

FOREWORD

FIDH and the International Criminal Court (ICC)

Since 1998, following negotiations in Rome on the Statute for the International Criminal Court, the International Federation for Human Rights (FIDH) has worked for the implementation of an independent and impartial ICC to protect the rights of victims. Throughout the process of implementation, FIDH has worked to defend these principles.

Today, FIDH focuses on transforming the ICC into an effective tool to be used in the struggle against impunity for crimes committed in violation of international law.

The FIDH ICC Programme

The FIDH programme devoted to the International Criminal Court – “The struggle against impunity and the promotion of international justice”— has one primary global objective: to train national human rights NGOs and to reinforce their capacity to act in defense of human rights. The realization of this objective would permit these organizations to promote and *in fine* to utilize the mechanisms currently available in the struggle against impunity of those who commit the most serious crimes against human rights - one of the most important of such mechanisms being the ICC. This programme benefits from the support of the European Commission (European Initiative for Democracy and Human Rights).

FIDH, in the context of the campaign for universal ratification of the Statute of the ICC, has chosen to focus its action on countries in Asia, North Africa, and the Middle East, regions in which very few states have ratified the Statute. Thus, in close collaboration with NGOs in the concerned countries, FIDH organizes international missions and other activities in the field, including round tables, in support of these objectives.

Law and Society Trust (LST)

The Law & Society Trust is a non-profit making body committed to improving public awareness on civil and political rights; social, economic and cultural rights and equal access to justice. The Trust is also concerned with the consideration and improvement of professional skills within the legal community. The Trust has taken a leading role in promoting co-operation between government and society within South Asia on questions relating human rights, democracy and minority protection and has participated in initiatives to develop a global intellectual and policy agenda.

The Law & Society Trust was set up in Colombo in 1982 to initiate studies and activities on law, its processes and institutions and was subsequently incorporated in 1992 under the Companies Act No. 17 of 1982.

The Trust designs activities and programmes, and commissions studies and publications, which have attempted to make the law play a more meaningful role within society. The Trust attempts to use law as a resource in the battle against underdevelopment and poverty, and is involved in the organization of a series of programmes to improve access to the mechanisms of justice, as well as programmes aimed at members of the legal community, to use law as a tool for social change. These include publications, workshops, seminars and symposia.

The activities of the Trust can be categorized under three programme areas namely Socio-Economic Rights and Globalisation, Human Rights & Conflict and Legal Research & Advocacy.

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ABBREVIATIONS

ASP : Assembly of State Parties
BIA: Bilateral Immunity Agreement
CAT: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CICC: Coalition for the International Criminal Court
CSHR: Center for the Study of Human Rights
EU: European Union
FIDH: International Federation for Human Rights
HRC: Human Rights Council (UN)
IBA: International Bar Association
ICC: International Criminal Court
ICCPR: International Covenant on Civil and Political Rights
ICTR: International Criminal Tribunal for Rwanda
ICTY: International Criminal Tribunal for Former Yugoslavia
IHL: International Humanitarian Law
LAG: FIDH Legal Action Group
LST: Law and Society Trust
NATO: North Atlantic Treaty Organisation
NGO: Non-governmental organization
OTP: Office of the Prosecutor
RS: Rome Statute – Statute of the ICC
RPE: Rules of Procedure and Evidence of the ICC
UN: United Nations
VTF: Victims Trust Fund

The round table was organized with the Sri Lankan organisation Law and Society Trust and in coordination with the Coalition for the International Criminal Court (CICC)



*This report was elaborated with the support of the European Commission.
The points of views presented herein reflect the opinion of participants in the seminar and not under any circumstances the official point of view of the European Union.*

INTRODUCTION

The workshop “Seeking justice in Sri Lanka: National and International Remedies for Victims of Grave Violations of Human Rights and International Humanitarian Law”, held in Colombo on 15 and 16 July 2006, was co-organised by LST and FIDH, to provide Sri Lankan human rights practitioners with a working knowledge of remedies for human rights violations (national, international including international humanitarian law) and to brainstorm on the best means to use these remedies, including the system and mechanism relating to the International Criminal Court. The objective was also to strategise on using the advances in international human rights, humanitarian law and criminal law in Sri Lanka.

The participants were a mix of activists and young lawyers. Although the majority of them had some access to information on human rights standards, the workshop was one of the first they attended where attempts were made to bridge the gaps between their own work and current trends in international law.

OPENING STATEMENT

International Federation for Human Rights - FIDH

FIDH with Law and Society Trust (LST) and the Coalition for the International Criminal Court (CICC) are happy to welcome you to this workshop on international justice.

In the aftermath of the second world war, FIDH was the first international human rights NGO to call for the creation of a permanent international criminal court. In 1956, the International Board of FIDH passed a resolution urging States to adopt a mechanism that would be permanent and universal to fight against the impunity of alleged perpetrators of war crimes, crimes against humanity and genocide. Since 1997, FIDH has been involved in the negotiations of the Rome Statute and lobbying for a fair and independent ICC. Since then, FIDH has been actively promoting universal acceptance of the ICC by organizing regional and national workshops throughout the world for national civil society about this new instrument that came into force on 1 July 2002.

The ICC is still far from being universal. While most countries of the Latin American, African and European continents have ratified the Rome Statute bringing it to 100 States parties as of today, the Asian and Middle East / North African regions are still critically under represented.

For that reason, FIDH has decided three years ago, to focus its energy in raising civil society awareness on the ICC in Asia, the Middle East and North Africa. Indeed, out of the 24 countries in Asia, only 5 (Afghanistan, Cambodia, Mongolia, the Republic of Korea and Timor-Leste) have ratified the Rome Statute. In that context, FIDH has organized national workshops in Cambodia, as well as in Yemen, Bahrain, Tunisia, Morocco, Lebanon, Jordan for Iraqi lawyers, Sudan and Turkey, and preliminary meetings in India and Afghanistan. Today's workshop is the last activity of this programme.

FIDH acknowledges that bringing the issue of the ICC in Sri Lanka is not an easy endeavor.

While supporting the general principles behind the establishment of the Rome Statute, Sri Lanka abstained from voting for the adoption of the Statute in Rome due to, among other things, the non-inclusion of terrorism, money-laundering, trafficking and similar crimes of concern to small island nations. In addition, questions about the practical application of the principle of complementarity, and the treatment of non-state actors by the ICC remain concerns for the Sri Lankan government.

The history of a two decade long civil war in Sri Lanka, on hold since the ceasefire agreement of 2002, is also playing an important role in the definition of the government's position. Indeed, while grave crimes committed prior to Sri Lanka's accession to the Rome Statute would not come under the jurisdiction of the ICC, the government remains sensitive to the political implications of accession.

**Seeking Justice in Sri Lanka: National and International Remedies for Victims of Grave Violations
of Human Rights and International Humanitarian Law**

FIDH has been discussing for several months with Sri Lankan human rights groups and prominent lawyers about the relevance of holding such a workshop. The recent reaffirmation of our partners' interest convinced us to organize this event. Working on the ICC in the Sri Lankan context will be a tough and long process.

FIDH is not a blind supporter of the ICC; we believe that this instrument is one of the available mechanisms to fight against impunity when national courts are unable or unwilling to do so; today the ICC is a concrete mechanism where for the first time, victims can participate in an international criminal jurisdiction; FIDH is the first and so far the only organization to represent victims of the Democratic Republic of Congo (DRC) before the Court. On 17 January 2006, the ICC issued a historic decision where it allowed those victims to participate in the ongoing case; FIDH not only lobbies for the ratification but also uses whenever possible the concrete remedies available for victims.

Sri Lanka is not a party to the ICC and therefore, we all know that there are very limited ways to help victims of the most heinous crimes using this very important instrument.

However, the UNSC Resolution of 2005 referring the Darfur situation to the ICC prosecutor has set a very important precedent. The challenges we are facing are immense but the US decision not to veto the resolution has given hopes to all victims who, because of the refusal of their State to ratify the Rome Statute, were denied access to the Court.

