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article 2

2(3). Each State Party to the present Covenant undertakes:

a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

c) To ensure that the competent authorities shall enforce such remedies when granted.

of the International Covenant on Civil and Political Rights

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About *article 2*

article 2 aims at the practical implementation of human rights. In this it recalls article 2 of the International Covenant on Civil and Political Rights (ICCPR), which reads,

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
>
> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

This is a neglected but integral article of the ICCPR. If a state signs up to an international treaty on human rights, it must implement those rights and ensure adequate remedies for persons whose rights have been violated. Mere talk of rights and formal ratification of international agreements has no meaning. Rights are given meaning when they are implemented locally.

Human rights are implemented via institutions of justice: the police, prosecutors and judiciary. If these are not functioning according to the rule of law, human rights cannot be realized. In most Asian countries, these institutions suffer from grave defects. These defects need to be studied carefully, as a means towards strategies for change.

Some persons may misunderstand this as legalism. Those from countries with developed democracies and functioning legal systems especially may be unable to grasp what it means to live in a society where 'institutions of justice' are in fact instruments to deny justice. As persons from such countries guide the global human rights movement, vital problems outside their experience do not receive necessary attention. For people in many countries, international human rights discourse then loses relevance.

After many years of work, the Asian Legal Resource Centre began publishing *article 2* to draw attention to this vital provision in international law, and to raise awareness of the need to implement human rights standards and provide effective remedies at the local level in Asia. Relevant submissions by interested persons and organisations are welcome.

Contents

Closing remarks at the "International seminar on major issues relating to the International Criminal Court"

Professor Zhao Bingzhi, Director, Research Center for Criminal Jurisprudence, Renmin University, Beijing

The "International seminar on major issues relating to the International Criminal Court" was co-organized by the Research Center of Criminal Jurisprudence, Renmin University, and the Asian Legal Resource Centre. It was held in Haikou, Hainan Province, China, and finished successfully after three days. As one of the organizers, I would like to assess the significance of this seminar in three respects.

First, while focusing on a very important issue, this international seminar was forward-looking and it has opened up new frontiers. Undoubtedly, the establishment of the International Criminal Court (ICC) and its entry into force on 1 July 2002 is a new and very important issue that cannot be ignored by any country, considering the globalization of cooperation in economic, political and legal affairs. Although China has not ratified or acceded to the Rome Statute of the ICC, as a responsible and large developing country that has been carrying out economic and legal reform, China has been paying close attention to the establishment and operation of the ICC. To carry out an in-depth study on the major issues relating to the ICC has a very important and realistic meaning for China. This was the first international seminar focusing on the ICC held in China.

Secondly, the international seminar received great attention with wide and active participation. The two co-organizers and co-hosts are important and influential bodies. The Research Center

The "International seminar on major issues relating to the International Criminal Court" was held in Haikou, Hainan, People's Republic of China, 9–12 February 2003. The seminar was co-organized by the Research Center for Criminal Jurisprudence at Renmin University, Beijing, and the Asian Legal Resource Centre, based in Hong Kong SAR. In addition to being director of the Research Centre for Criminal Jurisprudence, Professor Zhao Bingzhi is vice-dean of the Law School at Renmin University. The above remarks are a translated and edited version of his original statement.

for Criminal Jurisprudence of Renmin University is the only research agency established with the approval of the Ministry of Education for nationwide study of criminal law. In recent years, it has been playing an important function in the development of criminal jurisprudence and criminal law. The other organizer, the Asian Legal Resource Centre, is an important agency committed to promoting understanding of international legal development in relation to the United Nations, including the ICC. For many years, it has established a close relationship with the Chinese legal community and the Supreme People's Court of China, in terms of legal exchange and cooperation. The two co-hosts, Hainan University and the Southwest University of Politics and Law are famous universities in China.

The Research Center of Criminal Jurisprudence of Renmin University and the Asian Legal Resource Centre held several meetings and worked seriously to prepare for the seminar. The Hainan University and the Southwest University of Politics and Law provided great support. All these efforts contributed to its success. The Chinese and foreign legal communities attached great importance to the seminar and participated actively. There were about sixty participants. Including a number of post-graduate and undergraduate students of Hainan University, there were more than one hundred people taking part. Among the participants, about ten were experts and scholars from foreign countries, Hong Kong Special Administrative Region, and Macau Special Administrative Region. Participants from mainland China included experts from the Supreme People's Court, the Supreme People's Procuratorate, the Public Security Ministry, the Ministry of Justice, the Ministry of Foreign Affairs, famous scholars and young intellectuals from more than ten law schools, universities and research agencies and a number of officials and personnel with expertise from the political and legal bodies of Hainan province. The wide representation and high expertise of the participants was the main guarantee of the success of this seminar.

Thirdly, this seminar bore plenty of fruit. Forty-three Chinese and English papers were submitted, concerned with different aspects of the ICC. The organizers divided the papers into the following areas:

- Fundamental theories on the ICC;
- Issues concerning the jurisdiction of the ICC;
- Crimes within the jurisdiction of the ICC;
- The jurisdiction of the ICC and criminal responsibility;
- Norms of international criminal law in Chinese criminal law and practice;
- China and the ICC, and,
- The operating mechanisms of the ICC.

During the seminar, participants presented their papers and discussed them vigorously. The ICC is a very difficult subject that requires high expertise. Considering the current lack of study on this subject in China, it is significant to have had so many high-standard papers with original ideas. The discussion on the norms of international criminal law in Chinese criminal law, and the relationship between China and the ICC, was very useful for both Chinese and foreign experts and scholars to understand the norms, theories and practices in China. It was also very important to those studying how to improve the incorporation of the norms of international criminal law into Chinese domestic law. Based on the standard of the papers presented and the discussion during the seminar, we can say that it was a high-standard international seminar.

In light of the above three observations, we can recognize that this international seminar has had great meaning and has made a significant contribution to this field of study. During the seminar, Chinese and foreign legal experts took part in an effective scholarly exchange on different aspects of the ICC. Through their studies, the Chinese experts and scholars have raised the level of Chinese study on the ICC. The seminar and the views presented will have a positive influence upon Chinese legal studies. As a whole, this seminar was successful and satisfactory. It will leave its footprints clearly on the road exploring the theories and practices of the ICC in China, Asia and the world.

The International Criminal Court and its effect on Asia

Basil Fernando, Executive Director,
Asian Legal Resource Centre

Equality before international law", is a less commonly heard expression than simply "equality before the law", meaning equality within local jurisdictions. In fact, in Asia the overwhelming assumption is that there is no equality in international law. That assumption arises because international law has developed in favour of the historic colonial powers and worked against the interests of 'non-western' countries. However, since the Second World War the emergence of the United Nations has fuelled a counter-assumption, that equality before international law is not only possible but can in fact be the only basis for international relations.

The Non-Aligned Movement—which brought together countries from Asia, Africa and the Arab world during the mid-twentieth century—was intended as a united voice of disparate nations pursuing interests that did not correspond to those of the superpowers. After initial enthusiasm, however, it died away. Similar alliances have emerged from time to time. Presently, there is a growing movement to address global disparities of wealth as a matter of international justice. Without resources, many societies are unable to combat absolute poverty and disease, including HIV/AIDS. Over time, these inequities are increasingly being seen as gross human rights abuses subject to international law. Sometimes a shift in perspective is as important as the creation of a new institution, because it may contribute more effectively to improved international relationships.

However, without the possibility that international norms and standards may be upheld on a judicial basis, rather than on a political basis, the realization of equality before international law is an ideal that can be treated sceptically. While the ideal is yet to be realised, with the International Criminal Court (ICC) becoming

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a reality, using the Rome Statute as its basic law, the global debate on equality before international law has taken a giant step forward. This will have tremendously important consequences on thinking about both international and domestic law in Asia.

"Popular realization that even the highest in power cannot escape justice will inevitably lead to a more optimistic view of political life and social change."

For the historically 'weaker continents', the emergence of the International Court is much more important even than the emergence of the United Nations, though they are interrelated. The reason is that the United Nations is basically a political institution, which constantly gives rise to political game-playing, where the more powerful have advantage over the less powerful. The effect of the ICC is substantially different, as being a judicial institution, by its very nature it will exclude power politics. Therefore, international equality is no longer based purely on political considerations. International issues that had previously been subject only to political pressure may now become subject to judicial scrutiny. That a juridical element has entered into the equation opens new opportunities for the 'weaker' parties of the United Nations system. Some of these opportunities, and possible consequences, are suggested below.

First, the possibility of looking into the past from a juridical position—which suggests that if something happens again there now exists a very different way of dealing with it—creates a new intellectual climate. The ability to look back to the past acts of colonial powers—such as massacres, torture, genocide, war crimes, and crimes against humanity—as crimes that if repeated will end up before the ICC suggests a change in mentality of historical importance.

Secondly, the pursuit of crimes recognised in the Rome Statute through an international judicial institution teaches a lesson on the limits of what can be done and not done where and when politically expedient. Popular realization that even the highest in power cannot escape justice will inevitably lead to a more optimistic view of political life and social change. Such a shift in view has great potential to generate creative energies and encourage further constructive change. Thus, while at this time only a limited number of people globally are actively involved and interested in its development, mass support and interest is likely to follow. As local movements grow in support of international justice, it will be much more difficult for powerful elites to halt the trend. Even the few international tribunals that have been established in recent times, and some cases before domestic courts—such as the Pinochet case in Britain—have had a powerful effect. The prospect of criminal sanctions for those violating international law is no longer a fantasy. Rulers may be increasingly careful in their actions, and human rights defenders are more determined to record violations accurately, improve documentation and acquire greater skills in preparing evidence, for use at an international tribunal. Thus, an entirely new culture of justice is likely to emerge, both nationally and internationally, in the near future.

Thirdly, the ICC can also give rise to more consensual forms of governance. Citizens and states may cooperate in new and more invigorating ways when both are aware of the limits to the use of power. What is defined by international law and implemented by an international court can have a powerful effect on the internal management of a nation. In particular, the possibility that internal jurisprudence may be developed in keeping with international law is now more likely than before.

"Sri Lanka is one country where an international tribunal could play a significant role in the case of a crime against humanity"

Sri Lanka is one country where an international tribunal could play a significant role and address domestic frustration over the failure of the state to prosecute in the case of a crime against humanity. There, thousands of people are known to have disappeared at the hands of state agents from the late 1980s to early 1990s. The United Nations Working Group on Enforced or Involuntary Disappearances noted in 1999 that

> Three regional Presidential Commissions of Inquiry into Involuntary Removal of Persons set up in 1994 submitted their reports to the president of the republic on the 3 September 1997. The commissions investigated a total of 27,526 complaints and found evidence of disappearances in 16,742 cases. A further 10,135 complaints submitted to the commissions by relatives and witnesses remained to be investigated by the present (fourth) Presidential Commission of Inquiry.

