accountable for the crimes, are worried that they may not
be effectively prosecuted within the Indian legal system. Domestic
legal sanctions do exist to punish perpetrators and deter future
perpetrators of heinous acts such as those committed in Gujarat.
However, persons who have massacred minority communities within
India, namely the Sikhs in 1984, Muslims after the demolition of
Babri Masjid in 1993 and Christians in the last few years, have
escaped the clutches of domestic law due to state complicity in the
crimes. These instances illustrate the Indian government’s unwill-
ingness and inability to prosecute the offenders time and again.

The violent acts in Gujarat attract the definitions and ingredients of
“genocide” and “crimes against humanity” stated in the Rome Stat-
ute quite clearly. The reports of fact-finding missions substantiate
this. In 1998, the Indian government abstained from voting on
the Rome Treaty establishing the ICC. Subsequently, there has
been no apparent move to ratify the Treaty. The Indian govern-
ment has haughtily brushed aside legitimate international concern
towards the situation in Gujarat. However, India, in principle,
recognises that there are some actions that necessarily invite inter-
national scrutiny. It is apt here to mention that the Indian govern-
ment ratified in August 1959 the UN Convention on the Preven-
tion and Punishment of the Crime of Genocide, 1948 (which con-
tains a similar definition of genocide). In fact, it was one of the
prime movers of the Convention in 1948. It is therefore addition-
ally duty-bound to prosecute and punish the offenders, irrespective
of their position.

There is an urgent need to persuade the Indian government to
prosecute all offenders as well as to accede to the Treaty establish-
ing the ICC, especially in the wake of the Gujarat violence. It is
clear that the ICC statute will have no retrospective jurisdiction,
and hence will not directly impact the prosecution of offenders in
the Gujarat carnage. However, many of us in India are convinced
that the wave of awful violence that has swept Gujarat can spread
elsewhere in India too. It is important to have international legal
mechanisms, such as the ICC, in place in order to terminate the
culture of impunity within the country.

Please write to the Indian government and express your concerns
in this regard. Your letters would go a long way in supporting the
Indian campaign on the ICC. The addresses of persons to whom
you can send the letter are stated below.

In solidarity,

Saumya Uma
Coordinator, ICC-India

Persons to whom the letters can be directed:

Mr. Atal Bihari Vajpayee,
Prime Minister of India
Prime Minister’s Office
South Block, New Delhi 110001
Email: pmosb@pmo.nic.in

Mr. L.K. Advani
Minister,
Ministry of Home Affairs
North Block, Central Secretariat,
New Delhi - 110 001

Mr. Arun Jaitley
Minister,
Ministry of Law, Justice & Company Affairs
4th Floor, A-Wing, Shastri Bhavan  
New Delhi - 110 001  

Sonia Gandhi,  
Leader of the Opposition  
10, Janpath,  
New Delhi 110001.  

Mr. Justice J.S.Verma  
Chairperson,  
National Human Rights Commission  
Sardar Patel Bhavan,  
Sansad Marg, New Delhi-110001.  
email: chairnhrc@nic.in  

Dr. Poornima Advani  
Chairperson,  
National Commission for Women  
4, Deen Dayal Upadhyaya Marg,  
New Delhi-110 002.  
email: member_secretary@ncw-india.org  

Justice Mohamed Shamim  
Chairperson,  
National Commission for Minorities  
5th Floor, Loknayak Bhawan,  
Khan Market,  
New Delhi - 110 003.  
email: aoncm@ncm.delhi.nic.in  

This letter was sent by email to supporters of the ICC campaign as well as human rights activists worldwide.

18  

THE INTERNATIONAL INITIATIVE  
FOR JUSTICE IN GUJARAT  
AN INTERIM REPORT  
December 19, 2002  

The International Initiative for Justice in Gujarat is a response by national and international women’s groups to the horrific violence unleashed against the Muslim community of Gujarat since February 27, 2002, in which women were a central target. As part of this initiative, members of women’s groups from India accompanied nine women from Sri Lanka, Algeria/France, India, Israel/UK, Germany and the USA who visited areas in and around Ahmedabad, Vadodara and Panchmahals between 14 and 17 December 2002. During these visits, we met with survivors of the violence as well as with members of women’s groups, human rights groups, and other citizens’ groups from Gujarat.

