



## HUMAN RIGHTS analysis



# International Criminal Court

MUHAMMAD HABIBUR RAHMAN

ON 01 July 2002 the world's first permanent International Criminal Court (ICC) became operational. William Pace, the head of the Coalition for the Court, described the ICC as "truly one of the greatest advances of international law since the founding of the United Nations." On 18 July 1998 at the signing of the Rome Statute of the ICC Kofi Annan, the UN Secretary-General said, "The establishment of the Court is still a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law"

Present international unrest should have hastened some agreement on an immediate quest for global justice. The British Government has backed the ICC, seeing it as the way to indict a "future Pol Pot or Saddam Hussein". The basis of its support for the ICC comes from the speech of Baroness Scotland of Asthal in introducing the Bill: "It is an inescapable fact that the perpetrators of atrocities in the last century were largely left unpunished. The new century must not follow suit."

### Down the memory lane

Although, over the past half century the international community has created international and regional systems of human rights protection, millions of people have continued to be the victims of genocide, crimes against humanity and war crimes. Only a handful of those responsible for these crimes have ever been brought to justice by national courts. Most perpetrators have therefore committed these crimes in the knowledge that it was extremely unlikely they would be brought to justice for their actions.

Statistics for international criminal crimes committed in the last century are chilling. By one estimate, 174 million people were killed by genocide and mass murders. There have been 250 wars since the Nuremberg Military Tribunal, leading to the deaths of 65 million people. These figures do not, however, include numerous others who were injured, abused and denied human rights.

The concept of an international criminal court, talked about for more than half a century, gained a great impetus with the signing of the Rome Treaty in 1998. It required 120 countries to sign up by the end of 2000 and then would come into force after the treaty was ratified by 60 nations. Within less than five years, a remarkably short time, 139 states including the US, Israel and Iran signed the treaty by December 31, 2000. So far, 74 states have ratified the treaty.

### Jurisdiction

The ICC will not have primacy jurisdiction. It will try individuals only when member countries fail to do so or when expressly requested by the Security Council of the UN. The ICC will be independent, permanent, have its own legal personality, and the countries that have ratified the idea will be compelled to back it.

The ICC will (i) act as a deterrent to people planning to commit grave crimes under international law; (ii) prompt national prosecutors who have the primary responsibility to bring those responsible for these crimes to justice; (iii) victims and their families will have the chance to obtain justice and truth, and begin the process of reconciliation; and (iv) it will be a major step towards ending impunity.

The Court has only jurisdiction over crimes committed after the Rome Statute enters into force. It has jurisdiction to prosecute individuals when: (i) crimes have been committed in the territory of state which has ratified the Rome Statute; (ii) crimes have been committed by a citizen of a state which has ratified the Rome Statute; (iii) a state which has not ratified the Rome Statute has made a declaration accepting the court's jurisdiction over the crime; and (iv) crimes have been committed in a situation which threatens or breaches international peace and security and the UN Security Council has referred the situation to the Court pursuant to Chapter 7 of the UN Charter. The national courts will always have jurisdiction over such crimes. Under the principle of "complementarity," the ICC will only act when the national courts

are unable or unwilling to do so. A government may be unwilling to prosecute its own citizens, especially if they are high ranking, or where the criminal justice system has collapsed as a result of an internal conflict, there may be no court capable of dealing with these types of crimes.

### Initiating a case

Cases can originate in the Court three different ways. The Court's Prosecutor can initiate an investigation into a situation where one or more of the crimes has been committed, based on information from any source, including the victim or the victim's family, but only if the Court has jurisdiction over the crime and individual.

States, which have ratified the Rome Statute, may ask the Prosecutor to investigate a situation where one or more of the crimes has been committed, but only if the Court has jurisdiction. The UN Security Council can ask the Prosecutor to investigate a situation where one or more of the crimes has been committed. Unlike methods 1 and 2, the ICC will have jurisdiction when the UN Security Council refers the situation to the Prosecutor, even if the crimes occurred in the territory of a state which has not ratified the Rome Statute or was committed by the national of such a state.