The Final Report of the Commission of Inquiry into Involuntary Removal and Disappearance of Certain Persons (All Island) (Sessional Paper No. I - 2001) dated March 2001 stated that it had been given 10,136 complaints to investigate in which "no investigations [had] commenced" by earlier commissions. The Final Report also stated that at least a further 16,305 cases had been brought to the Commission's attention that it was not empowered to investigate (ch. VII, p. 45), making the number of disappearances in Sri Lanka one of the largest in any country in modern times. However, except in a few cases, no adjudication has occurred. Nor has the larger issue of the causing of widespread disappearances been seriously considered.

The Asian Legal Resource Centre has consistently submitted written statements of concern regarding disappearances in Sri Lanka to the United Nations Commission on Human Rights, but to date has not achieved tangible results. In its most recent statement, to the fifty-ninth session of the Commission, the Asian Legal Resource Centre observed that

> While this gross violation of human rights has been assessed, to date, no measures have been proposed to adequately deal with it, neither by international nor domestic agencies. The lack of genuine initiatives by the authorities to prosecute the perpetrators of enforced and involuntary disappearances has demoralised the families and loved ones of victims. Such reluctance to act according to law and punish the perpetrators has also reinforced the general loss of faith in the rule of law and law enforcement agencies in Sri Lanka, especially the Department of the Attorney General, which acts as the chief prosecuting authority. Meanwhile, as the government of Sri Lanka has ignored most recommendations coming from the Working Group and also all of the domestic Presidential Commissions of Inquiry—which even named some

of the persons to be investigated further and prosecuted-disappearances have continued; the National Human Rights Commission is investigating new cases.

"As all the cases that come before the ICC will receive colossal publicity, it is likely to play on the imagination of people everywhere"

Cambodia is another country with a judicial system desperately in need of international models and support. Despite ten years having passed since the United Nations sponsored elections in Cambodia, there has not been even an inch of progress in reforms to the law enforcement system there. This failure is the number one obstruction not only of Cambodian democracy but also its return to the rule of law. Anarchy and chaos prevail in Cambodia as it lacks a foundation upon which to cement an orderly society. Although the Asian Legal Resource Centre has made frequent urgent calls to prioritise police, prosecution and judicial reforms there, these have fallen on deaf ears. To date neither a proper Penal Code nor Criminal Procedure Code exists.

The international community, which has spent time and resources aiming to set up an international court to try former Khmer Rouge leaders, has done nothing to help improve the local 'justice system', which deprives every living Cambodian the possibility of enjoying a society that respects the law. Rather than concerning itself with such a tribunal, the international community owes it to Cambodia first to reflect upon the failures of the mission undertaken by the United Nations ten years ago, which aimed to build a liberal democracy there, but fell far short of its goal. This failure should be acknowledged but regarded not as a matter of shame so much as a question of integrity for the United Nations and other international agencies.

Many Asian countries are still developing the domestic principles and means to ensure the rule of law. This can be difficult without models to emulate. A functioning and procedurally just international court can act as a model for local courts. As all the cases that come before the ICC will receive colossal publicity, it is likely to play on the imagination of people everywhere. The large impression that it will create may contribute to similar practices in local courts, thus enhancing the rule of law everywhere.

Will the International Criminal Court be fair and impartial?

Dr Lyal S Sunga, Associate Professor,
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The Centre for Criminal Jurisprudence of the Peoples' University (Renmin) in Beijing and the Asian Legal Resource Centre are to be commended for having organized the "International seminar on major issues relating to the International Criminal Court". Because China is Asia's regional superpower, there is great significance of holding this international seminar on the International Criminal Court (ICC) in China. This is not only because it brings together academics, practitioners and government officials from China and abroad, but also because it stimulates wider debate in official circles on the potential value of the ICC for China and the region.

The future prospects for the effective enforcement of international criminal law depend much upon the degree to which the new ICC is perceived to be fair and impartial. This in turn hinges on the ICC's level of respect for the rights of suspects, the accused and convicts at various stages of its procedure.

This paper highlights the right to fair trial in international criminal justice from the Nuremberg and Tokyo trials, to the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Court for Rwanda (ICTR) and the ICC. It argues that respect for the human rights of the alleged offender

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will be critical to the ICC's legitimacy as an exponent of international criminal justice and in turn will determine whether the ICC will be effective over the longer term.[1]

"Because all those brought to trial at Nuremberg and Tokyo were from the defeated countries, the defence could argue convincingly that the trials were politically one-sided"

The Nuremberg and Tokyo International Military Trials: Fair and impartial?

The Nuremberg and Tokyo Charters each contained a part entitled "Fair Trial for Defendants", guaranteeing defendants the right to be informed in detail and in reasonable time of the charges against them, duly translated into a language they understood, as well as the right to have the charges explained to them. Defendants could conduct their own defence or request the assistance of counsel. They could present evidence at trial and cross-examine prosecution witnesses.

Despite these and other rights to fair trial, the Nuremberg and Tokyo Trials became widely criticized for having been unfair. Serious substantive and procedural shortcomings in both sets of trials led many to denounce them as 'victors' justice'. Numerous scholars agree that both international military tribunals violated the fundamental principles of *nullum crimen sine lege* and *nulla poena sine lege*, i.e. that there shall be neither crime nor punishment unless law so declares.[2] It is well known that the tribunals prosecuted individuals for 'crimes against peace' and 'crimes against humanity' which, prior to World War II, were not defined for the purposes of imposing individual criminal responsibility. This explains why the United Nations War Crimes Commission established by the Allied Powers in October 1943 had considerable difficulty reaching consensus as to whether to prosecute individuals only for war crimes (already established as legal category) or also for crimes against humanity (which was new but arguably within the spirit of the ancient customary *jus in bello*)—as well as for the planning, preparing, initiating or waging of a war of aggression, or 'crime against peace' (which was not established at all as a crime giving rise to individual responsibility).[3]

Both the Charters of Nuremberg and Tokyo permitted trial *in absentia* which today is recognized to contradict the right of the accused to defend himself or herself.[4] Also, the international military tribunals could and did in fact enforce the death penalty.[5] Trial *in absentia* and enforcement of the death penalty at Nuremberg and Tokyo have to be considered all the more serious together with the fact that no one convicted of a crime by either international military tribunal had a right to appeal against his or her conviction.[6]

Because all those brought to trial at Nuremberg and Tokyo were from the defeated countries, and the judges were drawn only from the victor nations,[7] the defence could argue convincingly that the trials were politically one-sided. Although the political climate of the time made it almost unthinkable to prosecute Allied war criminals, that not a single Allied commander or soldier had to answer for the indiscriminate bombing of Dresden, Hiroshima,

Nagasaki, or other civilian targets, reinforces the impression of 'victors' justice'. While this defence argument failed to sway the bench, except for Justice Pal,[8] post-Second World War learned legal opinion could not ignore it.

> "Modern international human rights standards on the administration of criminal justice apply to arrest and detention, pre-trial and trial phases"

The right to fair trial in international human rights law

Modern international human rights standards on the administration of criminal justice apply to arrest and detention, pre-trial and trial phases, including conditions of detention from the moment of arrest to the end of a term of imprisonment. The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) both prohibit arbitrary arrest and detention. In case of arrest, a person has the right to be informed of the reasons for his or her arrest, which should be carried out according to law and subject to judicial supervision and control. An individual has a right to be presumed innocent until proven guilty as well as the right to seek legal assistance and to be brought promptly before a judge or other officer authorized by law to exercise judicial authority. Article 10 of the UDHR recognizes the right to fair trial as a fundamental human right.[9] The "right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence" is provided for in article 11.1 of the Declaration.

The basic elements of the right to fair trial are expressed in article 14 of the ICCPR, which provides the accused with the following rights:

- Equality before the courts;
- A fair and public hearing;
- The presumption of innocence until proved guilty according to law;
- The informing of any charge promptly and in detail;
- Adequate preparation of a defence;
- Trial without undue delay;
- Presence at trial;
- The presenting of a defence in a language of one's own choosing;
- The examination of witnesses on an equal basis as the prosecution;
- The benefit of an interpreter where required;
- The right to remain silent;
- The right to an appeal;

• Compensation in case of a miscarriage of justice; and,

• Benefit from the principle of *non bis in idem*, i.e. the right of the accused not to be tried or punished more than once for an offence for which he or she has been convicted or acquitted.

"International humanitarian law guarantees the right to fair trial to prisoners of war in international armed conflict, and also sets a minimum standard for non-international armed conflict."

Finally, where the right to fair trial has been breached, the ICCPR guarantees the right to an effective remedy.

The right to fair trial is affirmed also in certain other multilateral human rights conventions, such as the Convention against Torture, the Convention on the Rights of the Child, the Convention against Racial Discrimination, and the Convention on Discrimination against Women. Numerous other international human rights instruments address the administration of criminal justice directly or indirectly, such as the General Assembly's Basic Principles on the Independence of the Judiciary and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[10] among others.[11] The European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights also guarantee the right to fair trial.

International humanitarian law guarantees the right to fair trial to prisoners of war in international armed conflict, and also sets a minimum standard for non-international armed conflict. In particular, Chapter III of the Third Geneva Convention of 1949 concerns penal and disciplinary sanctions that may be imposed by the Detaining Power. Chapter III encourages the Detaining Power to exercise the greatest leniency and adopt disciplinary rather than judicial measures (article 83). It also guarantees that a prisoner of war shall be tried by a military court, not a civilian court—except in certain cases—and affirms the basic principle of *non bis in idem*. Article 87 prohibits collective punishment for individual acts, corporal punishment, torture and cruelty, and provides that prisoners of war

> May not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts.

This is an important non-discrimination limitation on the range of penalties. Provisions relating to the imposition of the death penalty, conditions of detention while a prisoner awaits trial, notification of proceedings, the right to call witnesses, access to legal counsel and to prepare a defence, the right to an appeal and notification of findings and sentence, are found in articles 99 to 108 of the Third Geneva Convention.

Fair trial guarantees and rights relating to the treatment of detainees are found also in articles 71 to 78 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. Article 75 of Protocol I relating to international armed conflict supplements the provisions in the Third and Fourth Geneva Conventions. Article 3 common to the four Geneva

Conventions, applicable to non-international armed conflict, prohibits "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". Article 6 of Additional Protocol II, which applies to "the prosecution and punishment of criminal offenses related to the armed conflict", supplements common article 3 in connection with non-international armed conflict.

"The ICTY and ICTR statutes provide for individual criminal responsibility only for acts that have become well established as constituting crimes under international law"

The right to fair trial in the ICTY and ICTR

In contrast to the Nuremberg and Tokyo Tribunals, the ICTY and ICTR were established not through the joint exercise of municipal military jurisdiction, but by the United Nations Security Council on the basis of chapter VII of the Charter of the United Nations. ICTY and ICTR judges are drawn not from victor countries to judge the vanquished, but from a range of countries to judge perpetrators from all sides of the conflict, over which each exercises competence. However, the ICTY and ICTR can be criticized for being politically selective, since the Security Council did not set up tribunals to address similar violations in other countries.

Unlike the Nuremberg and Tokyo Charters, the ICTY and ICTR statutes provide for individual criminal responsibility only for acts that have become well established as constituting crimes under international law and have been defined as such with some precision.[12] Neither statute allows for trial *in absentia* and in line with the abolitionist trend in modern international human rights law, nor do they provide for imposition of the death penalty.