In parallel to any lobby at the international level, FIDH experience shows that awareness campaign at the national level is fundamental; additionally, because of the complementarity nature of the ICC, such campaign can also be an incentive for national reform of the criminal legislation.

Therefore, we believe that a very strong support from the Sri Lankan civil society hand in hand with international NGOs and committed States is crucial in order to launch a campaign in favour of a security council referral to the ICC. At the same time and in parallel, lobbying should be pursued for the accession of Sri Lanka to the Rome Statute.

BRIEF INTRODUCTION TO THE ICC

1 – Historic overview

On 17 July 1998, 120 States overwhelmingly approved a Statute to establish a permanent and independent International Criminal Court (ICC). Four years later, on 11 April 2002, following the 60th ratification, the Rome Statute (RS) of the ICC entered into force. On 1 July 2002, the ICC became fully competent to try individuals for genocide, crimes against humanity and war crimes.

The “road to Rome” was a long and often contentious one. Efforts to create a global criminal court can be traced back to the early 19th century. The story began in 1872 with Gustav Moynier – one of the founders of the International Committee of the Red Cross – who proposed a permanent court in response to the crimes of the Franco-Prussian War.

Following World War II, the Allies set up the Nuremberg and Tokyo tribunals to try Axis war criminals.

Because of the Cold war, 50 years passed before the world’s leaders decided to put the ICC on their agenda again.

Nonetheless, efforts were made in the 90’s to develop a system of international criminal justice with the establishment by the UN Security Council of the ad hoc tribunals, the International Criminal Tribunal for Former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994, and the creation of hybrid tribunals, like the Special Tribunal for Sierra Leone, the Khmer Rouge Tribunal in Cambodia and the Tribunal for East Timor, applying a combination of international and national law.

2 – The ICC is permanent and complementary to national justice

Permanent jurisdiction

Unlike the ad hoc tribunals, which have jurisdiction over core crimes committed in Former Yugoslavia from 1991 to 1993 and in Rwanda in 1994, and the hybrid tribunals, the ICC has jurisdiction with respect to crimes committed after the entry into force of the Rome Statute, that is after 1st of July 2002. This means that the ICC cannot try individuals for crimes committed before this date and thus has a non-retroactive jurisdiction.

Complementary jurisdiction

The ICC is complementary to national criminal jurisdictions and does not replace national courts. The Court will **only** investigate and prosecute if a State is unwilling or unable to genuinely prosecute (i.e. where there are unjustified delays in proceedings, as well as proceedings which are intended merely to shield persons from criminal responsibility).

3 – How to refer a situation to the ICC

There are three ways to refer a situation to the ICC Prosecutor:

- **State Party** referral. A Non State Party may also accept the jurisdiction of the Court, by referring a situation to the Court.
- United Nations **Security Council** referral under Chapter VII of the UN Charter
- Any person can refer a situation to the **Prosecutor** who, pursuant to his *proprio motu* prerogative, can decide to initiate an investigation, if he believes that there is “reasonable basis” to investigate. He must then seek the authorization of the Pre-Trial Chamber before proceeding with the investigation.

4 - Jurisdiction of the ICC

The ICC has jurisdiction to prosecute **individuals** for crimes under the Rome Statute when:

- crimes have been committed in the **territory** of a state which has ratified the Rome Statute;
- crimes have been committed by a **citizen** of a state which has ratified or made a *ad hoc* referral to the Rome Statute;
- the Security Council refers a situation to the ICC. In such a case the Court's jurisdiction is truly universal, meaning that it is not necessary for the alleged perpetrator of the crime to be citizen of a State Party or for the crime to have been committed on the territory of a State Party.

Since **1 July 2002**, the Court has jurisdiction over the crime of genocide, crimes against humanity and war crimes. The Court will exercise jurisdiction over the crime of aggression only once the terms of its definition have been agreed upon.

If a State becomes a Party to the Rome Statute after July 2002, the Rome Statute will enter into force for this State **60 days** after the deposit of its instrument of ratification.

5 - Core crimes defined in the Statute of the ICC

What crimes fall under the jurisdiction of the International Criminal Court?

The ICC has jurisdiction over the most serious violations of international human rights and humanitarian law: genocide, crimes against humanity, war crimes.

Genocide (Article 6 RS):

The definition of the crime of genocide has been taken from the 1948 Genocide Convention. Genocide is any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

- Killing members of the group
- Causing serious bodily or mental harm to members of the group
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
- Imposing measures intended to prevent births within the group
- Forcibly transferring children of the group to another group.

Crimes Against Humanity (Article 7 RS):

The Rome Statute is the first international convention which codifies crimes against humanity.

Crimes against humanity are defined as 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:

- Murder
- Extermination
- Enslavement
- Deportation or forcible transfer of population
- Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law
- Torture
- Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity
- Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law
- Enforced disappearance of persons
- The crime of apartheid
- Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. (...)

War Crimes (Article 8 RS):

Under the Rome Statute, war crimes are any of the following grave breaches of the Geneva Conventions of 12 August 1949, perpetrated against any persons or property:

- Willful killing
- Torture or inhuman treatment, including biological experiments
- Willfully causing great suffering, or serious injury to body or health
- Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly
- Compelling a prisoner of war or other protected person to serve in the forces of a hostile power
- Willfully depriving a prisoner of war or other protected person of the rights to fair and regular trial
- Unlawful deportation or transfer or unlawful confinement
- Taking of hostages.

Under the definition of war crimes, the Court will also have jurisdiction over the most serious violations of the laws and customs applicable in international armed conflict within the established framework of international law. These violations are defined extensively in Article 8, subparagraph (b) of the Rome Statute. In the case of armed conflict not of an international character, the Court's jurisdiction will cover breaches of Article 3 common to the four Geneva Conventions of 12 August 1949.

Crime of Aggression:

The Court will have jurisdiction over the crime of aggression once a provision defining the crime has been adopted during the Review conference in 2009.

The **applicable law of the ICC** (the sources) is primarily the Rome Statute (RS), the Elements of Crimes and the Rules of Procedure and Evidence (RPE) (Article 21).

6 - General principles of criminal law

Individual criminal responsibility (Article 25 RS)

The ICC has jurisdiction over individuals and not legal entities, such as multinationals or corporations.

Minimum age for ICC jurisdiction (Article 26 RS)

The ICC only has jurisdiction over individuals of 18 years of age or older.

Non-retroactivity (Article 24 RS)

No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

Command responsibility (Article 28 RS)

Commanders, from the military as well as other superiors, can be tried where they knew or should have known that their subordinates were committing crimes within the jurisdiction of the ICC, when they failed to take necessary measures to prevent or repress their commission and, for other superiors, when the crimes concerned activities that were within their effective responsibility and control.

***Ne Bis In Idem* (Article 20 RS)**

No person shall be tried by another court for a crime referred to in Article 5 for which that person has already been convicted or acquitted by the Court. No person who has been tried by another court for conduct also proscribed under Article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court were for the purpose of shielding the person concerned from criminal responsibility or were not conducted independently or impartially in accordance with the norms of due process recognized by international law.

Irrelevance of official capacity (Article 27)

The Rome Statute applies equally to all persons without any distinction based on official capacity. Immunities that may apply under national or international law are not applicable before the ICC.

7 - Sentences

The ICC does not recognize the death penalty and can impose a maximum penalty of 30 years of imprisonment or a term of life imprisonment when justified by the extreme gravity of the crime. In addition to imprisonment, the ICC can order a fine or a forfeiture of proceed, property and assets.