Many civil society groups and statutory government bodies have already documented the scope and systematic nature of the violence against the Muslim community, and in particular sexual violence against women in Gujarat. In our visit, we have heard many confirmations of the information contained in these reports. We find it regrettable that the Indian government has not paid attention to the facts provided through this process, nor ensured the enforcement and implementation of the recommendations set out in, for example, the report of the National Human Rights Commission. We are also concerned by the fact that in spite of the totally inadequate legal and other responses to the violence in Gujarat, the government has continued to deny permission for international scrutiny of the situation.

The situation that has arisen in the context of the post-election
scenario in Gujarat exposes the fallacy of India’s claim to be the world’s largest democracy and raises a clear question about whether a ‘free and fair’ election alone is a sufficient indicator to guarantee and assert the existence of democracy in any society. The key principles that underpin the democratic functioning of any system of governance consists of a series of closely balanced interlinkages of institutions that allow for accountability and transparency. A democratic system must also guarantee respect for human rights and freedoms on the basis of non-discrimination and equality. In a pluralist society such as India, ensuring the equal representation and participation of all communities and guaranteeing the rights of women and of minorities are among the most important tests of a genuine democracy. The propagation of fear and hatred among communities is anathema to these principles and is inconsistent with both national and international law.

We are also concerned about the various complex ways in which the post September 11 political climate and the ‘war against terror’ is being used to deepen divisions and conflicts in Indian society through the manipulations of prejudices and fears. The consequences of the conflation of the Muslims of Gujarat with the international construction of ‘the Muslim’ as ‘terrorist’ and the demonization of the community as a whole can also lead to a potentially explosive situation.

We have no doubt that the state has been complicit both in the perpetration of the violence in the state of Gujarat, and in the failure to redress it. Nine months later, we are appalled to discover the continuing levels of violence and the inadequacies of existing mechanisms to deliver justice to the victims and survivors. This violence, which reflects a longer and larger genocidal project, in our view constitutes a crime against humanity and satisfies the legal definition of genocide, both of which are crimes of the most serious dimension under international law. In addition, the results of the recent election in Gujarat give the instigators and perpetrators of violence in that state the power and potential to continue with their campaign of hate and terror against the Muslim community. As we heard so often, ‘They will never let us survive’. This constitutes a frightening exacerbation of the genocidal conditions prevailing in Gujarat with the potential of spreading to other parts of India, and calls for an urgent and concerted international and national response.

The use of systematic rape and sexual violence as a strategy for terrorizing and brutalizing women in conflict situations echoes experiences of women in Bangladesh in 1971, and in countries such as Rwanda, Bosnia and Algeria. In Gujarat, as in all these other countries, women have been targeted as members of the ‘other’ community, as symbols of the community’s honour and as the ones who sustain the community and reproduce the next generation. This has become an all too common aspect of larger political projects of genocide, crimes against humanity and subjugation. In Gujarat, sexual violence against Muslim women as well as against women in inter-religious marriages is central to the organized political project of Hindutva. During our visit, we have been struck by the explicit use of male sexuality as the mechanism and mobilising tool for recruiting members for the ‘cause’ and as a means of imposing ‘Hindu’ dominance upon the Muslim community. We find chillingly unique the incitement to sexual violence as a means of proving the masculinity of the ‘Hindu’ man, as reflected in the political propaganda of the forces of Hindutva prior to, during and after the violence in February/March 2002 and as carried out through patterns of men stripping and exposing themselves to women in an aggressive and threatening manner, and committing acts of mass rape and burning of victims.