In contrast to the Nuremberg and Tokyo Charters, the ICTY and ICTR provide for a full right of appeal against convictions on an error of law invalidating the decision, or on an error of fact which has occasioned a miscarriage of justice. The Appeals Chamber has the authority to affirm, reverse or revise the decisions taken by the Trial Chambers. Moreover, the Rules of Procedure and Evidence provide the accused with the right of appeal on an interlocutory basis from a denial of provisional release or from being found in contempt of court. However, as Scharf has argued, the rotation of Tribunal judges between the appellate and trial levels results in the lack of an effective appeal for the accused in the sense of article 14.5 of the ICCPR, which guarantees that, "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."[13]

Certain other rights not found in the Nuremberg and Tokyo Charters, such as the right to have access to exculpatory evidence in the possession of the Prosecutor, and the right against self-incrimination, are provided for in the ICTY and ICTR statutes.

The issue as to whether an order to conduct *in camera* proceedings to protect the identity of victims—a protective measure contemplated in both statutes—violates the right of the accused to a public hearing, arose in the *Tadic Case*. In that instance

"The Rome Statute envisages the systematic and comprehensive application of international human rights standards in ICC procedures"

Trial Chamber II held that the protection of victims and witnesses is a valid reason to limit the right of the accused to a public trial.[14] It was held in *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses* that the identity of certain prosecution witnesses could be withheld indefinitely from the defence—a decision that greatly hinders the right of the accused to conduct cross-examination.[15]

The right not to be subjected to double jeopardy also figures in the ICTY and ICTR statutes, which prohibit a person from being tried by a national court in respect of acts for which the person has been tried already by the International Criminal Tribunal.[16] This guarantee was absent from the Nuremberg and Tokyo Charters.

International human rights standards on fair trial are well reflected in the ICTY and ICTR Statutes and Rules. Articles 20 & 19 of the ICTY and ICTR statutes respectively provide that the Trial Chambers shall ensure that trials are

> Fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

Articles 21 & 20 of the ICTY and ICTR statutes respectively incorporate almost verbatim the provisions on the rights of the accused to a fair trial from article 14 of the ICCPR.[17]

The right to fair trial in the ICC

The Rome Statute envisages the systematic and comprehensive application of international human rights standards in ICC procedures. Article 21.3 provides that

> The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Article 55 of the statute—concerning the rights of persons during an investigation—follows the ICCPR, among other international human rights instruments. Article 55.2—concerning human rights observance in cooperating states—is particularly important. It reads:

> Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned...

The article then lists the right to be informed, to remain silent, to have legal assistance and to be questioned only in the presence of counsel.

Article 63 provides for the trial in the presence of the accused and addresses the situation where the accused continues to disrupt the trial. In such case

> The Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Article 64.2 provides that the Trial Chamber "shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses". Importantly, the "protection of the accused, witnesses and victims" figures also among the Trial Chamber's functions and powers (in article 64.6.e). Provisions guaranteeing the rights of the accused to have a public trial, and not to make a confession except voluntarily after "sufficient consultation with Defence counsel" are in articles 64 & 65 concerning the role of the Trial Chamber and the Pre-Trial Chamber and proceedings on an admission of guilt, respectively. The right of everyone to be presumed innocent until proved guilty is provided for in article 66, in economical wording.[18]

Article 67 on rights of the accused, provides detailed *minimum* guarantees, "in full equality" of the right of the accused to

- A fair, public and impartial hearing;
- Be informed promptly and in detail of the charges in a language which he or she understands and speaks;
- Prepare an adequate defence and communicate freely with counsel;
- Be tried without undue delay;
- Be present at trial and to conduct the defence in person;
- Have free legal assistance assigned by the Court in case he or she does not have legal assistance;
- Examine witnesses under the same conditions as witnesses against him or her;
- Have translation and interpretation as needed;
- Not be compelled to testify against himself or herself; and,
- Have access to exculpatory evidence in the possession of the prosecutor.

It is important to note also that the Rome Statute's provisions on the participation of victims and witnesses in the proceedings and on evidence (articles 68 & 69) are to be applied in ways that are not prejudicial to, or inconsistent with, the rights of the accused.

In conformity with international human rights standards, violation of the rights of the accused must be redressed with just compensation. In this regard, article 85 of the Rome Statute, entitled "Compensation to an arrested or convicted person",

provides in paragraph 1 that, "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." This remedy is lifted word for word from article 9.5 of the ICCPR. The rest of article 85 sets out a framework for compensation to be awarded to a person whose conviction has been reversed in circumstances amounting to a miscarriage of justice, or to a person who has suffered such injustice and has already been released. Article 85.3 states that:

> In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or termination of the proceedings for that reason.

"The Rome Statute imposes direct obligations upon State Parties to support and cooperate with the ICC"

However, article 85 does not clarify what kinds of violations committed by whom should be considered of sufficient gravity to trigger the right of a person acquitted or released by the court to receive compensation. Whether the obligations on the ICC imposed by article 85 will prove to be sufficient to safeguard the integrity of international criminal legal process and the legitimacy of the court will depend very much on how article 85 is eventually applied.

The Rome Statute imposes direct obligations upon States Parties to support and cooperate with the ICC. Moreover, according to the Vienna Convention on the Law of Treaties, even signatory states that have not ratified the statute must "refrain from acts which would defeat the object and purpose of a treaty".[19] In particular, Part 9 of the Rome Statute makes clear that the ICC provisions entail mandatory obligations on domestic jurisdictions, thereby establishing a vertical rather than horizontal relationship, with the ICC prevailing. Article 86 provides that, "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court." Article 88 is particularly important in relation to the observance of international human rights standards by cooperating domestic states because it obliges States Parties "to ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part". In the case of state non-cooperation, article 87.7 basically provides the ICC with the option to refer the matter to the Assembly of States Parties or, where the Security Council had referred the situation to the Court, to the Security Council. Article 89 concerns procedures for the surrender of a person to the Court. The rest of Part 9 covers the procedures for provisional arrest, competing requests for surrender of the suspect to the Court, contents of request for arrest and surrender, and other forms of cooperation and related issues.

Even after trial and conviction, prisoners shall serve sentences in the detention facilities of cooperating states, which are legally bound to observe the minimum standard of human rights for detainees.[20]

Concluding remarks

Many governments are likely to wait until the ICC demonstrates its trustworthiness in rendering fair and impartial justice before seriously considering joining the ICC regime. An important test will be whether the ICC can meet the high standard of protection for the human rights of the suspect, accused and convict, and ensure that states cooperating with it also meet this standard.

The challenge for the ICC will be to guard with great vigilance at least the minimum standards of human rights protection for every individual touched by the workings of international criminal justice. If the ICC lends the impression of being driven by politics rather than justice, or if it fails to guard the human rights of the suspect, accused or convict, it will lose legitimacy and eventually become ineffective.

"If the ICC lends the impression of being driven by politics rather than justice it will lose legitimacy and eventually become ineffective"

End Notes

[1] For fuller treatment of these arguments, see Lyal S Sunga, 'Full Respect for the Rights of Suspect, Accused and Convict: From Nuremberg and Tokyo to the ICC', *Le droit pénal à l'épreuve de l'internationalisation*, Marc Henzelin & Robert Roth (eds), LGDJ, Bruylant & Georg, Paris, Brussels & Geneva, 2002, pp. 217–39.

[2] See for example the remarks of Professors Telford Taylor, Cherif Bassiouni, Richard Falk and Yasuaki Onuma in Duane W Layton, 'Forty years after the Nuremberg and Tokyo Tribunals: The impact of the war crimes trials on international and national law', *American Society of International Law Proceedings*, vol. 80, 1986, p. 56. See further, Lyal S Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations*, Martinus Nijhoff, Dordrecht, 1992, ch. II.

[3] See *History of the United Nations War Crimes Commission and the development of the laws of war*, HM Stationery Office, London, 1948.

[4] Article 12 of the Nuremberg Charter provided that:

> The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

See the *London Agreement*, Cmd Paper 6903. HMSO, signed 8 August 1945. The Nuremberg Charter is annexed to the London Agreement.

[5] Article 27 of the Nuremberg Charter provided that, "The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just." See the *London Agreement*.

[6] Article 26 of the Nuremberg Charter provided that, "The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review." See the *London Agreement*.

[7] At the Tokyo Trials, one judge and one prosecutor were drawn from each of Australia, Canada, China, France, Great Britain, India, the Netherlands, and the United States. There were no judges or prosecutors drawn either from Japan or any neutral country.

[8] See Elizabeth S Kopelman, 'Ideology and international law: The dissent of the Indian justice at the Tokyo war crimes trial', *New York University Journal of International Law and Politics*, vol. 23, no. 2, 1991, p. 413.

[9] Article 10 of the UDHR reads, "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

[10] On 29 November 1985, the General Assembly adopted resolution 40/32, and on 13 December 1985, resolution 40/146, both of which endorse the Basic Principles on the Independence of the Judiciary, which were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Milan in August, 1985. The same day, the General Assembly also adopted resolution 40/34, entitled the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which applies to any person who has suffered harm "through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power". This provision could apply to any person who has suffered abuse at the hands of domestic or international authorities in the course of international criminal proceedings.

[11] See, the Code of Conduct for Law Enforcement Officials, UN General Assembly resolution 34/169, adopted 17 December 1979, UN Doc. A/34/46. Model Treaty on Mutual Assistance in Criminal Matters, adopted by the Eighth Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990, UN Doc. A/RES/45/117. The Basic Principles on the Role of Lawyers, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990, UN Doc. E/AC.57/DEC/11/119. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN GA Res. 43/173, adopted 9 December 1988, UN Doc. A/43/49. The Standard Minimum Rules for the Treatment of Prisoners, ECOSOC Res. 663 C (XXIV) of 31 July 1957, UN Doc. A/44/824. The Standard Minimum Rules for Non-Custodial Measures, Annex to the Tokyo Rules, UN Doc. A/5603 of 14 December 1990. The Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted on 25 May 1987 by the Committee on Crime Prevention and Control, ECOSOC resolution 1989/65. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted 25 May 1984 by the Commission on Crime Prevention and Control, Res. 1984/50, UN Doc. E/1984/92.

[12] In this regard, the Secretary General's Report to which the ICTY Statute is annexed underlined that the Statute provides for a framework for the enforcement only of established international humanitarian legal norms, and not norms *de lege ferenda*. See Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), including the Statute of the Tribunal, UN Doc. S/25704 of 3 May 1993 & Add.1 of 17 May 1993. The point was reiterated by Mrs Madeleine Albright, then Permanent Representative of the United States to the United Nations, in an interpretative statement, endorsed also by the governments of France and the United Kingdom. This statement expressed her government's view that article 3 of the ICTY Statute covered all the obligations under international humanitarian law agreements in force in the territory of the former Yugoslavia, including article 3 common to the four Geneva Conventions, 1949, and the provisions of Additional Protocol II, 1977. Significantly, the Security Council did not include in either the ICTY or ICTR statutes the crime against peace, i.e. crime of aggression. This was a wise decision, since aggression remains to be defined for the purposes of international criminal law enforcement. While the categories of crimes outlined in the ICTY and ICTR stick closely to the established law, and in fact are narrower, it should be kept in mind

that the principles of *nulla poena sine lege* and *nullum crimen sine lege* apply also to the interpretation of criminal law, and the tribunals' fidelity to the spirit of the law must be evaluated on a case-by-case basis.