In each of these situations, however, it is up to the Prosecutor, not the states or the Security Council, to decide whether to open an investigation, and based on that investigation whether to prosecute, subject to judicial approval. The Prosecutor can only initiate an investigation where the crime has been committed in the territory of a state party to the Statute, unless the Security Council refers a situation to the Court.

### Power of enforcement

The ICC, unlike national courts, has no direct powers of enforcement, apart from a few limited powers of investigation in the exceptional situation when a state's criminal justice system has collapsed. It cannot execute arrest warrants, search homes or buildings or compel witnesses to attend trial. The ICC will depend on national authorities to perform these roles, unless states consent to the ICC doing so. It is therefore essential for the effective working of the ICC, that countries which have ratified the Rome Statute cooperate fully, from the opening of an investigation to the enforcement of a sentence.

Each state party when it ratifies the Statute undertakes an obligation to "cooperate fully" with the ICC in its investigation and prosecution of crimes within its jurisdiction. The ICC can make requests to any state party for cooperation. States parties agree to "ensure that there are procedures available under their national law for all forms of cooperation" listed in Part 9 of the Statute. Each state party must eliminate obstacles to cooperation in

existing national procedures and ensure that its national law requires its courts and other authorities to cooperate fully with requests by the ICC for cooperation.

### Obligation to provide assistance

There is no express general requirement in the Statute itself requiring states, which are not parties to cooperate. However, the ICC may invite any state, which has not ratified the Statute to provide assistance on the basis of an ad hoc agreement. If a state enters into such an agreement, it is bound to comply with requests for assistance. In addition, if the UN Security Council refers a situation threatening international peace and security to the ICC, the Security Council may use its powers under Chapter VII of the UN Charter to ensure that non-states parties cooperate with requests by the ICC for assistance.

States parties have agreed to provide a broad range of assistance to the ICC during investigations and prosecutions, including identifying and locating witnesses and things, taking evidence, questioning persons who are being investigated or prosecuted, serving legal documents, facilitating the voluntary appearance of witnesses, examining sites and exhuming graves, conducting searches and seizures, providing documents, protecting victims and witnesses and preserving evidence. They have also undertaken to identify, trace and freeze assets and instruments of crime, such as weapons or vehicles, with a view to forfeiture, particularly for the benefit of victims. In addition, states parties have agreed to provide any other form of assistance, which is not prohibited by their own law. To enhance the effectiveness of the ICC, they should eliminate such restrictions.

States parties to comply immediately with requests by the ICC to arrest and surrender accused persons in their territories. The ICC must assist states in locating the accused including with its request the arrest warrant; information enabling the identification of the person; and documents needed to fulfil the national requirements of the surrender process in the country in question. National courts are required to ensure that the rights of the accused have been respected and to surrender that person as soon as possible.

Article 102 of the Statute makes it clear, *surrender* of an accused to the ICC, an international institution established by the states parties themselves, is a completely different legal procedure from *extradition* of a person from one state to another state. In any event, states parties have agreed under Article 86 to full cooperation with the ICC, which includes compliance with requests for surrender.

### Reparations to victims

States agree to give effect to ICC awards of reparations to victims. They also agree to make offences against the administration of justice by the ICC, such as perjury and threats to witnesses, crimes under national law and, upon request by the ICC, to submit cases involving such offences to their prosecutors.

The ICC has no prisons of its own. Sentences will be served in the detention facilities of states parties which have volunteered their facilities, provided that they are consistent with widely accepted international treaty standards governing the treatment of prisoners. States will have no power to revise or change sentences.

States parties cannot postpone complying with a request for assistance or refuse compliance on the grounds that they do not have adequate national procedures to deal with the request. States parties will have to ensure that their national legislation has provided for the procedures needed to cooperate with the ICC.

Article 94 permits states parties to postpone the immediate execution of a request, which would interfere with an active investigation or prosecution, but the length of the postponement must be no longer than necessary. States may, however, postpone execution of a request pending the outcome of a challenge to admissibility, unless the ICC has otherwise decided.