The impact of sexual violence experienced by Muslim women of Gujarat continues. The medical system has proved to be unresponsive to the needs of women who have been victims of violence including sexual violence. Survivors of sexual violence have little access to counseling, and issues relating to their sexual and reproductive health and rights are neglected. We found very little attention paid to issues relating to pregnancy, abortions and sexually transmitted infections as a consequence of sexual violence, and were appalled at the lack of safe spaces for women to recover and defend themselves. The medical system has also proved to be unresponsive to the needs of women who have been victims of violence including sexual violence. Survivors of sexual violence have little access to counseling, and issues relating to their sexual and reproductive health and rights are neglected. We found very little
attention paid to issues relating to pregnancy, abortions and sexually transmitted infections as a consequence of sexual violence, and were appalled at the lack of safe spaces for women to recover and defend themselves.

The few women who tried to bring charges of sexual violence have found the legal and investigative systems totally unresponsive to their needs. In many cases, it is the police who were the instigators and perpetrators of sexual violence against Muslim women. The entire system conspires to detract from the gravity of sexual violence as a crime including as a crime against humanity. In addition, patriarchal attitudes that prevail throughout the system preclude an unbiased approach on the part of the police and lawyers. The known connections of officials within the legal system including many members of the police, Public Prosecutors and the judiciary, with organizations of the Sangh Parivar clearly impairs the course of justice. In cases of sexual violence combined with murder, there is a tragic tendency to prioritise murder over rape. This situation has made it clear that the criminal justice system as it exists in India at present is not capable of dealing with incidents of sexual and other violence, particularly of a communal nature. What the experiences of Gujarat show more clearly than ever is the need to eliminate unjust evidentiary requirements that prevent prosecution without medical reports and other corroborating evidence.

Many women victims of sexual violence have been silenced, not only by the blatant biases against them at the level of the police, the medical and legal systems but also by their families and communities who seek to hide their ‘shame’. The forced marriage of young girls in an attempt to hide the fact that they had been raped, or as a preventative measure is but one terrible consequence of this situation. We met many mothers who admitted to us that they had been compelled to send their daughters ‘away’ or marry them off to men who they knew to be unsuitable. The failure of state agencies to prosecute perpetrators of violence means that rapists are free to continue to threaten and taunt women on a daily basis.

This situation is all the more unacceptable in the face of progress that has been made internationally in terms of prosecuting rape and sexual violence as torture, as a war crime and as a crime against humanity and genocide at the ad hoc Tribunals for the former Yugoslavia and Rwanda. These advances have now been expanded and codified in the Rome Statute of the International Criminal Court (ICC). (The emphasis is ours - Publisher.)

In addition, many testimonies point to the direct involvement of BJP, VHP and Bajrang Dal leaders as instigators and perpetrators of the violence in Gujarat. In a search for justice, holding public figures who bear a specific responsibility to safeguard democratic norms and human rights accountable is an essential step. This accountability has been demonstrated in the Tribunals for the former Yugoslavia and Rwanda, where public officials and public figures have been tried and convicted for the instigation and encouragement of crimes against humanity and genocide including sexual violence.

Despite the Indian government’s claims that normalcy has been restored, during our visits we have seen patterns of continuing violence that totally marginalize the Muslim community and convey to them that they do not have any place within the Indian nation today.

- We met many Muslims who had been displaced due to the attacks on their villages are not allowed to return to their homes. They continue to live in a state of limbo, unable to work, unable to send their children to school and with a deep sense of physical and mental insecurity. Even those few who remained in their villages and homes, or who have returned, are facing constant threats and insults. They fear to let children out of the home to play; they live a second-class and constrained existence and are denied freedom of movement even within the areas in which they live and work.

- In many cases, Muslims face an economic boycott, despite claims to the contrary. They remain unable to farm their fields, operate commercial vehicles, or return to their businesses. They are no longer allowed to rent stalls in public markets or fairs, and are being fired from their jobs including in the public sector. Muslims are also now forbidden to
engage in traditional occupations of the community, many of which have been taken over by others. This situation presents a grim parallel to the ghettoization and economic persecution faced by the Jewish community in Nazi Germany.

- The criminal justice system has failed to deliver justice to the victims of the violence. The Police have deliberately and consistently produced distorted, erroneous and incomplete complaints, or have refused to register complaints altogether. The investigations have almost always been biased, and in some cases false charge sheets have been filed against the victims themselves. While perpetrators continue to enjoy impunity, hundreds of Muslims remain in prison on false charges.