[13] Michael P Scharf, 'A critique of the Yugoslavia war crimes tribunal', *Nouvelles Etudes Penales*, no. 13, 1997, pp. 262–3.

[14] See *Prosecutor v. Dusko Tadic a/k/a "Dule", Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*, 10 August 1995, IT Doc. IT-94-I-T.

[15] *Prosecutor v. Dusko Tadic*. In this decision, in which Judges McDonald and Vohrah constituted the majority, Judge Stephen filed a separate opinion stating that the protection of victims and witnesses justified limiting the public nature of a hearing, but not its fairness.

[16] Article 10.1 of the ICTY Statute and article 9.1 of the ICTR Statute.

[17] Article 21 of the ICTY Statute provides that:

> 1. All persons shall be equal before the International Tribunal.
>
> 2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.
>
> 3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
>
> 4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
>
> (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
>
> (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> (c) to be tried without undue delay;
>
> (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
>
> (g) not to be compelled to testify against himself or to confess guilt.

[18] Article 66 provides that:

> 1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
>
> 2. The onus is on the Prosecutor to prove the guilt of the accused.
>
> 3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

[19] Article 18 of the Vienna Convention on the Law of Treaties, 1969, entitled "Obligation not to defeat the object and purpose of a treaty prior to its entry into force" provides that:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

[20] Article 103.1.a of the Rome Statute provides that a "sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons". Article 103.3.b provides that, "In exercising its discretion to designate where a prison term shall be served, the Court shall take into account the application of widely accepted international treaty standards governing the treatment of prisoners."

International humanitarian law and the International Criminal Court

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International humanitarian law is the part of international law primarily responsible for regulation of armed conflicts, and in particular, protection of victims. Its roots can be found in all regions of the globe. The conduct of war and what is or is not permissible is dealt with, for example, in the literature of China, India and Thailand. Key texts dating back many centuries advocate humanitarian principles that fallen soldiers should not be harmed, that civilians should not be attacked, and that certain types of weapons, such as poisons, should not be used even in times of war.

More formally, those principles were expressed internationally through treaty making from the nineteenth century onwards. The role of international customs—namely, binding international rules that are to be guaranteed even when there are no treaties, was also advocated in the nineteenth century by an important humanitarian, Fyodor Martens. International humanitarian customs now find their place in international law, recognized even in treaties, and are expressed as the Martens Clause to the effect that:

> Civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

The First and Second World Wars brought horrific violations of international humanitarian law and gaps in its implementation. This situation called for more comprehensive coverage through treaty making of a more universal kind, resulting in the four

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"A key challenge for international humanitarian law from the very beginning has been its enforcement"

Geneva Conventions of 1949, which are the backbone of international humanitarian law today. The four Geneva Conventions are concerned mainly with international armed conflicts, however they contain a key article in common dealing with non-international armed conflicts. This article is known as "common article 3" and while succinct, it stipulates key principles applying to all parties in non-international armed conflicts. These include the principle of non-discrimination in relation to humane conduct towards victims, the prohibition of inhumane treatment of victims, and prohibition of hostage taking. Humanitarian organizations must also be given access to victims.

In 1977 two protocols supplemented the 1949 Geneva Conventions, with regards to victims of international and non-international conflicts. Importantly, three key principles that were not clearly expressed in 1949 were strongly affirmed in 1977: war-related activities must distinguish between military targets and civilians; civilians must not be targeted; and, the use of weapons is not unlimited—weapons causing unnecessary damage or suffering must not be used.

A key challenge for international humanitarian law from the very beginning has been its enforcement. Violations of international humanitarian law are serious transgressions, whether in peace or war. However, until very recently prosecution of the culprits in most cases depended upon prosecution within countries rather than at the international level.

The new International Criminal Court (ICC) thus fills a crucial gap by providing the world with a permanent court that can act to prosecute the culprits if domestic courts fail to do so. The 1998 Rome Statute of the International Criminal Court established this Court. The Rome Statute itself has enormous implications for the evolution of international humanitarian law and its enforcement.

The jurisdiction of the ICC includes four varieties of crimes committed by individuals (not states): genocide, crimes against humanity, war crimes and the crime of aggression. While there are extensive definitions relating to the first three offences, the fourth has yet to be defined.

Under the Rome Statute, the definition of genocide is derived from the 1948 Convention against Genocide and covers the destruction or killing of members of a group with intent to destroy a national, ethnic, racial or religious group. Crimes against humanity encompass acts committed as part of a deliberate widespread or systematic attack against any civilian population, including murder, rape, sexual slavery and enforced prostitution. War crimes are defined as serious crimes in war—both international and non-international—such as grave breaches of the 1949 Geneva Conventions, and breaches of international customary law, such as intentional attacks on civilians and the recruiting of children under 15 years of age into armed conflicts.

The Court does not have jurisdiction over crimes before the entry into force of the Statute (2002). Cases are not admissible before the Court where a state is investigating or prosecuting the accused, unless the state is unwilling or genuinely unable to do so. Individuals cannot bring cases directly before the Court, but States Parties, the Security Council or the Court Prosecutor can initiate action. In the case where a State Party or the Court Prosecutor initiates the prosecution, the Court will not take up the case if the country where the alleged crime took place or the country of nationality of the accused person refuses to permit prosecution. This does not apply where the Security Council initiates the prosecution.

"Heads of government and military commanders are not immune from prosecution"

Heads of government and military commanders are not immune from prosecution. The Security Council is also entitled to take action against citizens of countries that are not members of the Court, and prosecute them before the Court. The Court may impose fines and imprisonment. Reparation for the victims is also possible.

The practical obstacles facing the Court are well known, and four of them are particularly worrying. First, the United States has now withdrawn from the Court. Secondly, that country has also pushed for a Security Council resolution exempting international peacekeepers (primarily United States troops) from the Court's jurisdiction. Thirdly, the United States is now pressing many countries to sign bilateral agreements not to initiate prosecutions against its troops. Fourthly, many countries in Asia are still not parties to the Statute of the Court.

Despite such difficulties, the International Criminal Court has bolstered international humanitarian law by providing it with a number of things:

1. *Certainty*. The Court provides greater certainty for international humanitarian law because its Statute helps to define various notions that were previously unclear. These include key definitions of genocide, war crimes and crimes against humanity. Article 7, for instance, defines "crimes against humanity" to mean

> Any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> a) Murder;
>
> b) Extermination;
>
> c) Enslavement;
>
> d) Deportation or forcible transfer of population;
>
> e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
>
> f) Torture;
>
> g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

"The Statute enumerates instances of war crimes and crimes against humanity"

h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law;

i) Enforced disappearance of persons;

j) The crime of apartheid;

k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. *Specificity*. The Statute enumerates instances of war crimes and crimes against humanity that provide key details specifying what is and what is not covered in the relationship between the Court's jurisdiction and international humanitarian law. Article 8 of the Statute, for instance, defines "war crimes" as covering both offences encompassed by treaties (namely, the 1949 Geneva Conventions) and customs in both international and non-international armed conflicts. While the two 1977 Protocols are not mentioned specifically, because several countries have still not acceded to them, various elements from these Protocols are now part of customary law and are covered by the Statute of the Court.

3. *Predictability*. In the past enforcement and accountability of international humanitarian law depended very much upon national and local actions, and this gave rise to a great degree of inconsistency and unpredictability. The Court provides greater predictability with the likelihood of more consistent jurisprudence.

4. *Complementarity*. While national jurisdiction is respected and while the national setting has priority in taking action against the culprits, where the national level fails to act, the Court has jurisdiction. This is the principle of complementarity.

5. *Universality*. As the ICC aspires to be a permanent global institution, it adopts a universal approach against international crimes. It invites participation from the global community, both governmental and non-governmental, in addressing violations of international humanitarian law.

6. *Representativity*. The discussions leading to the establishment of the Court permitted input from both developing and developed countries, and from both governmental and non-governmental entities. Thus the Court enjoys a degree of representivity in its establishment and in lawmaking. However, individuals and non-governmental organisations cannot bring cases directly before the Court. They need to work via the Court Prosecutor, who also needs to represent a global viewpoint.

7. *Victim-sensibility*. The Statute and its recent Rules of Procedure reflect the call for more victim-friendly and gender-sensitive interventions. For instance, the privacy of victims must be safeguarded, while audio-visual media and other means are to be used to help reduce the stress of victims when giving evidence. This is a constructive precedent for all international treaties.

8. *Remedial measures*. Interestingly, not only will the Court be able to impose criminal sanctions on those found guilty but also compensate the victims. This step blends criminal law and civil law remedies to simplify procedure. An international fund is also to be set up to help victims.

"The need for effective enforcement goes hand in hand with closer cooperation and assistance between all countries and the Court itself"

Notwithstanding, the Court faces three significant challenges:

1. *Exceptionality*. Clearly some countries are trying very hard to remain beyond the reach of international humanitarian law and the Court's jurisdiction. This type of exceptionality is objectionable; it undermines and detracts from the quest for the international rule of law.

2. *Security*. The relationship between international humanitarian law and the ICC will be seriously tested by the growing threat of global terrorism. The ICC must certainly strengthen the international rule of law against terrorism. This is all the more reason to call for universal accession by countries to the ICC, especially as terrorist acts may also constitute war crimes and crimes against humanity.

3. *Enforceability*. This is a question of responsive implementation measures at the national and local levels. Many countries still need to take stock of their national setting and how it might be brought into conformity with the Statute. Several countries have already adopted totally new legislation to implement the Statute, while others have been less enthusiastic. The need for effective enforcement goes hand in hand with closer cooperation and assistance between all countries and the Court itself to ensure pursuit of the offenders and guarantee justice for the victims.

All states in Asia should ratify and accede to the Statute of the International Criminal Court, with a commitment to effective enforcement of its provisions. To achieve this, both states and non-state bodies should mobilize. Broad-based education and capacity-building programmes should be carried out, to respond to the spirit of international humanitarian law and the ICC. Collectively, these actions will nurture a global culture respectful of humanity.

'Jan sunvai' for Dalit rights: A meaningful exercise

Justice H Suresh, Bombay High Court (retired)

Atrocities against Dalits [so-called 'untouchables'] are on the increase. Recently, five Dalits in Haryana were lynched over the alleged killing of a cow, without any strong reaction from the upper-castes. In Satharasankottai village of Shivganga District, Tamil Nadu, a Dalit was brutally beaten by caste Hindus because he questioned the elite in the village council. He had objected to them importing machines to de-silt local water, an activity that had normally been undertaken by farm labourers left unemployed as a result. Not one member of the upper-castes came to his rescue. In another village of Tamil Nadu, Sankaralingpuram, Dalits were attacked after one of them ran for election to the local council against a caste Hindu. It is a known fact that all over the country Dalits have been denied positions on, and often the right to contest for, the village councils. In this case, the police sided with their assailants.