A state party may in narrowly circumscribed circumstances deny requests for the disclosure of information or the production of documents would prejudice its national security interests, but the state must consult the ICC to see if there may be alternative ways in which the information or documents could be provided, such as through *in camera* (closed to the press and public) or *ex parte* (closed to everyone other than the state) hearings. If it persists in its denial of the request and the ICC determines that the evidence is relevant and necessary to determine the guilt or innocence of the accused and that the state is not acting in compliance with its obligations under the Statute, it can refer the matter, as in any other case of a refusal to cooperate, to the Assembly of States Parties or, if the situation was referred by the Security Council, to the Security Council for appropriate action.

### ICC and National Courts

The ICC will not supersede, but will complement national jurisdictions. National courts will continue to have priority in investigating and prosecuting crimes within their jurisdiction. The ICC can exercise its jurisdiction if national courts are unwilling or unable to investigate or prosecute such crimes. The court's jurisdiction is limited to genocide with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, crimes against humanity including murder, extermination, rape, sexual slavery, enforced disappearances and the crime of apartheid, and war crimes and aggression and other serious violations of the laws of war. It will not cover terrorism. The international community has failed to agree on a definition of terrorism. If the UN personnel who enjoy immunity from local prosecution, commit international crimes, they are supposed to be repatriated and tried by their own countries. They would only be subject to the ICC's jurisdiction if they had committed "widespread and systematic war crimes. The definition of war crimes under Article 8 has been widely drawn, occupying two full pages of the Rome Statute and making up its largest section. It includes intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life, or injury to civilians, attacking or bombing buildings that are undefended and not political targets; and transfer by an occupying power of parts of its own civilian population into territories it occupies.

The ICC as a body can be remotely successful in grappling with those responsible for man's apparent inhumanity to man only with the support of countries with international muscle. It will not be a panacea for all the world's problems. It might cause embarrassment for some signatories. Many developing countries appear have signed up to the Court precisely to gain some legal protection against murderous rulers like Pol Pot.

Muhammad Habibur Rahman was the Chief Adviser of the Caretaker Government (1996) and Chief Justice of Bangladesh.

## RIGHTS column



# A terrorist under every stone: India discovers McCarthyism

HUMAN RIGHTS FEATURES

SCRATCH a Muslim and a fanatic is revealed, goes the argument laid down with supreme self-assurance by the ultra-nationalistic Hindu, labouring under imagined victimhood. Proof of which was on display in Gujarat recently, where good, middle-class Hindus, having done with their armchair posturing, finally got a chance to go out and throw rocks at their Muslim neighbours because it was time "they" were "taught a lesson".

Besides, the argument goes, 'they' do not consider this country their own. Muslims will have to stay in relief camps like the ones in Gujarat if they "continue to take [sic] the country towards partition," the rabidly fundamentalist Vishwa Hindu Parishad (VHP), or World Hindu Council, said recently as part of what has now become a familiar tirade.

Political manipulation and State apathy are not the only factors responsible for the communalisation of Gujarat, as sociologists will point out. However, the complicity of the State apparatus, as was evident during the recent rioting, has ensured that those who targeted Muslim citizens will have no qualms about resorting to rioting and mayhem again at the first opportunity. In the case of Gujarat, the State did not even pretend to be neutral.

The State, in fact, is partly responsible for the reinforcing of stereotypes. This was demonstrated only a few months ago by Prime Minister Atal Behari Vajpayee, no less. At a public rally in the state of Goa, Mr Vajpayee was reported as saying that wherever there are Muslims in the world, there is also strife. "Once Islam meant tolerance, truth and compassion from what I see now, it has come to mean forcing their opinion through terror and fear. Islam is run on *jehad*."

As the statement made its way through the media, drawing criticism, and making Indian diplomats squirm at international forums, the Indian government sought to put a spin on it, claiming the Prime Minister had been quoted out of context. But the message was clear. "We were secular even in the early days when Muslims and Christians were not here," Mr Vajpayee had said in the latter part of his speech. "We have allowed them to do their prayers and follow their religion." For the Prime Minister "intellectual," "poet," "gentle face" of the ruling Bharatiya Janata Party Muslims are most definitely "the other." Who must live according to the diktat laid down by 'us', the majority.