8 - Organization of the Court

There are four organs within the ICC:

- The **Presidency**, composed of the President, Mr. Philippe Kirsch (Canada), and two Vice-Presidents.
- The **Chambers**, divided into Pre-Trial Chambers, Trial-Chambers and Appeals Chambers and composed of 18 judges, elected by the Assembly of States Parties.
- The **Office of the Prosecutor**, composed of the Prosecutor, Mr. Luis Moreno Ocampo (Argentina), elected by the Assembly of States Parties, two Deputy Prosecutors, Mr. Serge Brammertz (Belgium) and Mrs. Fatou Bensouda (Gambia), also elected by the Assembly of States Parties.
- The **Registry**, headed by the Registrar, Mr. Bruno Cathala (France), elected by the Assembly of States Parties.

9 – Victims rights

Victims' access to international criminal justice is new. Indeed, for a long time, the interests of victims were not considered in international law. In Nuremberg in 1945 as well as before the international criminal tribunals created in 1993 and 1994 (International Criminal Tribunal for Former Yugoslavia – ICTY – and International Criminal Tribunal for Rwanda – ICTR) the victim is only considered as a witness.

The Statute of the ICC consecrates the statute of the victim in international law. It includes innovating provisions enabling the protection, participation, legal representation and the reparation of victims.

Wide definition of “victim”

The Statute of the ICC includes in the definition of victims not only direct victims but also indirect victims. Moreover, psychological harm is recognized next to physical harm. Only natural persons are recognized as victims before the ICC.

Protection of Victims and members of their family

Another progressive aspect of the ICC is the obligation of protection of victims-witnesses, during the investigation phase as well as during the proceedings. Victims and witnesses have the right to physical protection, but also to receive psychological assistance from all the organs of the Court.

Effective participation

Beyond the possibility of supplying information to investigations, victims can participate in the proceedings before the ICC, provided that they are effectively informed of their rights and are fairly represented. Having been informed of the consequences, modalities and limits of the participation in the proceedings before the ICC, victims are free to choose counsel of their choice. If there is a large number of victims, they will generally have to choose a common legal representative, for whose remuneration they can receive financial assistance from the ICC – within the limits defined by the Court.

Reparation

Unlike the *ad hoc* tribunals, the ICC establishes a real system of reparation for victims. The Court may determine the scope and extent of any damage to be repaired by the convicted person to the victims or their beneficiaries (restitution, compensation or rehabilitation), without the need for any specific request. If reparation cannot be paid directly by the convicted person, the Victims' Trust Fund, a subsidiary organ of the ICC, assists. The funds collected by the Trust Fund will come from forfeitures and fines ordered by the Court against convicted persons, as well as from voluntary contributions from States, individuals and organizations.

SESSION 1: INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW IN SRI LANKA

Chair: Christine Martineau, lawyer (France), FIDH

Part I

- **International human rights instruments: Universal Declaration on Human Rights, International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights**
- **Fundamental rights under the Sri Lankan Constitution**

Resource Person: Sudarshana Gunawardena, Movement for the Defence of Democratic Rights (MDDR)

Mr. Sudarshana Gunawardena made a lively presentation on international human rights instruments and on fundamental rights under the Sri Lankan Constitution, that was conducted through a discussion of recent attempts at legislation curbing religious conversions ("the Anti Conversion Bill"). This session managed to discuss constitutional theory, international human rights, their applicability in Sri Lanka via the Constitution; the rights as recognized by national law and the dimensions of the remedies available: both theoretically and realistically. Some time was spent on the means by which rights recognized internationally become applicable to Sri Lankans nationally and issues such as the dualist nature of the Sri Lankan legal system in relation to international law.

From this, the discussion led towards the issue of disappearances (this is extremely topical and at the same time familiar to the participants). What does it mean to be a democratic nation that follows the rule of law? A legal remedy must be available in case of abduction. But the usual criminal investigations were not available since most abductions were by state authorities. The remedies under the Fundamental Rights chapter of the Constitution were not available because the right to life is not enshrined in the Constitution and, to argue illegal arrest / detention or torture, the constitutional insistence of petitions by the person whose rights are being violated was a barrier.¹ In terms of international law remedies, Sri Lanka not being a party to the Optional Protocol of the International Covenants at that time meant no direct access for individuals. The only remedy was so old we had almost forgotten it: the ancient remedy of the Writ of *habeas corpus*. But of course, these cases took a very long time to conclude.

This led to a discussion on the limitation of law² and other means for ensuring rights, such as organizing groups who lobbied on these issues and worked nationally with politicians and internationally both with politicians and with international human rights groups, to change the situation. Sudarshana Gunawardena underlined that many of the advances we now take for granted were achieved through this work (rather than through courts alone) including how we increased Sri Lanka's international obligations since 1994 ensuring more periodic reports being filed with the various monitoring bodies and also providing access to individuals to file complaints with the Human Rights Council (HRC). The on going problem for Sri Lankans remains that human rights are not considered part of their culture, but appear imposed through international treaties and thus, their recognition and value is minimal. Almost all decisions regarding human rights have been made from a political rather than a principled point of view and so, we see many

¹ Both these matters have been remedied via case law: the Supreme Court has now recognized a limited form of the Right to Life and also granted *locus standi* to family members in extreme situations where the person whose rights were violated is not available.

² Regardless of a large Constitutional guarantee of rights and the fact that the country is a party to the ICCPR and a founding member of the United Nations, the government promulgated emergency regulations under the Public Security Ordinance that condoned disappearances. In fact the only, even if limited, remedy Sri Lankans had, pre dated all these developments: the ancient remedy of the Writ of Habeas Corpus.

retreat from the standards they themselves wished to impose on others when they were in opposition now that they are in government.

Part II

- **Remedies for victims of torture in Sri Lanka: the UN Convention against Torture and its implementation by Sri Lanka**

Resource Person: Lorna McGregor, International Bar Association

Ms. Lorna McGregor drew upon her experience of working with Redress, an organization that works with torture survivors and provides litigation strategies.

This session concentrated on submissions to the Convention against Torture (CAT) committee.

What is the Committee Against Torture?

- Article 17 of the Convention against Torture establishes the Committee against Torture;
- The Committee consists of ten experts elected by States Parties;
- The Committee was set up to monitor the implementation of the CAT by States Parties. It is the authoritative interpretative body of CAT.

How can CAT be Used?

5 ways:

- State Party Reports

States Parties are obliged to submit reports on the implementation of CAT to the Committee. (Every 4 – 5 years).

- Individual Communications

In general, the CAT may receive individual communications claiming that the rights of the individual concerned have been violated under the Convention. However, this mechanism can only be used if the State concerned has made the necessary declaration under Article 22 of the Convention, recognising the competence of the Committee to receive individual communications.

Sri Lanka has not made a declaration on Article 22, therefore individual complaints cannot currently be made (although civil society may wish to advocate for the adoption of such a declaration). However, individual complaints can and have been made to the Human Rights Committee responsible for monitoring the implementation of the ICCPR as Sri Lanka has acceded to the Optional Protocol recognising the competence of the Committee to receive individual communications.

- Inter-State Complaints

This mechanism has never been used. Sri Lanka has not made a declaration under Article 21.

- Inquiries by the CAT itself

The CAT can initiate its own inquiries if it believes that there has been a systematic violation of the Convention.

- General Comments

The CAT can issue general comments, however, unlike the Human Rights Committee, it has only made one.

REDRESS' Shadow Report to the CAT³

The CAT allows the submission of “shadow” reports on the human rights situation by NGOs.

Preparation of the Report

The CAT first draws up a list of issues related to the enjoyment of the rights under the Convention (this is taken from the relevant report and other information supplied to the Committee). This list is sent to the state, which usually (and did in this case) provides written answers.

In the list of issues on Sri Lanka, the CAT highlighted the following:

- the independence and impartiality of the National Human Rights Commission;
- Gender-Based Issues;
- Impunity;
- Victims' Rights;
- Witness Protection;
- Child Recruitment;
- Whether Sri Lanka envisages ratifying the Rome Statute.