- Everywhere we went, in towns and villages, we met Muslims who spoke of being forced to ‘compromise’. They are being subject to constant pressure to withdraw their complaints, in exchange for being allowed to return to their homes. They speak of an increasing surrender of their social and cultural way of life, including prohibitions on prayer. The Muslims have also experienced the destruction of mosques, graves and community buildings as an attack on the community as a whole.

- The state continues to abdicate its responsibilities to the Muslim citizens of Gujarat in terms of support for survival needs, rehabilitation and reconstruction in the aftermath of the violence. It has left this process almost entirely in the hands of NGOs and charitable organizations. The fact that at present it is primarily Muslim organizations that are providing resources for relief and reconstruction in Gujarat points to shrinking secular spaces and heightens feelings within the Muslim community that they have been abandoned by the state and by fellow citizens and that it is only within their own community that they will find support and security.

- Administrative procedures are insensitive to, and obstruct access to redress for victims, such as widows’ pensions, school admission, documentation for ‘missing persons’; There is a lack of focus on specific issues faced by single women, widows, female heads of households especially in the context where their traditional systems of support have collapsed.

Analyzing and combating the continuing violence in Gujarat becomes all the more critical in the context of the recent elections. Given the failure of all other democratic institutions to protect them, the Muslims of Gujarat saw the elections as their last hope. They came out in large numbers to exercise their franchise as citizens in spite of widespread intimidation including use of hate speech and direct threats during the polling. In all our interviews, we found that the election had become such a critical watershed in their own perception of the future, that plans to return to their homes and rebuild their lives were put on hold until the results of the election were known.

In the post-election scenario, where the BJP won in all areas where violence was most widespread, Muslims feel that for them, all democratic options for justice and representation have been closed off. On the one hand the election results give the perpetrators of violence in Gujarat a ‘legitimate’ platform from which to deny that violence of this scale ever happened. On the other hand at the local level the pre-election as well as post election victory slogans not only explicitly admit the violence but also hold out the threat of its continuation. The election result reaffirms the impunity of those who unleashed and enacted the violence, and their renewed strength has increased fear among the Muslim community. Muslim women told us that slogans at the ‘vijay yatra’s directly stated that sexual violence against women would be a part of a future political agenda: ‘There is more violence to come’. (Aage aur dhamaal hain)

Post-election victory speeches and statements have also threatened all those who have tried to draw attention to the situation of the Muslim community in Gujarat, labeling them as ‘pseudo-secularists’ who try to ruin the image of Gujarat. For example, we cite Pravin Togadia’s statement, “All Hindutva opponents will get the death sentence and we will leave it to the people to carry this out”. (The Hindu, 18 Dec, 2002). Such statements enhance fear and insecurity among NGOs, community leaders and progressive media persons that they would be targeted next. In many villages women activists are being told ‘we know where you live, we know you go to
the field alone, what happened to Muslim women can also happen to you’. The tolerance of such hate propaganda is morally reprehensible, and in flagrant violation of national and international standards that prohibit the inciting of hatred against a community, as set out in the Convention against Genocide and in the International Covenant on Civil and Political Rights, to which India is a signatory.

At the conclusion of our visit, the most immediate need remains to guarantee safety, and legal and social justice to the victims of violence in Gujarat at the individual and collective level. Not only must the system of justice and law be re-defined in the context of the specific nature and form of the violence, so that individuals who have suffered may receive justice, but all those who bear responsibility for propagating and encouraging the violence through their political and other activities must be held accountable for their failure to protect the rights of Indian citizens and for the flagrant violation of international and national human rights norms and standards.

Even as we indict the state and its mechanisms for its failures to protect citizens and to provide redress for injustices, we also call upon all Indian people and civil society institutions to actively counter the campaign of hatred and fear that is at the core of this genocidal project. Active mobilisation against discrimination and hating-mongering against minorities and against women on the part of all sectors of society within and outside India is urgent. The international community, at the level of state, inter-governmental and non-state organizations, must condemn the advance of this genocidal project in India, and pressurise the government of India to protect human rights and democratic principles.