Add to this the paranoia that has been needlessly evoked by State authorities at the highest level and which have predictably, and menacingly, percolated down to the lower levels of the State hierarchy. The State theory scratch a Muslim and you'll find a terrorist got a boost after the 11 September attack on the World Trade Center in the United States and the 13 December attack on the Indian Parliament. These incidents led to the focused as well as random targeting of individuals suspected of having committed, or about to commit, acts of terrorism. Attempts to deal with the 'enhanced security threat' have

resulted in bizarre, and often tragic, incidents.

In January 2002, three young Muslim men were detained at New Delhi's Indira Gandhi International (IGI) airport, after they were "reported" by a person sitting next to them. The three men, who had come from Rampur in Uttar Pradesh to pick up their teacher, were speaking Urdu. Their conversation was about the general problems faced at airports, the Urdu word for 'problem' being '*masail*.' Struck by the thought that three bearded men were talking about missiles, a man sitting next to them reported the matter to the police, who promptly took the three men into custody. It took the policemen and the Intelligence Bureau officials 12 hours of interrogation to realise their mistake and set the men free.

In the same month, police in the northern Indian city of Lucknow arrested two Jordanians and a Palestinian for pos-

**A recent attempt to bring madrasas, or Islamic seminaries, under scrutiny has been driven by the assumption that these institutions are partly responsible for fomenting 'anti-national' activities using funds received from Islamic countries. In an interview, however, Rajnath Singh, the former Chief Minister of Uttar Pradesh a state where anti-madrasa tirades have been at their shrillest admitted that there was no evidence yet of madrasas being hotbeds of Islamic militancy.**

sessing false documents and overstaying, both valid grounds for arrest. However, the police went a step further. The men were declared as Hamas activists. Officials in the Ministry of External Affairs later clarified that not only did the three men have no links to the Palestinian organisation, Hamas was not on India's list of watched terrorist organisations. The paranoia, as it turns out, is not confined to the lower levels of the administration.

Another instance was the arrest of left-wing university students distributing pamphlets denouncing the American campaign in Afghanistan. Six members of the Democratic Student's Union and the All India People's Resistance Forum in New Delhi were arrested on 8 October 2001 for distributing pamphlets against the US war on Afghanistan. The police justified its actions saying that it wanted to pre-empt any communal tension that may have arisen on account of the contents of the pamphlets. The students were arrested and remanded to ten days' judicial custody. Conscientious protest is a cornerstone of democracy, which is further protected in India under

Article 19(1) (a) of the Constitution (freedom of speech and expression). It is clear that the enforcing of stricter guidelines has been restricted to Muslims, presumably because of the widespread misconception that all Muslims are terrorists or anti-nationals. The hostile mood of the times has been exacerbated by the Indian government's aggressive posture on the matter.

For example, a typical reaction to a terror strike, or the threat of a strike, involves police raids on areas where minority communities are concentrated. Following the attack on the Indian Parliament in New Delhi in December 2001, the Kashmiri trader community, an "extensive exercise" was launched to "verify the antecedents" of the 3,000-odd woollen garment traders staying in the city. The traders arrive in the city every winter and return to Kashmir after the snow in the Valley melts. Many of them claimed they had been asked to leave the capital immediately, a charge denied by the police. Any freeze on their businesses, the traders said, would deprive them of an entire year's earnings since there were few employment opportunities available in the Valley.

While any attack on the seat of government would call for enhanced security measures, the near-reflexive targeting of certain sections of the population has become routine. Being overcautious or paranoid about finding a terrorist in every Muslim or in every peaceful protestor, is no different from the Salem witch-hunts or the McCarthy-era targeting of communists real and imagined. Such targeting not only casts unfair aspersions on the targeted group, but also amounts to a tacit rejection of the rights of protest and free speech of other groups and communities.

A recent attempt to bring *madrasas*, or Islamic seminaries, under scrutiny has been driven by the assumption that these institutions are partly responsible for fomenting 'anti-national' activities using funds received from Islamic countries. In an interview, however, Rajnath Singh, the former Chief Minister of Uttar Pradesh a state where anti-madrasa tirades have been at their shrillest admitted that there was no evidence yet of *madrasas* being hotbeds of Islamic militancy. "We are not looking at every madrasa with suspicion," Singh claimed, "though it is true that we are getting some complaints from the border." However, he added, "we don't have clinching proof as yet."