The focus of the shadow report was on whether national law *and* practice complies with the CAT. Even where a State has ratified (or in the case of Sri Lanka, acceded) to a Convention, very often, particularly in dualist countries like Sri Lanka, difficulties arise in the application of the Convention by the domestic courts. States usually do not adopt comprehensive implementing legislation as they often claim that a number of existing laws already provide for particular rights and/or obligations. This usually leads to gaps.

On the basis of the List of Issues, REDRESS focused on:

- those relating to complaints procedures, investigation, prosecution and punishment and
- reparation for torture in Sri Lanka

In the preparation of the shadow report, the types of questions REDRESS posed were:

- Are the laws in conformity with the CAT?
- Are the rights and obligations under CAT provided for?
- Are there any other laws which are incompatible, e.g. the CAT found PTA incompatible with the prohibition of torture and the right to fair trial?
- Are the rights and obligations under the Convention being met in practice?

In supporting its positions, REDRESS refers not only to the CAT, but any other source of international law which fleshes out the rights and responsibilities under the Convention, for example, the Basic Principles on the Right to a Remedy and Reparation for Serious Violations of Human Rights and Gross Violations of International Humanitarian Law; jurisprudence of national, regional and international courts and tribunals; other international treaties; customary international law, etc.

Next Steps

The next Sri Lankan report (the combined third and fourth) is due on 1 February 2007. In the most recent report, the Committee recommended that Sri Lanka involve civil society in the preparation of the report. This may be something the groups wish to consider preparing for and advocating broad-based participation.

Why the CAT Can Be Useful

While the Committee cannot force states to implement its recommendations (concluding observations), all five mechanisms under the CAT can be very useful in the work of civil society groups. This may be

³ See REDRESS Report “Comments to Sri Lanka's Second Periodic Report to the Committee against Torture”, October 2005, available at: <http://www.redress.org/publications/SubmissionSL31Oct2005.pdf>

especially true in states such as Sri Lanka in which no regional mechanism exists (e.g. a human rights commission or court).

In Litigation

Any decision of the CAT – as the authoritative interpretative body of the Convention – should be used in litigation, particularly at the domestic level. E.g. *Bouzari* and universal jurisdiction.

Advocacy Tool

States parties reports and the concluding recommendations are useful to highlight the human rights situation, particularly in the context of countries like Sri Lanka where it can be difficult to make sure human rights stay on the agenda.

Funding

Particular recommendations in the concluding observations can be used as the basis for donors funding on particular work.

Used Together with ICC Strategies

As with many countries, Sri Lanka has not fully implemented the CAT into domestic law. It can be very difficult to get comprehensive implementation of the CAT on the agenda. However, the approach of the IBA in addition to many other organisations working on the ICC is to consider the implementation of other international treaties when advocating for the implementation of the Rome Statute into domestic law.

Part III

- **Main instruments and standards of International Humanitarian Law (Geneva Conventions 1949, Additional Protocols 1977); their ratification and implementation in Sri Lanka**

Resource Person: Renaud Galand (Belgium), FIDH

1- What is international humanitarian law?

a. Origins

“I establish these laws to prevent the strong from oppressing the weak.” (Hammurabi, King of Babylon)

Mahabharata, the Bible and the Koran contain rules advocating respect for the adversary.

1863: Lieber Code (American Civil War)

1863: International Committee of the Red Cross (Geneva)

1864: First Geneva Convention

b. Definition

International Humanitarian Law (IHL) (also known as Law of war, Law of armed conflicts) comprises the rules which, in times of armed conflict, seek to protect people who are not or are no longer taking part in the hostilities and restrict the methods and means of warfare employed, so as to limit the suffering caused by war.

c. Sources of IHL

The sources of IHL can be found in conventions, international customary law as well as case law from courts and tribunals at national and international level.

- Main conventional sources

1949: Four Geneva Conventions (192 States Parties)
1954: The Hague Convention - cultural property
1972: Bacteriological and toxic weapons
1977: Two additional Protocols to the four 1949 Geneva Conventions
1980: Prohibitions or restrictions on the use of certain conventional weapons
1993: Prohibition of chemical weapons
1997: Ottawa: Convention on the prohibition of anti-personnel mines
1998: Rome Statute of the International Criminal Court
2000: Involvement of children in armed conflict

We have to bear in mind the international law principle of relativity, that says that a convention is only applicable to a State insofar as it has accepted to be bound by it (signature and ratification / accession).

- International Customary Law

General practice can be accepted as law - "*opinio juris*". The sources are extensive and represent State practice: official accounts of military operations, other official documents, military manuals, national legislation and case law.

- Decisions of courts and tribunals

The decisions of national courts as well as international tribunals (ICTY, ICTR, ICC) can be seen as sources of IHL.

2- IHL, international relations and international public law

a. Jus ad bellum - Jus in bello

Jus ad bellum addresses the legality of the conflict. The agreements regarding acceptable practices while engaged in war are referred to as the *jus in bello*.

IHL regulates only the aspects of the conflict which are of humanitarian concern. It applies to the warring parties irrespective of the reasons for the conflict and whether or not the cause upheld by either party is legal or not. Moreover, there are no questions of reprisals for violations of rules relating to the conduct of hostilities or for violations of IHL.

Jus in bello must remain independent of *jus ad bellum*.

b. IHL and human rights

IHL and human rights are complementary: both strive to protect the lives, health and dignity of individuals. Humanitarian law only applies in situations of armed conflict.

Some human rights treaties allow governments to derogate from certain rights in situations of public emergency, with the exception of certain fundamental rights that must be respected in all circumstances.

3- In which situations does IHL apply? When, how, to whom does it apply?

a. To what?

IHL only applies in cases of armed conflict.

- International armed conflict

We can talk about international armed conflict when:

- 2 or more states are involved ;
- Intervention of foreign State in an internal conflict (troops/other support);
- UN military intervention;
- Secession conflict (strict conditions);
- National liberation war (against colonial, racist regime or foreign occupation).

- **Internal armed conflict**

There is a discrepancy in the definitions.

The Additional Protocol II to the Geneva Conventions (Art. 1(1)), presents a strict and narrow definition of the internal armed conflict.

However, the Common Art. 3 to the 1949 Geneva Conventions does not provide strict definition, so the understanding of internal armed conflict is broader than in the Additional Protocol II.

There is no application of IHL to internal disturbances and situations of internal violence – in this case, Human Rights law applies.

b. To whom? Who is bound by IHL?

- States
- International Organisations (through Customary Law or specific regulations)
- National Liberation Movements
- Parties to an internal conflict
- Private persons: non-compliance can render the individuals liable under penal law.

c. When does it apply?

IHL applies when armed conflict begins, but does not stop at the end of active hostilities.

3 conditions have to be respected for IHL not to be applied anymore:

- End of military operations
- End of occupation
- End of detentions (prisoners of war and civil internees).

4- Fundamental principles

There are two branches: Law of The Hague – Law of Geneva.

a. The « Law of war » - Law of The Hague

3 basic principles:

- Targets (who?)

There is a distinction between the civilian population and combatants. A civilian is any person who is not a combatant. If there is any doubt, the person must be considered as a civilian. Combatants are members of the armed forces, with the exception of the permanent medical and religious staff.

Members of a militia can be considered as combatants if they have distinctive signs, they are under responsible command, are subject to the law of war and are carrying arms openly.

- Targets (what?)

Solely military objectives can be considered as targets (Art. 52 of Additional Protocol I). A civilian objective is everything that is not a military objective. There is a need to always keep potential civilian victims in mind when identifying a target.

Among prohibited targets, we can find:

- medical services;

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- civilian facilities (houses, hospitals, schools, places of worship, cultural or historic monuments, etc.);
- places that are indispensable to the survival of the civilian population (food, drinking water facilities, farming areas)
- “dangerous forces” (dams, dykes or nuclear power), that could cause severe losses among the civilian population.

- Means and Methods

Means and methods of war are not unlimited.