Anissa Helie (Algeria/France), Farah Naqvi (India), Gabriella Mischkowski (Germany), Meera Velayudhan (India), Nira Yuval-Davis (U.K.), Rhonda Copelon (U.S.A.), Sunila Abeysekara (Sri Lanka), Uma Chakravarty (India) and Vahida Nainar (India).

The International Initiative for Justice in Gujarat was organized by a group of women’s rights and human rights organizations in India. The panelists comprised of jurists, activists, lawyers, writers and academics from various parts of the world.

19

ICC-INDIA’S PRESS STATEMENT, 12 JULY 2002

ICC-INDIA: THE INDIAN CAMPAIGN ON INTERNATIONAL CRIMINAL COURT
PRESS STATEMENT, 12 July 2002

SHOCKING MOVE BY THE INDIAN GOVERNMENT

While the ICC Statute has come into force with effect from 1st July 2002, after reaching sixty ratifications within an overwhelmingly short period of time, the United States has been involved in an attempt to exempt all peacekeepers involved in peacekeeping operations of the United Nations from the jurisdiction of the ICC undermine the ICC.

In its latest attempt to seek such an exemption, through an open debate in the Security Council on 10th July 2002, it was supported by a single country – India. Though India has not signed the ICC Treaty, and is not yet convinced of the urgent need for an ICC, it was expected to do so with a passage of time. At the very least, it was not expected to hamper the effectiveness of the ICC, which has receiving overwhelming international support.

The Rome Statute of the ICC provides jurisdiction over some of the most serious crimes of concern to the international community. These crimes are so serious that the drafters of the Rome Statute consciously excluded immunities, even for Head of State or official acts. This basic and important principle should then not be corrupted in practice with respect to UN peacekeepers. Such an exemption would seriously undermine the legitimacy and credibility of the future Court, and its effectiveness in investigating heinous crimes that would otherwise be within its jurisdiction.

The United States is the only country that has been making sev-
eral attempts to exclude its own peacekeepers from the jurisdiction of the ICC. Despite signing the Treaty last year, the US government recently sent a letter to the UN to indicate it will not become a party to the ICC treaty and considers that it no longer has obligations arising from the Statute. It has also attempted passing a strong anti-ICC legislation in its Senate, and threatened to cut off military aid to countries that ratify the ICC treaty and would prohibit US cooperation even in a case of international terrorism. Given this recent history of the United States in its engagement with the ICC, it is appalling and shameful that India, which apparently stands for justice and rule of law, would join hands with it and be its sole supporter in undermining the efficacy of the ICC.

India’s shocking support to the US weakens the ability of the ICC to truly make a difference in preventing the commission of horrific crimes and providing justice in a fair and impartial manner when crimes do occur. ICC-India strongly condemns the act of the Indian government. Further it hopes that India will rethink further support for such a move, which would undoubtedly alienate it from the global community and question its commitment to human rights.

20

ICC-INDIA’S PRESS STATEMENT,
2 JANUARY 2003

ICC-INDIA: THE INDIAN CAMPAIGN ON INTERNATIONAL CRIMINAL COURT
PRESS STATEMENT, 2 January 2003
INDIA JOINS THE UNITED STATES IN ITS WAR AGAINST THE ICC

At a time when eighty-seven countries around the world have shown their support for establishing the International Criminal Court (ICC), India has moved a giant step backwards. On 26th December 2002, it entered into an agreement with the United States not to extradite each other’s nationals to “any international tribunal without the other country’s express consent.” The agreement has been signed at the initiative of the United States and gives a tremendous boost to the US efforts at sabotaging the establishment of the Court.

On 10th July 2002, India was the only country to enthusiastically support an American resolution in an open debate in the Security Council at the United Nations aimed at exempting its peacekeepers from the jurisdiction of the ICC. The debate ended with the Security Council passing a resolution that exempts all peacekeepers from the jurisdiction of the ICC for a renewable period of one year. With peacekeepers already exempt, one is left to question India’s motive to enter into such an agreement as expressed by the Indian Foreign Office spokesman - that India has concerns relating “to its Army personnel involved in international peacekeeping operations.”