Such demonisation makes it easy for, and gives reason to, security forces to act with impunity, as seen in the above examples. State officials at the lower levels must be made aware of the need to adopt an approach based on research and intelligence information in the countering of terrorist activities. The unthinking targeting and harassment of 'suspects' will only serve to alienate the targeted groups, leading to resentment and raising the prospect of a violent response to State atrocities.

Human Rights Features is a publication of South Asia Human Rights Documentation Centre, Delhi, India.

## LAW opinion



# Legal implications of the ETV Verdict

KHANDAKAR QUDRAT-I-ELAHI

THE ETV appeared in air as a private terrestrial and satellite channel on 14 April 2000. After more than one year of the ETV operation, two professors of the Dhaka University, Chowdhury Mohammad Hossain and Abdur Rob, and an eminent journalist of the country, Gias Kamal Chowdhury, unitedly filed a writ petition challenging the legitimacy of the ETV licence.

In submitting this public litigation interest writ, the petitioners noted three major irregularities in granting the private TV channel licence to the ETV Limited. First, the Ministry of Information granted the licence to AS Mahmud, a private individual, on 9 March 1999, although he did not participate in the tender floated by the government inviting commercial enterprises to install and operate a private television channel. Second, ETV's proposal in the tender was first rejected by the Ministry's technical committee as it was found 'non-responsive.' However, the same technical committee put the ETV Limited back on the selection list and graded it number one. Finally, with the government's approval, AS Mahmud transferred the licence to the ETV Limited.

Based on these accusations, the High Court Division of the Supreme Court issued *rule nisi*, on 19 September 2001, calling upon the government and the ETV Limited to show cause as to why the licensing agreement and its subsequent transfer "should not be declared to have been entered into and granted unlawfully and without any lawful authority." The Division Bench comprising Justice Hamidul Huq and Justice Nazmun Ara Sultana passed the verdict on 27 March 2002. The verdict declared the licence granted to the ETV Limited "illegal and without any lawful authority."

The Court, however, allowed the ETV lawyers to appeal against the judgement, which they did. This controversial legal melodrama finally ended on 30 August, when a seven-member full Bench of the Appellate Division of the Supreme Court (SC), chaired by the Chief Justice Mainur Reza Chowdhury dismissed the review petition and upheld the High Court's 27 March verdict.

The events and actions that followed this important SC verdict are well known and well reported. We are all free to form our own opinions about this case and its verdict. These opinions will, of course, reflect our moral judgements and perhaps our partisan bias. However, whatever are our partisan or moral opinions, the legal virtues of the SC ruling are of tremendous importance to all of us, because this ruling has also negative implications for the operation of our judicial system.

This legal battle has proved, beyond all reasonable doubts, that the ETV licence was granted under admin-



istrative irregularities. Consequently, concerned and critical citizens expected that implicated persons and agencies would be held accountable for their unlawful activities. This legal implication has some noticeable aspects.

Firstly, two parties were involved in this wrongdoing-government officials and the ETV owners. Yet, the petitioners requested the Court to revoke the ETV licence, not to punish the people who were involved in these irregularities. This might suggest that the judgement has not been quite fair. For, revoking the licence punishes only one party involved in these administrative irregularities, the ETV Limited, while, the government officials, who were the main culprits, face no penalty. This might suggest two things. One, the judgement is not comprehensive. Two, it will encourage corruption in the country.

Secondly, the petitioners' motives in filing this petition are questionable. This is a public interest litigation case, because the petitioners were not parties in the tendering process. Why do they want only to revoke the ETV licence? And how does merely revoking the ETV licence serve public interest?

Ever since the High Court's 27 March verdict, these, and other similar, issues are being debated in the public media. This is a public interest litigation case. Therefore, questions naturally arise, who are those people whose interests are being served by this verdict?

The concerned and critical citizens of this country have tremendous respects for their judges. Although this case is one of the most politically motivated legal battles fought in the country, they do not believe that their judges had any partisan motive in declaring ETV licence illegal and without legal effect. However, they also think that their judges perhaps did not consider all aspects and implications of this verdict.

Khandakar Qudrat-I-Elahi is a former Associate Professor of Bangladesh Agricultural University. He currently lives in Guelph, Ontario, Canada.