The principle of proportionality has to be respected: even when attacking military facilities, an evaluation must be made between the strategic advantages of an attack and the collateral damages it would inflict upon victims (civilian population or facilities).

It is, moreover, forbidden to use weapons or methods of warfare that are likely to cause unnecessary losses or excessive suffering.

Specific weapons are prohibited: chemical and biological weapons, inflammable projectiles and incendiary weapons, dumdum bullets, blinding laser weapons, small fragments weapons (escaping detection by X-rays), poison, anti-personnel landmines, etc.

Also prohibited is the order or threat to leave no survivors, take hostages or use civilians to shield military targets.

b. Protection of wounded, prisoners and civilian population – The Geneva Law

The Geneva law applies to persons who do not (civilians) or can no longer take part in the hostilities (wounded combatants and prisoners).

These persons have the rights to be:

- in all circumstances treated with humanity, without any unfavorable distinction whatever;
- protected against all acts of violence or reprisal;
- entitled to the respect for their lives and for their physical and mental integrity;
- entitled to the respect for their dignity, their personal rights and their political, religious and other convictions.

These rights are inalienable.

The wounded and sick must be collected and cared for. No priority should be given except on medical grounds.

It is prohibited to:

- kill or injure an adversary who surrenders or who can no longer take part in the fighting;
- use physical torture, corporal punishment or cruel or degrading treatment;
- use sexual violence;
- force the displacement of the civilian population (“Ethnic cleansing”);
- recruit children under 15.

In international armed conflicts, a captured combatant has the right to a specific status (“Prisoner of war”) and must be released after the end of active hostilities.

Captured combatants and civilians must enjoy basic judicial guarantees, that is a fair trial (impartial tribunal, regular procedure, etc.). Collective punishment is prohibited.

5- Two systems of protection

In case of **international armed conflicts**, the set of rules is very broad and complete. The four Geneva Conventions and Additional Protocol I, the Statute of the International Criminal Court (ICC), and customary law apply.

In case of **non-international armed conflicts**, the set of rules is less complete. The principle of State sovereignty has to be respected. However, the Common Article 3 to the four Geneva Conventions and the Additional Protocol II, as well as the Statute of the International Criminal Court and customary law apply.

The common Article 3: a treaty in miniature – the minimum standards

« In the case of armed conflicts not of an international character (...) each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and any place whatsoever with respect to the above mentioned persons:

- violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- taking of hostages;
- outrages against personal dignity, in particular humiliating and degrading treatment;
- the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for. (...) »

Among the weaknesses we can find, Article 3 makes no specific reference to:

- Principles of distinction, proportionality, definition of civilians;
- Prisoners of war (status, rights, registering, ...);
- Civil internees (conditions, rights, etc.);
- Prohibition of forced displacement of civil population;
- Humanitarian assistance to population (refugees, family links,);
- Protection of medical services.

However, this does not mean that there is no protection. Customary law still applies.

6- Implementation measures

“The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” (Article 1 common to the four Geneva Conventions).

There are preventive as well as repressive measures of implementation.

Preventive measures - spreading knowledge of IHL by:

- training qualified personnel, appoint legal advisers in the armed forces;
- adopting legislative and statutory provisions to ensure compliance with IHL;
- translating the texts of the Conventions.

Repressive measures:

- the obligation for the national courts to repress war crimes ;
- the criminal liability and disciplinary responsibility of superiors, and the duty of military commanders to repress and denounce offences;
- mutual assistance between States on criminal matters.

7- How are criminals prosecuted under IHL?

War criminals must be prosecuted at all times and in all places, and States are responsible for ensuring that this is done.

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“The High contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present convention ...” – Art 49, 50, 128 and 146, common to the four Geneva Conventions.

By becoming a party to the Geneva Conventions, States are bound to prosecute in their own courts any person suspected of having committed a grave breach of the Conventions, or to hand that person over for judgment to another State.

The principle of universal jurisdiction requires States to bring to justice any person who has committed a grave breach, irrespective of his nationality or the place where the offence was committed.

There are specific regulations for war crimes:

- No immunity for head of State or other public servant (art. 27, ICC Statute);
- Following orders is not an excuse;
- Commanders and superiors are responsible for their subordinates;
- No statutes of limitation (Art. 29 ICC Statute)

There are several legal basis for war crimes:

- Nuremberg Statute
- Geneva Conventions and Additional Protocols
- Statute of the ICTY and ICTR
- ICC Statute (Art. 8)
- National legislations.

8- What does IHL say about terrorism?

IHL applies only in situations of armed conflict, it does not regulate terrorist acts committed in time of peace.

The requirement to distinguish between civilians and combatants, and the prohibition of attacks on civilians or indiscriminate attacks, lies at the heart of humanitarian law.

IHL also proscribes the following acts:

- spreading terror among the civilian population
- attacks on civilians objects
- attacks on places of worship
- attacks on works and facilities containing dangerous forces
- the taking of hostages
- murder of persons not or no longer taking part in hostilities.

9- International IHL Treaties binding Sri Lanka

1949: Four Geneva Conventions (art. 3 directly applicable because self-sufficient, self-executing and precise)

1954: The Hague Convention for the protection of cultural property in the event of armed conflict (partially applies to internal conflicts, art. 19)

1980: Convention on prohibitions or restrictions on the use of certain conventional weapons (internal conflicts, art. 1(3))

2000: Additional protocol to the CRC on the involvement of children in armed conflict.

DISCUSSION on SESSION 1

The discussion focused on two issues of concern for the participants: (1) Non implementation of laws, decisions and recommendations and (2) some difficult aspects of IHL relating to non state actors and ceasefires.

(1) Many participants discussed their experiences, including extensive work on preparation of shadow reports for treaty monitoring bodies; working on commissions of inquiry into human rights violations in Sri Lanka and the Human Rights Commission. They expressed their frustration at the lack of available space to even discuss the findings of the expert Committees or Commissions added to the failure by the government to follow up on decisions. This also led to a series of comments on the problems of working within the Sri Lankan framework: the multiplicity of institutions created by the State more as a means of placating the international community than as a result of a commitment to human rights principles, the difficulties of challenging unconstitutional laws given the conditions imposed by the Constitution itself, the difficulties of prosecuting when the government is expected to conduct all prosecutions and victims do not have access to the processes. It was felt that bringing prominent cultural figures in the Human Rights movement might have an added value. Also, where prosecution does not happen internally, it may be useful to look outside.

(2) How does IHL apply to non state actors and how do we ensure they also comply?

The discussion was around the definition of parties bound by IHL and also the need for increased work on IHL, making people understand the ways it works, and through it guaranteeing increased respect for the law. It would also be useful to publicize the means by which non state actors have been charged in other countries (such as the ICC prosecutions on Uganda). Also, was discussed the possibility of requesting safety zones where all actors respect some standards. The use of diplomatic measures tied to breaches in IHL such as travel bans was also discussed.

As far as cease fires were concerned, the applicability of IHL seemed to extend to circumstances where it is possible to demonstrate that a conflict still exists rather than the formal document called a cease fire.

Although the original note in the discussion was despondent, it seemed to end on a high note. Firstly, with the various expert committees and periodic reports, it is possible for continuous scrutiny of the country's record. Secondly, the own working methods of the participants were discussed and the need for sustained work rather than only responding to crisis as a strategy was discussed. Finally, the participants realized that their documentation work may have more long term impact than what they expect.

SESSION 2: INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT AND UNIVERSAL JURISDICTION

Chair: Ramani Muttettuwagama

Part I

- **Historical overview of the ICC**

Resource Person: Renaud Galand (Belgium), FIDH

The Presentation dealt with the “Road to Rome”. It included a discussion of the first proposal to set up a permanent international court to deal with crimes committed in the context of conflict. A brief introduction also to the *ad hoc* tribunals such as the attempts after World War 1 to try the Kaiser and other Germans, the Nuremberg trials, the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone. This included a brief discussion of how these tribunals were set up and their politics and the contrast between them and the ICC. A discussion arose on the Rome Statute’s ratification in 1998, its coming into force with the 60th ratification in 2002 and the subsequent Court’s competence to try individuals.