The anti-ICC efforts of the US government have invited sharp
criticism from the international community. The European Union has denounced the American “impunity agreements” as inconsistent with international law. Despite the arm-twisting tactics used over last two years, the United States has managed to secure such agreements from only sixteen countries. However, the agreement with India is its major victory as all other agreements have been with small and economically developing countries.

Human rights defenders from India advocating for the ICC reacted strongly against the agreement. Vahida Nainar, a lawyer and activist involved in a larger effort to integrate gender concerns in the ICC for the past four years said, “The agreement marks an unprecedented shift away from India’s emphasis on justice, human rights and rule of law in global politics. It is deplorable to watch India wear the imaginary garb of a superpower and align itself with the US interests.”

“ICC-India”, which initiated the Indian campaign on ICC two years ago, today finds growing support from the Indian human rights movement towards ratification of the ICC Treaty. Mihir Desai, Executive Director of India Centre for Human Rights and Law, Mumbai, said: “India’s ratification of the ICC Treaty is a way of creating an international obligation for criminal acts committed by persons within the country.” Henri Tiphagne, Executive Director of People’s Watch – Tamilnadu, comments: “The urgent need for a campaign on the ICC in India arises from the need for accountability, justice and rule of law.”

The recent International Initiative for Justice in Gujarat has demanded in its interim report that India accedes to the Rome Treaty of the ICC and simultaneously introduces its provisions in domestic law. Ms. Nainar continued, “Seen in the context of the genocidal pogrom unleashed against the minorities in Gujarat since February this year, the agreement is an effort to avoid applicability of international jurisdiction for the most heinous crimes, one of the fundamental principles of customary international law, over its nationals, particularly those with political clout and patronage.”

A LETTER TO THE PRESIDENT OF INDIA

To

His Excellency Hon’ble A.B.J. Abdul Kalam
President of India.
New Delhi.

Date: Jan 20, 2003.

Respected Sir,

WHITHER NON-ALIGNMENT POLICY

INDIA JOINS U.S.’s “HAGUE INVASION”

I am writing to express my concern about our country’s policy on International Peace and Security. It is time that our PM comes out with a credible consistent policy.

Basing the history of the U.S., it is appalling and shameful that India which stands for justice and peace would join hands with US. India, known formerly for its policies of non-alignment is the only country supporting and assisting the U.S. to pursue its national interests thereby undermining the interests of humanity as a whole. India is making a grave mistake if it considers her national interests matches with those of the US.

The Bush administration has enlisted India in its campaign against the newly formed International Criminal Court. On December 26th representatives of both governments signed an agreement, which provides that neither country will surrender persons of the other country to any international tribunal without the other country’s
express consent. Of all the sixteen countries that have signed such bilateral agreements with the U.S.—most of them under pressure or threat—India is by far the most significant.

It is learnt that New Delhi’s concerns are related to its army personnel involved in international peacekeeping operations, while, according to The U.S. Ambassador, U.S. and India are concerned about the International Criminal Court treaty with respect to the inadequacy of checks and balances, the impact of the treaty on national sovereignty, and the potential for conflict with the UN Charter. While the Bush administration can be credited with consistency—though not principles—in its position on the International Criminal Court, India can claim neither consistency nor principles in this exercise.

The Rome Treaty of July 17, 1998 by which 160 nations decided to establish a permanent International Criminal Court to try individuals for the most serious offences of international concern, such as genocide, war crimes, and crimes against humanity, officially came into force on July 1, 2002. A critical missing link in the international legal system was thus provided.

At the United Nations Diplomatic Conference, which made the Agreement, the main objections raised by India were not against what was in the agreement but what was left out. The Head of the Indian Delegation had of course raised the question of sovereignty and told the Conference, “the ICC should be based on the principles of complementarity of state sovereignty and non-intervention in the internal affairs of state.” This is well taken care of in the Statutes.