Untouchability was abolished by the Constitution of India fifty years ago. Stringent laws were introduced to prevent atrocities and protect Dalits. But these things have remained on paper only; the reality is otherwise. The mindset has not changed. It is now necessary to move past expectations that government policy and legal instruments will be able to address this crisis. One avenue towards the advancement of Dalit rights is the use of public hearings, 'jan sunvai', on violations. If communities take the initiative and people establish their own tribunals to hear of atrocities and try the offenders, they are likely to advance their cause significantly.

Dalit rights and the law

When the Constitution was drafted, it took into account the Universal Declaration of Human Rights, with its recognition of the inherent dignity and equal and inalienable rights of all persons. This is the foundation of global freedom, justice and peace. Article 1 of the Universal Declaration affirms that, "All human beings are born free and equal in dignity and rights." This affirmation is reiterated in the preamble to the Constitution of India, which goes on to declare that the Republic is constituted

> To secure to all its citizens:
>
> JUSTICE, social, economic and political;
>
> LIBERTY of thought, expression, belief, faith and worship;
>
> EQUALITY of status and of opportunity;
>
> and to promote among them all
>
> FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation.

In the Chapter on Fundamental Rights in the Constitution, the right to equality is expressly included, under article 14. However when it comes to untouchability, it only gets expressed in terms of wishful thinking: article 17 states that it is abolished and its practice in any form is forbidden. Just like a statement that poverty shall be abo1ished, the article 17 provision is a mere pious hope. On the other hand, a right not to be poor (more recently expressed as a right to develop) would at least have met with greater assurance that the state's obligations would be fulfilled. For its part, the Constitution fails to confer on Dalits a more positive right: the right not to be treated as an untouchable, which should have been included as an absolute right, without any derogation whatsoever.

Article 38 of the Constitution instructs the state to

> Strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

This is akin to what international humanitarian law says. For instance, article 2.1 of the International Covenant on Civil and Political Rights urges states "to achieve progressively the full realisation of the rights recognised". How much during the last 50 years did the state in India "strive" for the "full realisation" of article 17 in the Constitution? Had a positive obligation been placed on the state it might have been called to answer for its failure.

Apart from the Constitution, statutes and police, the government has various commissions at its disposal. These include the National Human Rights Commission and its state-level equivalents, the Scheduled Castes and Scheduled Tribes Commission and commissions of inquiry appointed from time to time, under the Commissions of Inquiry Act. Reports and recommendations by the Scheduled Caste and Scheduled Tribes Commission are all placed before the parliament, where they remain pending for years, without any discussion. The National Human Rights Commission and state human rights commissions, though constituted under the provisions of the Protection of Human Rights Act, do not guarantee any effective remedy for human rights violations. Most of their members are retired judges of the Supreme Court or high courts and the remaining members come from the Home Ministry or police. For them it is just a job,

"Reports and recommendations by the Scheduled Caste and Scheduled Tribes Commission are all placed before the parliament, where they remain pending for years"

and one that entitles them to retire from active government service. Their power is also limited to the making of recommendations to the government, which it is free to accept or reject.

"Where democratic governance fails it is for the people to take the initiative"

As for the commissions of inquiry, governments have throughout used them as a shield against public criticism. Faced with reports of serious human rights violations, governments promptly announce an inquiry by a sitting or retired judge. This immediately silences the press, public and affected persons. It also stops any inquiry by the National Human Rights Commission, because under the Act, if any government inquiry is announced, the Commission will not inquire into that incident. It also stops further inquiry by the police or other investigating agencies. Having silenced all concerned, the government waits for completion of the inquiry and the report. If the report is favourable, it is accepted. Otherwise, the government may just refuse to accept it or act on its recommendations. In the meanwhile years pass on, as in the case of the Justice Srikrishna Commission, which took six years, and after which the victims obtained no justice [see further below].

In other cases, commissions work to exonerate the government as quickly as possible. Two examples of this practice are the Justice Wadhwa and Justice Mohan Commissions, both led by retired judges of the Supreme Court. Justice Wadhwa enquired into the death of Graham Staines and his two children. He exonerated the Bajrang Dal and the Sangh Parivar and brought the report within four months, stating that the killings were the work of one man, Dara Singh, when other reports and contemporaneous documents show differently. Justice Mohan reported on the death of 17 persons in the Tamraparni River, after the police used excessive brute force. The incident was recorded in photographs and several videotapes shot as the attack was going on. Yet Justice Mohan certified the police action in a report he brought promptly, containing half-truths, lies and several untenable inferences. The 17 persons killed—including a child—31 persons injured and admitted to the hospital, and over 300 who had to jump into the river to save themselves, suffering injuries as a result, did not mean anything to this judge.

People's initiatives and social action litigation

Where democratic governance fails it is for the people to take the initiative. This becomes imperative where the violations of human rights are significant and have taken place mainly because the state is apathetic. Law is about compromise between conflicting interests. If there is a conflict of interest in a society it is for the state to bring in a suitable law to resolve it and assure peaceful existence and development. Once a law is brought, it is seen primarily as an instrument of the government and state. If the state fails to enforce the law and protect human wellbeing, it does not mean that society has no role to play. Law is as much an instrument of society as it is of government.

It is for the society as a whole—not merely the victims—to take the initiative and address government failures. If a minority group is victimized, redress must come with support from the majority. Without this, a minority group cannot hope to get justice, as law enforcement will remain one-sided. The Dalits, then, cannot be left to fight their battle alone, for the confrontation is so unequal that they could not possibly succeed. The rest of society must come forward to join this struggle.

"If a minority group is victimized, redress must come with support from the majority"

The concept of public interest litigation rests on an ideal that the state and society are obliged to support such struggles. In the past, the doctrine of *locus standi* held that victims alone should come to court for redress, and no one else on their behalf. This was during an era when private law dominated the legal scene. It was essentially a procedure to vindicate private rights, whether individual or proprietary. However with advent of welfare states, and increased state obligations, it became necessary for the courts to liberalize this doctrine. Now, when the state failed in its obligations towards the poor, weak and marginalized sections of society, the courts could not allow such injustice to continue simply because the persons affected were unable to come to court. Thus the courts gradually changed their position, allowing, in the words of Justice P N Bhagvati (in the *Judges' Transfer Case* AIR 1982 SC 144) any member of the public to seek a judicial remedy for a legal wrong caused

> To a person or to a determinate class of persons, who by reason of poverty, helplessness or disability, or socially or economically disadvantaged position, is unable to approach the court directly.

Justice Bhagvati termed this "representative social action"; it is generally referred to as "social action litigation". It has also been extended to a situation where an injury to the public is not clearly tangible. If there is a public wrong then there has to be a remedy. Again, in the words of Justice Bhagvati (*Judges' Transfer Case*),

> If no one can maintain an action for redressal of such public wrong or public injury, it would be disastrous for the rule of law, for it would be open to the state or public authority to act with impunity beyond the scope of its power or in breach of a public duty owed by it.

Conceptually, Lok Adalats [People's Courts] also fall into the same category as Social Action Litigation, as they are intended to provide easy access to justice in disputes between individuals, and between individuals and the state. Unfortunately, the Lok Adalat institution has now become a part of court mechanisms and has ceased to have any connection with people's initiatives. So also has 'public interest litigation' become 'publicity interest litigation', and in any case cannot be called social action litigation. There is hardly any public interest litigation for and on behalf of the poor, the Dalits or any socially and economically disadvantaged people in India. Moreover, the legal trappings such as rules relating to judicial precedents, *resjudicata*, hearsay evidence estoppel and various procedural requirements have all made this avenue for relief as uncertain as any other judicial process.

People's initiatives, 'jan sunvai' and people's tribunals

"The important element of public hearings is not the constitutional or statutory structure of any institution, but rather the community's conscience"

Internationally, people's initiatives have led to people's tribunals mainly to address serious human rights violations by states unwilling to provide any relief to the victims. The Permanent People's Tribunal established in Italy in 1970, for instance, consisted of private citizens of high moral standing. It had no constitutional or statutory authority, initially carrying out its work on its own, later on the basis of the Algiers Declaration of 1976. This Tribunal investigated the allegations of the genocide of Armenian people in Turkey sometime in 1915, the role of the Soviet military in Afghanistan, the Indonesian use of force in East Timor, and the atrocities committed by the Marcos government in the Philippines. In each case the Tribunal heard witnesses, examined various reports and documents, and gave its judgement on the basis of the evidence produced before it. The judgements, together with the evidence, were published as reports. In each case the concerned government was invited to have its say on the evidence gathered by the Tribunal.

At this juncture reference should be made to the concept of 'universal jurisdiction' developing in the international community. This approach allows states to ensure that their national courts can exercise universal and other forms of extra-territorial jurisdiction over grave human rights violations and breaches of international humanitarian law. Among the human rights violations over which national courts may exercise universal jurisdiction are genocide, crimes against humanity, war crimes, extrajudicial killings, hostage taking, disappearances and torture. The principle may be applied irrespective of whether the crimes were committed by state or non-state actors. If any particular state fails to fulfil its responsibility, other states may request the suspect's extradition. Courts in Austria, Denmark, Germany, the Netherlands, Sweden and Switzerland have exercised universal jurisdiction over grave crimes under international law that were committed in the former Yugoslavia. Courts in Belgium, France and Switzerland have opened criminal investigations or begun prosecutions related to genocide, crimes against humanity and war crimes committed in Rwanda. Italy and Switzerland have opened criminal investigations on torture, extrajudicial executions and enforced disappearances in Argentina. Spain, France, Belgium and Switzerland had sought the extradition of Augusto Pinochet, former head of the state of Chile, from the United Kingdom under this principle.

The important element of public hearings, then, is not the constitutional or statutory structure of any institution within any national jurisdiction, but rather the community's conscience. When the state fails, this is what must be invoked above all else. This is the meaning of people's tribunals, and public hearings, or 'jan sunvai'.

One of the first public hearings within India was conducted by the Indian People's Human Rights Tribunal (IPHRT), set up by the Indian People's Human Rights Commission, on the killing of 23 people at Arwal, Bihar, in 1987. Justice Potti, retired Chief Justice of the Gujarat High Court, and Justice T U Mehta, retired Chief Justice of the Himachal Pradesh High Court, conducted the hearing. The next was in respect to the burning of 646 tribal huts in the district of Vishakapatnam by the Andhra Pradesh government in 1988, by Justices Chandrashekhar Menon and Jyotirmoy Nag, retired judges of the High Courts in Kerala and Calcutta respectively. Since then several inquiries have been conducted by the IPHRT, the most important being *The people's verdict*, on the Bombay riots in December 1992 and January 1993. While releasing the report, Justice V R Krishna Iyer, president of IPHRT, said that

"One of the first public hearings within India was conducted by the Indian People's Human Rights Tribunal"

> The right to know is a citizen's right. The freedom of information is fundamental to all fundamental rights. A People's Tribunal gathering information, collecting relevant materials on an event of public importance, sorting them out judiciously, marshallinq the evidence and conveying the whole testimony so gathered, in the shape of a report, is the discharge of public duty of the highest order. No one can, under the laws of India, stop the right to give or receive information, except where it is mischievously intended to skew the course of judicial justice.