Part II

- **System of the ICC (jurisdiction, complementarity, trigger mechanisms)**

Resource Person: Nehama Jayawardene, Center for the Study of Human Rights (CSHR)

This presentation reviewed the features of the ICC of relevance (such as its permanent nature – i.e., not in response to a situation and thus, could be considered more than just victor’s justice); the crimes the Court deals with and the manner and conditions under which the ICC’s jurisdiction will be exercised. After this, the presentation focused on the underlying principle of the ICC that is complementarity and the general principles of criminal law that bind the Court. Then the structure of the Court was discussed briefly. The presentation provided participants with a brief overview of the means by which gender is integrated into the Courts: in the definition of crimes; the rules the court is bound by; the special structures set up and the demand for gender equity and expertise in the workings of the court.

- **Crimes within the jurisdiction of the ICC and the general principles of criminal law**

Resource Person: Nehama Jayawardene, CSHR

This presentation very rapidly introduced the participants to the crimes of genocide, crimes against humanity and war crimes. This section of the presentation generated considerable interest among participants.

The discussion focused afterwards on the crime of aggression and how the international community has recognized it as a potential crime to be tried by the ICC but decided to wait for a definition of the crime in terms of the UN Charter. This of course means that the Security Council has greater power over the definition, which is politically rather dangerous. Another option that is now being considered is that the Court proceeds without Security Council clearance at all or perhaps asks the International Court of Justice for an advisory opinion on the matter. At the same time, there is also a debate on whether the definition should, as in the case of the other three crimes, be defined in an exhaustive manner (i.e. with a list of instances that would be considered aggression).

- **Using the mechanism of universal jurisdiction: the experience of FIDH**

Resource Persons: Katherine Booth, FIDH Asia Desk, Delphine Carlens, FIDH International Justice Desk

This presentation introduced a topic that was new to most participants.

1- Definition and origins of the universal jurisdiction principle

The principle of universal jurisdiction allows the national authorities of any state to investigate and, where there is sufficient evidence, prosecute persons for serious international crimes committed outside a state's territory, which have no particular connection to that state. This principle is based on the notion that some crimes - such as genocide, crimes against humanity, war crimes and torture - are of such exceptional gravity that they affect the fundamental interests of the international community as a whole. Accordingly, there is no condition that the crime be linked to the state exercising universal jurisdiction by the nationality of the suspect or the victim, or by harm to the state's own national interests.

Although the principle has been part of international law for centuries, it was only after Judge Garzon of Spain initiated proceedings against Pinochet on the basis of universal jurisdiction in 1998 that this principle has become an effective instrument in the fight against impunity. For many victims of genocide, crimes against humanity, war crimes and torture, who are unable to obtain justice in their own countries, either because there is no functioning justice system, or because the state is unwilling to prosecute, universal jurisdiction is the only means to ensure that justice is served.

2- Different conventions providing for universal jurisdiction

Some international treaties require States Parties to exercise universal jurisdiction.

For example, Article 7 (1) of the **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**, adopted on 10 December 1984, provides that "*The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purposes of prosecution*".

The four **Geneva Conventions** go further by obliging each High Contracting Party to "*search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case*"⁴.
(Art 49 in Convention 1; Art 50 in Convention 2; Art 129 in Convention 3; Art 146 in Convention 4)

Most recently, the UN **Convention on the Protection of all Persons from Enforced Disappearances**, adopted at the first session of the newly established Human Rights Council on 23 June 2006, provides for the exercise of universal jurisdiction to investigate and prosecute enforced disappearances.

International Convention for the Protection of All Persons from Enforced Disappearance: Art 9 (2): « *Each State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.* »

Other international instruments include references to the duty of States to exercise universal jurisdiction. The United Nations Principles on the right of victims to reparations state that in cases of gross violations of international human rights law and serious violations of international humanitarian law, constituting crimes under international law, "where so provided in an applicable treaty or under other international law

⁴ GC I, art. 49, GC II, art.50, GC III, art. 129, GC IV, art. 146.

obligations, States shall incorporate or otherwise implement within their domestic law, appropriate provisions for universal jurisdiction”⁵.

The United Nations Principles on Combating Impunity of 2005 require States to “undertake effective measures... that are necessary to enable their courts to exercise universal jurisdiction over serious crimes under international law in accordance with applicable treaties of customary and treaty law”⁶.

3- Experience of FIDH

- **The FIDH Legal Action Group**

The FIDH Legal Action Group (LAG) is a network of more than 50 lawyers, magistrate and legal advisers from national HR organisations around the world affiliated to FIDH and elected representatives of FIDH.

Its mandate is to:

- support victims: to bring direct legal assistance to victims of serious human rights violations by providing advice, representation and support in proceedings against the suspected perpetrators. LAG works to implement victims rights to independent and fair proceedings to ensure that their rights are recognized and that they can receive measures of reparation.
- Unite all the legal and factual elements necessary for the initiation of legal proceedings to bring the responsible of serious violations of human rights to justice.
- Initiate legal proceedings before national and international courts in order to reinforce the activities on national legal systems in the pursuit of those responsible for HR violations. The LAG makes particular use of the principle of universal jurisdiction.
- Build on the complementarity of national and international jurisdictions by promoting the ratification of the Rome Statute and the enactment of national implementing legislation.
- Provide clear explanation of the mechanisms of international criminal law to enable FIDH member organisations and their local partners to use the procedures available to them at the national, regional and international level.

In the framework of this LAG, FIDH has supported victims from Argentina, Chile, Congo, Iraq, Mauritania, Rwanda, Chad, Tunisia, Algeria, Libya to initiate proceedings using the mechanism of universal jurisdiction in France, Belgium, Senegal and Germany. For example, FIDH is involved in proceedings against Pinochet, Hissène Habré and Khadafi.

- **Examples of 2 cases**

Two cases are however particularly relevant to illustrate the use of the universal jurisdiction principle.

The first relates to a case from the Congo (Brazzaville) popularly referred to as the “**Disappeared of the Beach**”. Here, we were introduced to a variety of legal actions and their interconnectedness.

In 2001, in France, FIDH and two member organisations first lodged a complaint against a variety of persons considered responsible for the incident. One of them, General Norbert DABIRA, General Inspector of the Armies, was residing in France at the time of incident. He was charged but went back to the Congo and extradition requests were not acceded to BUT an international warrant for his arrest has been issued. Meanwhile, another of the suspects, Jean François NDENGUE, chief of the police in Congo, arrived in Paris in March 2004 and was arrested on 1 April and charged. He managed to obtain bail and fled the country immediately on 3 April. Currently, the victims have appealed against a ruling nullifying the proceedings, so that the rights of victims to an effective remedy be recognized and guaranteed. The procedure is still pending before the Supreme Court of France.

⁵ Principle 4

⁶ Principle 21, *Measures for Strengthening the Effectiveness of International Legal Principles Concerning Universal and International Jurisdiction*

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Meanwhile, proceedings were also initiated by the State in the Congo. In 2000, an investigation was held and this led to the prosecution of 15 accused in 2005 (despite several legal challenges to the prosecutions and with severe intimidation of the witnesses) but they were all acquitted within one month. The court did recognise that more than 85 people had disappeared and ordered the state to pay 15,000 EUR per family.⁷

Also, the UN Working Group on Disappearances used information provided by FIDH and its local partners to ask information to the government of Congo of some cases of disappearance. This Working Group has also asked for an investigation into the fate of the persons concerned.

The second example relates to the judicial proceedings initiated by FIDH and its member organisation in France (LIDH) in 1999 before Montpellier Tribunal (*Tribunal de Grande Instance*) against the Mauritanian Captain **Ely Ould Dah**, for torture. He was initially arrested but was subsequently released on bail. He returned to Mauritania. However, the investigating judge issued an order of arrest and despite many applications by his lawyers for cessation of the proceedings, he was tried *in absentia* and was convicted of torture and condemned to a ten year prison sentence.