The grounds for admitting a case to the Court are specified in the Statute and the circumstances that govern inadmissibility and unwillingness are carefully defined so as to avoid arbitrary decisions. In addition, the accused and interested States, whether or not parties to the Statute, may challenge the jurisdiction of the Court or admissibility of the case. They also have a right to appeal any related decision.

Since India takes such pride in the independence and efficiency of its criminal justice system, it contradicts itself when it states that its own judiciary will not seriously consider evidence of the quality necessary for a successful action before the Court.

The concern about peacekeepers also is unfounded. This issue was not raised by India at the Rome conference. The Court’s Statute provides special protection for peacekeepers by prohibiting intentional attacks against personnel, installations, material units, or vehicles involved in humanitarian assistance or peacekeeping missions. Such violations constitute war crimes and under certain circumstances also crimes against humanity. In addition, the Statute does not affect existing arrangements, for example, with respect to UN peacekeeping missions, since the troop-contributing countries continue to retain criminal jurisdiction over their members of such missions.

In fact India’s main objections at the last stage of the Conference related to the non-inclusion of terrorism and the first use of nuclear weapons in the list of crimes. The Indian delegate described terrorism as “the most condemnable form of international crime.” He said, “It is ironic that the Statute treats offenses such as murder as international crime, but refuses to treat the first use of nuclear weapons as international crimes.”

It is ironic that India, which had tabled an amendment in Rome to include the use of nuclear weapons as a crime, has signed an immunity agreement with the United States, which in its current strategic posture has stated that it will use nuclear weapons in the face of “surprising developments”—even against non-nuclear states.

At the time of voting on the Statutes of the International Criminal Court, the Indian “non-position” puzzled many diplomats, who saw a confusion of thought rather than a principled stance.

On 3rd August U.S. President George W. Bush signed into law the American Service Members Protection Act of 2002, which is intended to intimidate countries that ratify the treaty for the ICC. The new law authorizes the use of military force to liberate any American or citizen of a U.S.-allied country being held by the Court, located in The Hague. The provision dubbed the “Hague Invasion Clause” caused a strong reaction from U.S. allies around the world.

The agreement on “impunity,” which shows that India has joined
U.S. in its “Hague Invasion,” has to be seen against the Bush doctrine of war fighting and the new strategic alliance between the two countries.

The notion of international impunity is a key concept of the Bush doctrine of war fighting. “Changing the regime of an adversary state” and “occupying foreign territory” are important parts of the Bush doctrine evolved in the context of the War on Terror. India was one of the first countries to declare unequivocal support for the Bush administration’s War on Terror.

The current leadership in New Delhi has since been dismantling the entire rationale of non-alignment and the edifice of an independent foreign policy, thus subjugating India’s national interests to U.S. war plans to preserve the lifestyles of wealthy elite of USA.

It is hoped that you will take necessary leadership steps to safeguard the interest of the humanity as a whole and ensure respect the HAGUE Regulations, the four Geneva Conventions as well as the views of the global community instead of joining with the US.

I now await your communication

BE WELL and PROSPER
IN LIGHT,UNITY, LOVE. PEACE and GOODWILL.

J. Vaidyanathan.
13/16, Anna Avenue,
Adyar, Chennai 600 020.
Phone: 091 - 44 – 2441 3145.

Notes on Authors of the Articles

J. Vaidyanathan is a founder member of Tamil Nadu United Nations Association. He works on human rights issues, including the campaign on ICC in India.

Ram Jethmalani is a leading advocate of the Supreme Court of India. He is famous for his defence of the prime accused in the Indira Gandhi assassination case. Jethmalani has functioned as a Union Minister for urban development, as well as a Union Minister for Law, Justice and Company Affairs. As a law minister, he vowed to reform the country’s legal system. In the year 2000, he opposed the Indian government’s attempt to introduce a new law on terrorism. In July 2000, he resigned from the union cabinet. In 2002, Jethmalani set up and headed a seven-member private citizens’ group on Kashmir, in an attempt to try to find a permanent solution to the Kashmir problem.