For *The people's verdict*, the Tribunal adopted a simple procedure. It recorded the statements of the victims who came to depose. The social activists who had visited different areas and had collected materials placed them before the Tribunal. There were many contemporaneous reports that were all recorded. Media reports and audio and videotapes also helped the Tribunal test the veracity of the victims' version. In particular it observed that

> It is true that the witnesses have not been cross-examined. But our sittings were open to the public and all those interested were welcome. We would have been happy if the police had attended our sittings. But just because there has been no challenge to the evidence before us, it cannot be said that the evidence is not reliable. Most of the victims have suffered injuries and have lost everything; their livelihood, their belongings and their place of living. They have not been able to get justice, so far. In the case of some, their earlier statements in the form of complaints, [First Information Reports] and Panchanamas [police inquiries], are all on record and they have tendered copies of those documents. Therefore there is no reason why evidence so received cannot be accepted.
>
> Moreover, the evidence came to be recorded in an atmosphere where there was no fear or favour. Ours is a friendly tribunal, where the victims would give vent to their feelings of the trauma they had undergone. In this sense, as compared to government-appointed enquiry commissions, a tribunal like ours has a better chance at arriving at the truth. In fact many victims who were nervous about giving the names of their assailants to the partisan police, had the confidence to disclose them to us.

The report was ready within six months, with all the summary of evidence, the findings of the Tribunal and its various recommendations. The official inquiry, the Justice Srikrishna Commission, took six years to complete. Importantly, the findings of that official commission and the findings of the IPHRT were

virtually identical. The same occurred in the case of the IPHRT report *Gunning down Dalits*, on the police firing at the Ramabai colony, Ghatkopar, Mimbai, on 11 July 1997. That report was ready within a month of the incident, whereas the official commission, the Justice Gundewar Commission, took 13 months to reach the same conclusions.

"Public hearings can be used in the fight against discrimination and the struggle for equality of the Dalits"

Current and future prospects

On 18 & 19 April 2000, the National Public Hearing on atrocities against Dalits was held in Chennai. It outlined its purposes as follows:

> a. To provide space for the Dalit victims of atrocities to depose their cases before the People's Court of the national and international community,
>
> b. To give an opportunity to the national and international community to express their solidarity with the victims,
>
> c. To solicit support from the media for the purpose of creating and shaping public opinion against such atrocities,
>
> d. To provide a platform for those who are concerned about upholding human rights,
>
> e. To bring to the minds of those obligated with the responsibility of maintaining law and order and dispensing justice in the democratic polity,
>
> f. To impress forcefully on the minds of the dominant caste groups that the feudal character and the practice of untouchability is an anachronism in these changing times.

These reasons aptly summarize how public hearings can be used in the fight against discrimination and the struggle for equality of the Dalits. The task of these 'jan sunvai' is a meaningful one: to awaken the consciousness of society at large to the urgency of the need to restore and uphold the rights of Dalits.

Genocide in Gujarat: Patterns of violence

Concerned Citizens Tribunal – Gujarat 2002

The Concerned Citizens Tribunal – Gujarat 2002, was conceived as a response to the carnage that rocked the state of Gujarat following the Godhra tragedy [when the partial incineration of a train was blamed on Islamic militants as a pretext for the massacre that followed] on February 27, 2002. The eight-member Tribunal was constituted in consultation with a large number of groups from within Gujarat and the rest of the country.

The Tribunal collected 2,094 oral and written testimonies, both individual and collective, from victim-survivors and also independent human rights groups, women's groups, NGOs and academics. The documentation work done by relief camp managers and community leaders, from lists of persons killed or 'missing', to the meticulous tabulation of economic loss and religious desecration, is unprecedented and immense.

The Tribunal pays tribute to the victim-survivors, individually and collectively, who deposed before us at great risk to their person in the simple hope that one day justice will be done and the guilty

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The Concerned Citizens Tribunal – 2002 submitted its report on the carnage in Gujarat in *Crime against humanity* (Citizens for Justice and Peace, Mumbai, 2002). The Tribunal was headed by the preeminent human rights campaigner and builder of India's people's tribunal movement, retired Supreme Court judge, Justice V R Krishna Iyer. Among its members was Justice H Suresh, author of '"Jan sunvai" for Dalit rights: A meaningful exercise', in this edition of *article 2* (vol. 2, no. 1, February 2002). For an earlier short article by Justice H Suresh on the events in Gujarat, see 'Gujarat, a crime against humanity', *article 2*, vol. 1, no. 3, June 2002, pp. 18–19.

This is the first in a series of edited excerpts from the *Crime against humanity* report of the Concerned Citizens Tribunal to be published in *article 2*. These will be accompanied by articles from scholars and activists inside and outside of India assessing the massacre and its implications for rule of law and human rights in India. The entire report is available online, at [http://www.sabrang.com/tribunal].

The Asian Legal Resource Centre is taking steps to highlight the report and the work of the Tribunal out of concern that the scale and horrendous nature of the massacre, combined with the extent of planning and state complicity, has not been adequately addressed regionally and internationally. The international community is now beholden to respond.

be punished. Even as the Tribunal sat in Ahmedabad, there were threats and premises like the circuit house at Shahibaug were denied us due to the omnipresence of prowling mobs. We acknowledge our great debt to the activists on the ground who worked day and night to bring the victims and reliable eyewitnesses to us.

"The health of any society lies not in denials and half-truths when grave injustices have occurred, but in courageously admitting to them"

After recording evidence, visiting sites, placing on record statements and collecting other relevant material, the Tribunal arrived at some prima facie conclusions. These were forwarded along with our recommendations to both the central and state governments and their views were awaited. However, the Tribunal regrets that neither the state government nor the central government, or individual ministers to whom request letters were sent, responded. Though we are entitled to draw adverse conclusions from this lack of response, because that they did not respond to the interim findings, we do not propose to do so.

In a democracy, the people's right to information should be paramount. Any government wedded to this basic right should have eagerly cooperated in the effort of a citizen's tribunal to inquire and let the people know what happened in Gujarat, who engineered the carnage, and who the guilty are.

The Tribunal undertook this huge task as part of the exercise of this fundamental human freedom. The health of any society lies not in denials and half-truths when grave injustices have occurred, but in courageously admitting to them, righting those wrongs with justice and then reconciliation. That both the government of Gujarat and the government of India did not participate in the inquiry reveals their utter disregard for the people's basic democratic right to know.

Having completed its task, it is with humility that the Tribunal presents this report to the country and the world. Even as we complete our task, we know and recognise that our country's record in the matter of punishment of the guilty in cases of mass crimes, against the minorities, against Dalits, and against the poor has been pathetic. Yet, with hope that is eternal to the human condition, we do present this report in the belief that, this time, knowing the truth will help us chalk a future that is radically different.

The sorry state of the rule of law in the country is closely connected to the functioning and accountability of our courts, and the criminal justice system is crying out for radical reform. We hope that with justice to the victim-survivors, these reforms will become a matter of urgent political debate.

The panel that constituted the Tribunal pays a humble tribute to all the hapless and innocent victims of the ghastly Gujarat carnage. We dedicate this report to them and to their surviving relatives. And also to each one of those women and men who, at great risk to their person, provided succour and helped expose the truth.

Patterns of violence

A noticeable feature of the Gujarat carnage is the distinct and similar patterns that have emerged from different parts of the state. While some local conditions and socio-economic factors do differentiate the attacks from one place to another, detailed and extensive evidence before the Tribunal points to the overwhelming and sinister similarity of the attacks that were engineered and launched. This is evident in the manner in which innocent people were quarterised, sometimes sexually violated and killed; in the ammunition used for the gory killings and the arson; in the immediate and long-term preparations for the violence. All these are detailed below.

"Detailed and extensive evidence before the Tribunal points to the overwhelming and sinister similarity of the attacks"

Selective targeting of Muslims

From the extensive evidence recorded by the Tribunal, it is clear that Muslims from all social strata, rich and poor, were the prime targets for the state-sponsored pogrom unleashed all over the state of Gujarat. From cities and towns to villages, be it the question of life, dignity or property, barring few exceptions, Muslims were the sole target. While the targeting of economically better off Muslims was limited to their property, and this damage was vast and extensive, the lower middle class and the working class sector, be it in urban centres or villages, faced attacks on their life, property and dignity. Except in the few cases where some Hindu establishments were targeted (in the immediate vicinity of areas that have been converted into Muslim ghettos), in cities like Ahmedabad and Vadodara, the recent carnage was marked (unlike earlier rounds of violence where sections of both communities were affected) by the selective targeting of Muslim lives, Muslim homes, Muslim business establishments and Muslim properties. Whether it was on the posh CG Road of Ahmedabad, the main streets of Bharuch, Ankleshwar and Vadodara, or the villages of Kheda district or the Panchmahal, small and large farms and properties, homes and shops, only of Muslims were the target of marauding mobs. A potentially gruesome tragedy, where the rampaging mobs nearly set upon and burnt alive 70 children in a Muslim-run orphanage in the city of Bhavnagar, was averted by a conscientious police official loyal to his uniform, is worthy of mention here. For having shown exemplary courage and saving innocent lives, the SP Bhavnagar, Rahul Sharma was 'rewarded' with a summary transfer.

In most places, Hindu houses amongst Muslim *bastis* had been marked out before the attacks using saffron flags, or pictures of Ram and Hanuman, or with crosses. Evidence before the Tribunal shows that in some places this marking was done a few days before February 27 and which was the ostensible justification for the 'retaliation'. These markings were to avoid inadvertent attacks on Hindu homes and businesses in areas that were targeted later.

There was no damage whatsoever to the Hindu houses so marked. Months later, saffron flags were still aflutter in many villages of Gujarat and it is evident how the attacks and destruction

were carried out so that the Hindu houses were not damaged. In some villages, the adjoining Hindu houses were first sawed away from the Muslim houses before the latter were set on fire. Each attack, therefore, took not just extensive planning but also several hours to execute, which further indicates an abdication of responsibility by the police in its failure to come to the rescue of the targeted community.

"Apart from the lives of Muslims, several symbols of India's composite culture were deliberate targets during the carnage in Gujarat"

From the state wide evidence earlier recorded and placed before us, it is also clear that apart from the lives of Muslims, several symbols of India's composite culture were deliberate targets during the carnage in Gujarat. The *durgahs* (shrines) of Sufi saints that are revered by persons from all communities, especially the oppressed castes, deserve special mention here.

The other targets of violence were couples who had entered into inter-community marriages. Evidence was specifically placed before us about the shameful stripping, gross sexual abuse and subsequent quartering and killing of Geeta (Mumtazbano), a Hindu woman from Ahmedabad who had married a Muslim man, Salim. The couple was tricked into visiting her family on April 5. They were set upon while travelling on a scooter. Geeta died while Salim survived.