Discussion: Much of the discussion was left for the next day, to tie into the next day's presentations. This session was a difficult one for participants because they were introduced a variety of complex ideas and issues that they were rather unfamiliar with. Many of them were extremely interested in the issues involved including the politics of the ICC, the non-definition of the crime of aggression and the means of using the principle of universal jurisdiction in Sri Lanka.

⁷ It should be noted that Congo has also filed action against France before the ICJ for permitting the trial of the Congolese in France. This case is on going but the ICJ refused Congo's interim application requesting France to drop the charges in France.

SESSION 3: VICTIMS' RIGHTS / REMEDIES: ICC, INTERNATIONAL AND NATIONAL REMEDIES FOR VICTIMS OF GRAVE VIOLATIONS OF HUMAN RIGHTS

Chair: Ramani Muttettuwegama

Part I

- **Overview of status of victims and witnesses before the ICC**

Resource Person: Nehama Jayewardene, Attorney at law, Research Officer, CSHR

This was a brief but useful presentation on the definition of a victim and the means by which their participation in proceedings is ensured within the ICC. Special mention was made of Rule 86 on the special needs of children, elderly persons, persons with disabilities and victims of sexual and gender violence, the victim and witness unit of the Prosecutor's office and Rule 68 on victim and witness protection.

After this, attention was drawn to the reparations available under the ICC. It was stressed that the concept is not limited to compensation, that the Court needs to take into account the victim's opinion prior to making an award on reparations and the accessibility of the Trust Fund.

Part II

- **Advances in International Criminal law and its relevance to the work in Sri Lanka**

Resource Person: Sunila Abeysekera, Executive Director, INFORM

This presentation tied up recent advances in international criminal law and the ICC with situations Sri Lankan NGOs deal with in their work through an initial focus on crimes against women.

First, we had a quick overview of some of the key cases relating to crimes against women before the ICTR and ICTY, and the recent charges before the ICC.

Then, the problem of the reluctance of the State to deal with sexual violence and thus ignoring rape of murdered women was discussed. The acknowledgment that rape is a war crime and a crime against humanity will assist in shifting this attitude. Further, the focus on rape means other forms of sexual abuse are not even investigated. The developments in the definition of rape in international law to invasive penetration will mean this problem may be addressed as well. The rules of evidence and the prohibition on discussing previous sexual history means that women victims will be taken seriously and will also find it easier to complain. The right to participation will also contribute to a stronger status of women in the procedures. Take for instance bad investigations (a recent case a conclusion of no evidence of sexual assault based only on the fact that the woman's body had her underwear on) - families could challenge these proceedings.

The independence of the investigative mechanisms introduced by the ICC is a useful standard for Sri Lankans. In crimes committed in the context of the conflict in Sri Lanka, the investigations are extremely badly carried out. Most cases are covered up at this point. When, for instance DNA investigations are requested for purpose of identifying mutilated bodies, the courts ordered the families of the victims to pay the cost of the testing (later this order was changed and the State was ordered to pay the cost). The results of the analysis are held in the custody of the police who change them.

Thus the standards introduced via the new advances in law would help to address some of the more pressing problems of the politicization of the Sri Lankan criminal justice system by providing standards the system is compelled to work within.

SESSION 4: THE CHALLENGES OF RATIFICATION OF THE ICC STATUTE BY SRI LANKA

Chair: Christine Martineau, FIDH

Speaker: Sanjeeva Liyanage, Programme Coordinator, AHRC, Coordinator for South-East Asia of the International Coalition for the ICC (CICC)

- **Status of ratifications and implementation of the ICC Statute in the region**
- **The political and legal challenges to ratification of the ICC Statute by Sri Lanka: possible obstacles to overcome. Bilateral immunity agreements between the United States and Sri Lanka**

This presentation first provided an overview of the status of ratification and implementation of the ICC Statute in Asia. The record is dismal partly due to lack of political will but also due to resource considerations. Some countries cannot afford the massive changes that the Rome Statute will require to their criminal justice system and the huge law reform processes that may need to be undertaken. In addition, these countries are subject to pressure from the United States of America and most have already signed bilateral immunity agreements that shield US citizens and contractors employed by the US in other countries from prosecution before the ICC.

Mr. Liyanage then focused on the fact that the lack of pressure from civil society due to resource considerations (money, knowledge) and networking limitations means there is also no pressure on States. The question is how to make the ICC important to us. The morning's presentation displayed some important elements. We can focus on how victims and witnesses benefit from the Rome Statute and do our advocacy through that approach.

Discussion on SESSIONS 3 & 4

The initial discussion focused once again on implementation related issues. From this, gradually, some speakers also began to draw on the Rome Statute and examined why the State does not wish to accede to it. The general consensus was that civil society was weak in this area. And an emphasis on broad basing information on the ICC and its relevance to Sri Lanka as a first step was discussed.

Closing remarks and conclusion

The workshop was extremely interesting and useful to participants, since many of them had limited information on international criminal law and humanitarian law. Through the two days discussion, they had an opportunity to both access information but also share their experiences of the issues they work on, their working methods and the potential use of IHL and international criminal law in their work. The participants were also extremely interested in FIDH as a network of local organizations. There was a renewed emphasis on networking and sharing of the information made available at the workshop. Participants were provided with copies of the power point presentations made but also some publications in Sinhala and Tamil on frequently asked questions on the ICC, international criminal law and IHL relating notably to sexual crimes and disappearances.

The resource people and the manner in which they conducted the sessions were also interesting. For instance, in the Parts on international human rights standards and their applicability in Sri Lanka, reporting to CAT and the potential uses of new standards in international criminal law, the resource people conducted the sessions in order to foster discussion and exchanges. Many of the participants were familiar with situations and incidents and some aspects of law, which have use to interesting contributions. In the more technical sessions, power point presentations greatly assisted in cutting through some difficult and new areas and issues for participants. The sessions on IHL and universal jurisdiction were especially appreciated by participants. Many participants welcomed the fact that resource people were also willing to discuss the politics of the ICC as much as its technicalities.

The participants in this workshop agreed on the following main recommendations.

They called for:

- the creation of a network of human rights NGOs and activists, victims organisations, lawyers, academics, students, trade unions and other interested persons aiming at the ratification of the Rome Statute by Sri Lanka
- the organisation of training sessions on the ICC system, independently or as part of education activities on human rights
- the translation into Sinhala and Tamil of important material and documents on the ICC

They also acknowledged the need:

- to explore the full range of tools and international justice mechanisms available to victims of human rights violations and crimes under international humanitarian law
- for training on international justice mechanisms
- to push for bringing the national legislation in line with human rights and international humanitarian law standards.

Follow-up

Since the workshop, LST had a meeting on disappearances that was attended by most participants from the workshop (in addition to the usual network of groups working on disappearances). At this meeting too, it was decided to share more information on the ICC and IHL and to pursue the work for ratification.

Also, at several recent demonstrations by activists on peace, human rights and disappearances, several posters requesting the government to sign the Rome Statute were displayed for the first time.

APPENDICES

AGENDA

**Seeking Justice in Sri Lanka:
National and International Remedies for Victims of Grave Violations of Human Rights and
International Humanitarian Law**

**Colombo, Sri Lanka
15-16 July 2006**

WERC Auditorium, 58, Dharmarama Road, Colombo 6.