Ravi Nair is the Director of South Asian Human Rights Documentation Centre, based in Delhi, India. The Centre seeks to investigate, document and disseminate information about human rights treaties, conventions, human rights education, refugees, media freedom, prison reforms, political imprisonment, torture summary executions, disappearances and other cruel, inhuman or degrading treatment. Ravi Nair was previously with Amnesty International in London. He serves on the board of the International Service for Human Rights, and has been an international consultant to the Office of the High Commissioner for Human Rights. He is a noted speaker and writer on human rights issues.

Saumya Uma is a lawyer and a women’s rights activist. She graduated from National Law School of India, Bangalore, in 1994. She worked with Majlis, a legal and cultural centre for women, based in Mumbai, from 1994 to 1998. During this time, she represented women in cases of domestic violence in the Bombay High Court.
and Family Court. She obtained an LL.M. in Human Rights and Family Law from Bombay University, and an LL.M. in International Human Rights from University of Nottingham, U.K. Subsequently, she worked for a year with India Centre for Human Rights and Law, Mumbai, in the capacity of Assistant Director. She initiated ICC-India, the Indian awareness campaign on the International Criminal Court, two years ago and continues to coordinate the campaign. She also presently heads Women’s Research and Action Group, Mumbai.

_Usha Ramanathan_ is a New Delhi-based researcher in law. She studied law at Madras University and at the University of Delhi. She is expected to complete her PhD this year. She currently teaches at the Indian Law Institute and conducts training programmes at NIPPCID in New Delhi. Her research interests include environmental law and policy, human rights, children rights, women rights, labour law, marginal communities and the law, and torts. Usha participated actively in the negotiations during the Rome Conference on the International Criminal Court in 1998, and also delivered lectures on ICC in parts of India soon after the conclusion of the Conference. She has written several well-researched articles on ICC. These have been published in mainstream journals in India.

_Vahida Nainar_ is a lawyer and women’s rights activist. She participated at the Rome Conference in July 1998 in the delegation of the Women’s Caucus for Gender Justice (WCGJ) advocating for gender issues in the statute of the International Criminal Court treaty. Subsequently, as the Executive Director of WCGJ, she led the delegations of Women’s Caucus in eight preparatory commission meetings of the ICC from 1999 – 2001, negotiating gender issues in the operative documents of the Elements Annex and Rules of Procedure and Evidence. She has organized and conducted several trainings and workshops on Gender, ICC and international justice mechanisms. She is the co-founder of Women’s Research and Action Group, Mumbai.
OTHER PUBLICATIONS

English

- Adivasi women and customary law and practices (forthcoming)
- A set of 5 booklets on Muslim personal law by Noorjehan Safia Niaz, 2003
  Book 1: History of Development of Islamic Law
  Book 2: Understanding & Interpretation of Quranic Verses on Divorce
  Book 3: Laws Governing the Muslim Community
  Book 4: Maintenance after Divorce: A Major Concern of Muslim Women
  Book 5: Sources of Islamic Law
    Muslim Women’s Views on Personal Laws:
    The Influence of Socio-economic factors
    Vahida Nainar, 2000
- Shah Bano and the Muslim Women Act a Decade on
  Lucy Carroll (ed.), 1998
- Aspects of Culture & Society: Muslim Women in India
  WRAG, 1997

Hindi

- A set of 5 booklets on Muslim personal law, by Noorjehan Safia Niaz (forthcoming)
- Mahila Kanoon 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 distributed in India by WRAG.

WOMEN’S RESEARCH & ACTION GROUP

PO.Box No. 6830, Santacruz (E), Mumbai 400 055
Ph: +91-22-2610 0400 / 2615 5031 Fax: 2615 5031
Email: wrag@vsnl.com

COMBATING IMPUNITY

A COMPILATION OF ARTICLES ON THE INTERNATIONAL CRIMINAL COURT AND ITS RELEVANCE TO INDIA

Compiled by
Vahida Nainar & Saumya Uma

WOMEN’S RESEARCH & ACTION GROUP