Violence against mixed couples has become common all over Gujarat and the issue of inter-religious marriage has become part of the hate propaganda against Muslims and those Hindus who enter into or accept such marriages.

Brutality and bestiality of attacks

The widespread violence that targeted Muslims in urban and rural Gujarat was marked by utter bestiality and brutality. We have recorded evidence from Naroda Patiya in Ahmedabad, as also from witnesses from Kheda, Bharuch, Ankleshwar, Panchmahal, Mehsana, Sabarkantha, Banaskantha and Vadodara, that training camps were conducted by the Bajrang Dal and the VHP [Vishna Hindu Parishad], backed by the RSS [Rashtriya Swayamsevak Sangh] and supported by democratically elected representatives from the ruling BJP [Bharatiya Janata Party]. The camps were often conducted in temples. The aim was to generate intense hatred against Muslims painted as 'the enemy', because of which violence was both glorified through the distribution of *trishuls* and swords, and justified as the legitimate means to self-defence.

In the attacks all over Gujarat, as recorded before the Tribunal, areas were besieged for 7-8 hours, by mobs of over a few thousand (this varied in different cases but the marked similarity was the scale of the attackers). In all the cases, the leaders of the mobs co-ordinating and supervising the transport of gas cylinders, *trishuls* and talwars, chemicals and gelatine sticks have been identified by witnesses and survivors as prominent leaders and elected representatives from the BJP or leaders of the VHP, Bajrang Dal or the RSS. In most cases, there was large-scale mobilisation from local areas; neighbours attacked neighbours even though

outsiders were called in to make up the numbers; rapes, too, were carried out by known figures from the village or locality. This, too, was the result of definite planning, intended to terrorise completely and to destroy the faith of the survivors in co-existence or living in neighbourhoods that had been their homes, for centuries in many cases.

> "The manner and method of killing has left an indelible imprint on the minds of the survivors"

Women and young girls were targeted brutally, as were children. Evidence recorded before us shows how in the macabre dance of death, human beings were quartered and the killing protracted while the terrorised survivors looked on; the persons targeted were dragged or paraded naked through the neighbourhood; victims were urinated upon, before being finally cut to pieces and burnt. Hundreds of testimonies before us show how this manner and method of killing has left an indelible imprint on the minds of the survivors, who saw their near and loved ones killed and, that too, in such a fashion. These are images that have the potential to haunt, traumatise and enrage the survivors. In the case of the now well-known Gulberg society, where former MP Ahsan Jafri was killed along with 60 others (estimate of independent sources), after the housing colony was set upon, the massacre orchestrated, and the survivors had finally managed to escape in the evening, the skulls of those killed were used by some in the neighbourhood to play cricket with.

Muslim men, women and children were killed by stabbing, in private or police firing, or by burning them alive. Evidence before the Tribunal shows that the burning alive of victims was widespread. This is not accidental. For the victim community, Muslims, who bury their dead, the killing by burning was meant to annihilate as also to terrorise and establish dominance over the entire community. When 6-year-old Irfan asked for water, his assailants at Naroda Patiya made him forcibly drink kerosene, or some other inflammable liquid, before a lit match was thrown inside his gullet to make him explode within. Such brutality, which was encouraged or condoned by the government in power, is now cynically being denied.

Bodies of victims were dismembered in a merciless fashion before they were finally killed. Women and children were especially subject to this; women were not just raped but all kinds of objects and instruments were brutally inserted into their bodies. There were instances where young children, even infants, were hoisted on swords or *trishuls* before being flung into flames.

Unprecedented scale and degree of violence: Ethnic cleansing

The Tribunal recorded evidence from more than 16 districts of Gujarat. From the evidence placed before us it is clear that starting from February 28, within the first 72 hours [of the massacre], even as [the Chief Minister of Gujarat] Shri Modi claimed the situation to be under control, there was unprecedented loss of life and property. Thereafter, violence continued in 3-4 distinct

stages right up to mid-May. Even the hearings of the Tribunal in the first half of May were preceded by warnings to call off the Tribunal. We, too, had to ask for state security.

"The destruction of property across Gujarat was thorough and precise"

To cause the maximum possible damage swiftly and comprehensively, a powdery-white chemical was widely used, which not only burnt human beings to the bone, but even cement houses were completely burnt down. From Vatwa to Gulberg society in Chamanpura, Ahmedabad, to far-flung district-places like Ode, Sardarpura and parts of Vadodara, we have recorded evidence of the use of this powdery-white chemical. When Tribunal members visited Gulberg society on May 5, the compound of the society was littered with small bottles with remnants of a whitish powder inside. From Vatwa we collected not only evidence of use of this powder but also ingenious electrical wiring to ensure that all 65 homes of the Vohra Muslim Burhani society caught fire almost simultaneously. During our visit to Ankleshwar, a few days later, we recorded testimonies of many victims who said that in the attacks in that district, gelatine sticks of the kind used in mining operations were widely used. The premeditated and meticulously planned attacks were obviously intended to ensure that the targeted homes and business establishments of the minority were reduced to bare shells. A noticeable pattern in the attacks on rural farms was the total destruction of bore-wells in such a way that it left no scope for repair of the device.

Evidence before the Tribunal shows that, guided by leaders, the trained mobs first sprinkled the targeted buildings with fuel drawn from *kerbas* (large cans/barrels), or even a tanker in some cases, followed by a spray of acid. Immediately thereafter, a gas cylinder brought along by the mobs was unsealed and tossed into the flame. The result was a deadly explosion that ripped buildings apart and killed a large number of persons on the spot.

Across Gujarat, over 1100 Muslim-owned hotels, the homes of not less that 100,000 families, over 15,000 small and big business establishments, around 3000 *larri gallas* (handcarts), and over 5000 vehicles (private cars, trucks, taxis, autorickshaws) were badly damaged or completely destroyed in the attacks. These figures, arrived at by the Tribunal through the voluminous evidence presented before us indicate the attempt to economically cripple a community on a scale unprecedented in the post-independence history of communal violence in the country.

Looting and destruction of property

The destruction of property across Gujarat, in the most affected cities of Ahmedabad and Vadodara, as also elsewhere, was thorough and precise. The extensive evidence before the Tribunal shows that this, too, was part of the pattern and the planning behind the attacks; to devastate and completely destroy the property of the targeted Muslim section. The Tribunal has photographs and written and oral evidence that shows how even RCC slabs of homes and shops caved in because of the intensity of the chemically-fuelled fires. As significant is the fact that every

single Muslim household and business establishment was looted before being reduced to an empty shell. There are instances where, at the more affluent shops located on the main roads in Ahmedabad or Bharuch, the middle and affluent classes among Hindus, women and girls noticeably, were seen looting choice collections from a boutique or shop before it was completely destroyed. Whether it was household articles painfully collected by the working classes, or dowries that were carefully amassed over the years for girls to be married, the marauding mobs made sure that no recovery was possible and that to rebuild their lives, the affected families would, literally, have to begin from scratch.

"In most places, the looting and the destruction of property went on for days after the people had run away from their villages"

Most of the attacks in the first round of violence began on the morning of February 28, or on March 1, the day of the Bharat *bandh* [public protest]. On day one of the murder and loot, brutal state wide killings were conducted with precision. Apart from that, in cities and in far-flung rural areas, evidence shows that the attacks were on the houses and business establishments of the Muslim community, which were either in Hindu dominated areas like market-places or on the outskirts of villages. This was almost like a prelude or 'warm-up' activity for what was to follow. In most places, the attacks started in the afternoon, driving Muslims out of their homes. From March 1-3, in all the affected villages, Muslims were forced to flee their homes taking nothing with them. In the villages, people first tried to gather in the local mosque or in the few concrete houses that belonged to better-off Muslims. When these were also attacked, they had to flee in some available vehicles or on foot. Trees were felled to block roads and obstruct Muslims trying to escape from the frenzied, armed mob. The way in which large masses of victimised Muslims were terrorised and made to flee is despicable in a society where democracy and secularism is said to be the norm. Although in a large number of cases, people managed to escape from their villages and reach safer places, many were chased, caught, killed, and sometimes even dismembered and completely burnt. Women were stripped naked and repeatedly sexually assaulted by mobs. In many cases, the dead bodies have not been found.

Once the Muslims fled from their villages, mobs looted and then burnt their houses and shops at leisure. In many villages, houses were being torched until as late as March 10-13, and, in some instances, even later. In every structure targeted, be it a house or a shop, doors, windows, window frames, grills, electric wiring, water pipes, taps, switch-boards, electric meters, all movable property, even roofs, went missing. There were traces of the chemical powders used even when Tribunal members visited these villages two months after the crime. Every place was burnt completely. In some places, even walls have been broken down. Elsewhere, only burnt, bare walls remained. The dwellings looked as though they had been bombed. Even bore-wells were totally damaged or blocked. Every single tree, including all fruit-bearing trees, was cut down. The marauders made sure there was no sign of life left anywhere. In most places, the looting and the destruction of property went on for days after the people had run

away from their villages. Victims deposed that many of their goods can still be found in the homes of their Hindu neighbours but no attempt has been made by the state to look for them and book the culprits.

"There was prior mobilisation of men and materials, and an organisation in place that made possible the systematic and calculated preparations that preceded many of the massacres"

The evidence recorded before the Tribunal shows that, while Godhra provided the pretext, there was prior mobilisation of men and materials, and an organisation in place that made possible the systematic and calculated preparations that preceded many of the massacres. The mass use of gas cylinders in Ahmedabad and many other places, even while there was a shortage a fortnight before, the training needed to torch the fire-proof showroom of Harsoliya Motors (Sabarkantha), the selection of the kind of blasting devices and detonators needed to destroy Muslim-owned factories and establishments in the GIDC area in Modasa (Sabarkantha) or Vatwa (Ahmedabad), while the areas were under curfew between March 1-3; they all suggest detailed military-style pre-planning.

The Tribunal has received evidence from across the state of Gujarat that a deliberate motive behind driving Muslims out of villages where they have lived for centuries, and where an economic and social boycott is even today being carried out, is to surreptitiously and illegally take over landholdings held by them.

Military precision and planning behind attacks

How the operations were executed: Large mobs running into thousands were led by well-known elected representatives from the BJP, leaders of the VHP, Bajrang Dal and RSS and even cabinet ministers. From the evidence before us, it is clear that these leaders quite often carried computer printouts of the names and addresses of Muslims homes and shops. Field operations were co-ordinated by a central command using mobile phones.

The formation of arson battalions: The evidence before the Tribunal clearly points to scores of key actors leading large mobs, fully aware of what they had to do and achieving their task with precision. This suggests the existence of a private, trained militia running into thousands in Gujarat. A militia, moreover, established and made fighting fit through training camps, distribution of weaponry and hate propaganda glorifying violence. Weapons used in attacks, such as swords, were of the same brand, and must obviously have been distributed in advance across large tracts of the state. The deployment in many of the attacks of large tempos or trucks, full of hired hooligans, some local and others from [Uttar Pradesh], [Madhya Pradesh] or Maharashtra, identified as such because they spoke in Hindi or Marathi, is a worrying indicator of the scale and reach of these underground operations. Village-level evidence points to hired mobs, where the hooligans were equipped with *trishuls* [tridents], iron rods and swords, carrying supplies of water, salted beans and peanuts and liquor pouches and paid Rs. 500 per day or Rs.1000 per night.

Profile of the assailants: The leadership of large mobs running into thousands was provided by easily identifiable elected representatives of the BJP (including cabinet ministers), and others from the VHP, the Bajrang Dal and the RSS. From the evidence before us, it is clear that these leaders were carrying computerised sheets containing people's names and addresses. Houses were marked off community-wise. Evidence regarding surveys collected in advance and details obtained through revenue and sales tax records, apart from electoral rolls, was placed before the Tribunal. The mobs, arriving in vehicles such as trucks, Tata Sumos, tempos, jeeps and Maruti vans, were led and directed by local Hindu leaders belonging to the *Sangh Parivar* [Hindu organizations]. Leaders, who used mobile phones while the attacks were being carried out, have been named by Muslim survivors in the complaints sent to the police by registered post or in the FIRs recorded.

"Mob leaders were carrying computerised sheets containing people's names and addresses"

The second rung comprised of the chief executioners who wielded all the weapons — guns, *trishuls*, swords — and handled arsenals and supplies — petrol, diesel, kerosene, chemicals and gas cylinders — for starting fires. They moved around in vehicles loaded with chemicals and weapons. This was the group primarily responsible for the brutal killings, sexual assaults and other abuses. Muslim survivors from many villages told the Tribunal that these aggressors carried identical backpacks filled with pouches of chemicals. The planning was so elaborate that a particular group of people had been assigned only the task of loading guns.

The third group was mainly involved in looting property from the houses and shops. In some of the tribal areas, this group consisted of Adivasis. In some villages, people said that not all of those who came in the mob spoke Gujarati. Some of them were also speaking in Marathi and Hindi.

A well-financed operation: Money, in several instances, was an added factor in mobilising mobs. The Tribunal has recorded the evidence of four witnesses who attended training camps conducted by the VHP and the [Bajrang Dal], often inside local temples. Swords and *trishuls* were sold to those attending. They were indoctrinated into being prepared at all times to attack Muslims and assured that if someone lost his life performing his 'duty', his dependants would be paid an adequate sum of money; one witness said that a few lakhs was promised as compensation. The propaganda and the indoctrination created fanatics who were comforted by the assurance that, were something to happen to them, their family members would be well looked after.

Such access to resources raises the critical question as to who funded these operations and from where such huge resources had come from. From the evidence of expert witnesses and victims recorded before the Tribunal, it is clear that groups like the RSS, the VHP and the [Bajrang Dal] have access to large sums.

"The visible lack of remorse among a large section of the Hindu educated middle-class is a disturbing feature of the violence in Gujarat"

The state *bandh* on February 28, and the Bharat bandh on March 1 — both called by the VHP/[Bajrang Dal] and supported by the state BJP and the chief minister himself — helped in the killing, loot and destruction. The fear created by aggressive sloganeering and posturing, the deathly silence and empty streets helped the trained militia to carry out their jobs with ease, unhindered by the state police.

Complicity of civil society

With their relentless hate campaign, the masterminds of the violence ensured such complicity from civil society in their murderous deeds, that there were very few instances of members of the majority community coming out to protect Muslims. This complicity was due to the following factors.

Lack of remorse: The visible lack of remorse among a large section of the Hindu educated middle-class, about the enormous human tragedy that affected such large numbers of people in the state, is a disturbing feature of the violence in Gujarat. This situation is quite unlike that in other communal riots, where this social segment played a role in the restoration of peace. In many Hindu middle-class localities, Hindus who had social relationships with their Muslim neighbours, gave encouragement and shelter to attackers. The reality that many of these attackers were lumpen elements, of whom they would normally be fearful, did not seem to disturb them. There was enthusiastic participation of middle-class Hindus in the looting of shops. Right from the beginning of the violence, statements like, 'a lesson needed to be taught' and other justifications of the violence were often heard from middle-class Hindus, ranging from university teachers to petty businessmen. It is almost as if the affected people are the antagonistic 'other', beyond the pale of human ethics and morality. There is an eerie silence in which victims of the carnage appear to have been rendered invisible.

Fear and terror generated by threats and hate speech: The Tribunal has recorded evidence that clearly shows how Hindus who sheltered and supported affected Muslim families were threatened and abused. A witness as highly placed as Shri Piyush Desai, CMD, Wagh Bakri Chai, and a corporate leader belonging to the majority community, took the lead in organising relief and mobilising men from the trading and business groups to initiate reconciliatory measures. Even on the day he deposed before the Tribunal, May 5, Shri Desai was threatened by local VHP-[Bajrang Dal] goons and asked to stop his activities. If a man as highly placed as him could be so threatened, imagine an ordinary citizen or a family wanting to help his/her neighbour. Even retired High Court judges and lawyers did not have the courage to come out openly against the goons, for they, too, felt unsafe.

Tirades against peace initiatives, secularists: In their public exhortations and speeches, hate pamphlets and articles published in blatantly communal newspapers like *Sandesh*, and mouthpieces like *Hindu Vision* and *Hotline*, top level state functionaries in

Gujarat and their minions, have specifically targeted the small number of men and women from Gujarat and outside, who have stood out at this moment of crisis, speaking for sanity and reason, and against hatred.

> "Dominant sections of caste Hindu society have driven a wedge among the oppressed sections, pitting Dalits, Waghris and Charas against the Muslim minority"

Use of hate speech and hate writing

Widespread hate propaganda was conducted through pamphlets distributed by Hindu communal organisations in different areas in large numbers. The content of these included calls for the social and economic boycott of Muslims, warnings about Muslims constituting a danger to the survival of Hindus, urging Hindus to awaken and to decimate and drive Muslims out from India.

Much of the local media played a reprehensibly partisan and inflammatory role right from February 28 onwards. Local political leaders used the electronic media in the most despicable manner. It would [also] be no exaggeration to state that the local press, particularly *Sandesh* and *Gujarat Samachar* (the former with greater impunity) was party to fuelling communal tension in the state through sensationalised, provocative, and, at times, highly inflammatory reporting.

Mobilisation of women, [tribal communities] and Dalits

The incitement of tribal communities, and the targeting of Muslims in rural areas, is a disturbing feature of the recent violence in Gujarat. Dalits and members of the denotified tribes like Waghris and Charas were [also] active in the violence in urban areas, especially in the more gruesome instances of rape, killing and bestiality. The tragedy behind this pattern lies in the fact that influential and dominant sections of caste Hindu society have driven a wedge among the oppressed sections, pitting Dalits, Waghris and Charas against the Muslim minority. In urban Gujarat, especially Ahmedabad, Dalits and Muslims live in close proximity. The lower castes were cynically trained to indulge in violence of a kind that dehumanises the perpetrators themselves.

Women, especially from the affluent classes of Hindu society, were visible participants in the violence; in some cases, they even led the assaults and instigated Hindu men to commit sexual crimes against Muslim women.

Preparation for violence: Immediate and long term

The Tribunal recorded extensive evidence on the systematic pre-planning and preparations that also explain the military precision with which the violence was led and its devastating consequences for the state's Muslims.

Six months before the carnage, the tempo of communal mobilisation had increased in a number of villages, with the launch of the shilapujan connected to the building of the Ram temple in Ayodhya. *'Trishul diksha'* programmes, in which *trishuls* were distributed at large gatherings, were also organised in a number of areas during the same period. In almost all the affected villages, meetings were held on the evening of February 27 or on February 28 to plan the attacks.

It was only due to such organisation and pre-planning that mobs as large as 7-10,000 or more could be so quickly mobilised, not only in a large city like Ahmedabad but also in the rural areas of Gujarat.

Evidence before the Tribunal also reveals there were many cases where the Muslims fled the villages before the attacks, thanks to their being alerted in time by their peace loving Hindu neighbours. This was true especially in Bharuch, Ankleshwar and Sabarkantha districts and in parts of Panchmahal.

"In the face of all the evidence of prior planning, the 'spontaneous reaction' explanation for the post-Godhra violence touted by officials and political leaders is hopelessly inadequate"

On the strength of the extensive evidence placed before the Tribunal, it is led to the conclusion that the Gujarat carnage has its roots in the sustained anti-Muslim mobilisation by the Sangh Parivar, among specific social groups. In the face of all the evidence of prior planning, the '*pratikriya*' ('spontaneous reaction') explanation for the post-Godhra violence touted by officials and political leaders is hopelessly inadequate, to say the least.

The Asian Human Rights Charter on enforcement of rights and the machinery for enforcement (www.ahrchk.net/charter)

15.1 Many Asian states have guarantees of human rights in their constitutions, and many of them have ratified international instruments on human rights. However, there continues to be a wide gap between rights enshrined in these documents and the abject reality that denies people their rights. Asian states must take urgent action to implement the human rights of their citizens and residents.

15.4a The judiciary is a major means for the protection of rights. It has the power to receive complaints of the violation of rights, to hear evidence, and to provide redress for violations, including punishment for violators. The judiciary can only perform this function if the legal system is strong and well-organized. The members of the judiciary should be competent, experienced and have a commitment to human rights, dignity and justice. They should be independent of the legislature and the executive by vesting the power of their appointment in a judicial service commission and by constitutional safeguards of their tenure. Judicial institutions should fairly reflect the character of the different sections of the people by religion, region, gender and social class. This means that there must be a restructuring of the judiciary and the investigative machinery. More women, more under-privileged categories and more of the Pariahs of society must by deliberate State action be lifted out of the mire and instilled in judicial positions with necessary training. Only such a measure will command the confidence of the weaker sector whose human rights are ordinarily ignored in the traditional societies of Asia.

15.4.b The legal profession should be independent. Legal aid should be provided for those who are unable to afford the services of lawyers or have access to courts, for the protection of their rights. Rules which unduly restrict access to courts should be reformed to provide a broad access. Social and welfare organizations should be authorised to bring legal action on behalf of individuals and groups who are unable to utilize the courts.

15.4c All states should establish Human Rights Commissions and specialized institutions for the protection of rights, particularly of vulnerable members of society. They can provide easy, friendly and inexpensive access to justice for victims of human rights violations. These bodies can supplement the role of the judiciary. They enjoy special advantages: they can help establish standards for the implementation of human rights norms; they can disseminate information about human rights; they can investigate allegations of violation of rights; they can promote conciliation and mediation; and they can seek to enforce human rights through administrative or judicial means. They can act on their own initiative as well on complaints from members of the public.

15.4d Civil society institutions can help to enforce rights through the organization of People's Tribunals, which can touch the conscience of the government and the public. The establishment of People's Tribunals emphasizes that the responsibility for the protection of rights is wide, and not a preserve of the state. They are not confined to legal rules in their adjudication and can consequently help to uncover the moral and spiritual foundations of human rights.

In this issue of *article 2*

Focus: The International Criminal Court

People's Tribunals

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