Saturday, 15 July 2006

**INTERNATIONAL AND NATIONAL REMEDIES FOR VICTIMS OF GRAVE VIOLATIONS OF
HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW**

9:00 - arrival of the participants / registration / distribution of the agenda and documentation kit

9.15 – 9.45 OPENING: Presentation of the objectives and expectations of the workshop

9.45 – 11.15 / SESSION 1

INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW AND SRI LANKA

Chair: Christine Martineau, FIDH

Speakers:

SUDARSHANA GUNAWARDENA, Movement for Defence of Democratic Rights

LORNA MCGREGOR: International Bar Association

Renaud Garland, FIDH

- International human rights instruments: Universal Declaration on Human Rights, international covenant on civil and political rights, international covenant on economic, social and cultural rights (SG)
- Fundamental rights under the Sri Lankan Constitution (SG)

10.45 – 11.00 TEA

- Remedies for victims of torture in Sri Lanka: the UN Convention against torture and its implementation by Sri Lanka (LMG) 15 min
- Main instruments and standards of International Humanitarian Law (Geneva Conventions 1949, Additional Protocols 1977...), ratification and implementation in Sri Lanka (RG) 30 min

Discussion: Focus on gaps between domestic standards and international standards. strategies to overcome these

12.30 – 14.00 : Lunch

14.00 – 16.30 / SESSION 2

INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT AND UNIVERSAL JURISDICTION

Chair: Ramani Muttettuwagama

Resource People: Renaud Galand, FIDH

Nehama Jayewardene, Centre for the Study of Human Rights, University of Colombo

Katherine Booth, FIDH

Delphine Carlens, FIDH

- Historical overview of the ICC (RG) 20 min
- System of the ICC (jurisdiction, complementarity, trigger mechanisms) (NJ) 20 min
- Crimes within the jurisdiction of the ICC and the general principles of criminal law (NJ) 20 min

Tea: 15.00 – 15.15

- Using the mechanism of universal jurisdiction: the experience of FIDH (KB and DC) 20 min

Discussion: Where do these fit with our work? Strategies for using the principles developed in recent international criminal law in our work.

Sunday, 16 July 2006

**THE INTERNATIONAL CRIMINAL COURT IN THE
SRI LANKAN CONTEXT : THE ROLE OF VICTIMS**

10.00 – 12.30 / SESSION 3

VICTIMS' RIGHTS / REMEDIES: ICC, INTERNATIONAL AND NATIONAL REMEDIES FOR VICTIMS OF GRAVE VIOLATIONS OF HUMAN RIGHTS

Chair: Ramani Muttettuwagama

Speakers: Sunila Abeysekera, INFORM

Nehama Jayewardene

- Overview of status of victims and witnesses at the ICC (NJ) 15 min
- Available remedies for witnesses and victims in Sri Lanka: the experience of Sri Lankan organisations and lawyers (SA) 20 min

10.45 – 11.00 : Tea break

Discussion : How much of this do we have ? How much can we push for within the current framework of the law? Do we need law reform ?

12.30 – 14.00 : Lunch

14.00 – 16.00 : SESSION 4

**THE CHALLENGES OF RATIFICATION OF THE INTERNATIONAL CRIMINAL COURT BY
SRI LANKA**

Chair: Christine Martineau, FIDH

Speaker: Sanjeewa Liyanage, AHRC

- Status of ratifications and implementation of the ICC Statute in the region
- The political and legal challenges to ratification of the ICC Statute by Sri Lanka: possible obstacles to overcome. Bilateral immunity agreements between the United States and Sri Lanka

Discussion:

Identifying Implications/ impact/ blocks in relation to Sri Lanka ratification.

How will it help us?

Is it possible?

Is it worth it?

Strategies for ensuring ratification.

Plan of Action?

Closing Remarks and close of Workshop

LIST OF PARTICIPANTS

**Seeking Justice in Sri Lanka: national and international remedies for victims of grave violations of
human rights and international humanitarian law**

July 15 & 16, 2006

Venue: WERC, Colombo

LIST OF PARTICIPANTS

1. Rev. Fr. Reid Shelton Fernando, People against Torture
2. Mr. U.L.A Joseph
3. Mr. Shelton Handuwela, Embilipitiya Disappeared School Children's Parents Organisation
3. Mr. M.A.P.E Reggie, Organisation of parents and family members of disappeared (OPFMD)
4. Ms. Soma Hapugahapitiya, H.R.C.C
5. Ms. T.W. Nayomi Piyadasa, Institute of Human Rights
6. Mr. M.C.M. Iqbal
7. Ms. Hemamali Perera, Movement for the Defence of Democratic Rights (MDDR)
8. Mr. M.A.R. Suranga, MDDR
9. Mr. H.D. Mahendra Jayasinghe, MDDR
10. Mr. Sudharshana Gunawardena, MDDR
11. Ms. Nilanthi Devasinghe, Home for Human Rights
12. Ms. Sajeewani Abeykoon, Home for Human Rights
13. Mr. Thirunavukarasu Janakan, Home for Human Rights
14. Ms. Bhavani Fonseka, Center for Policy Alternatives (CPA)
15. Ms. Subaskary, Human Rights Commission (HRC)
16. Ms. Dilani Kaushalya, HRC
17. Ms. Jayanthi Kuru Utumpale, Women & Media Collective
18. Mr. Sarath Samarasinghe, OPFMD
19. Ms. Christine Martineau, FIDH
20. Ms. Katherine Booth, FIDH
21. Ms. Lorna McGregor, International Bar Association
22. Ms. Delphine Carlens, FIDH
23. Mr. Renaud Galand, FIDH
24. Mr. Sanjeewa Liyanage, Asian Human Rights Commission (AHRC)
25. Ms. Sunila Abeysekera, INFORM
26. Ms. Nehama Jayewardene, Center for the Study of Human Rights (CSHR)

FIDH Press Release

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ORGANISATION INTERNATIONALE NON GOUVERNEMENTALE AYANT STATUT CONSULTATIF AUPRES DES NATIONS UNIES, DE L'UNESCO,
DU CONSEIL DE L'EUROPE ET D'OBSERVATEUR AUPRES DE LA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

International Federation
for Human Rights

Federación Internacional
de los Derechos Humanos

الغدرالية الدولية لحقوق الإنسان

Press Release

Victims' access to justice in Sri Lanka

Sri Lankan civil society looks at remedies available for victims of grave violations of human rights and international humanitarian law

Paris, 26 July 2006 - On 15 and 16 July 2006, the International Federation for Human Rights (FIDH) and the Sri Lankan non-governmental organisation Law and Society Trust (LST), together with the International Coalition for the International Criminal Court (ICCC), organized a workshop on "Seeking Justice in Sri Lanka: national and international remedies for victims of grave violations of human rights and international humanitarian law" in Colombo, Sri Lanka.

This training and information workshop took place in the context of widespread impunity for violations of human rights and international humanitarian law, in particular for crimes of enforced disappearances and torture, as well as in the context of the internal conflict reaching levels unseen since 2002. The failings of the national judicial system to effectively address those crimes were examined and the workshop explored the full range of national and international mechanisms available.

National and international experts provided an overview of international human rights instruments and instruments of international humanitarian law and their implementation into Sri Lankan law. The system and jurisdiction of the International Criminal Court (ICC) were discussed, as well as the United Nations treaty bodies and the use of the universal jurisdiction mechanism, in particular for crimes of disappearances and torture. The presentations on victims' rights before the ICC and on the interest and challenges of ratification of the ICC Statute by Sri Lanka led to very fruitful discussions on victims' access to justice in Sri Lanka and the possibilities for future incorporation of progressive provisions of the Rome Statute on victims' participation, protection and reparation into national law.

The participants in this workshop agreed on the following main recommendations and conclusions:

- the creation of a network of human rights NGOs and activists, victims organisations, lawyers, academics, students, trade unions and other interested persons aiming at the ratification of the Rome Statute by Sri Lanka

**Seeking Justice in Sri Lanka: National and International Remedies for Victims of Grave Violations
of Human Rights and International Humanitarian Law**

- the organisation of training sessions on the ICC system, independently or as part of education activities on human rights
- the translation into Sinhala and Tamil of important material and documents on the ICC
- the need to explore the full range of tools and international justice mechanisms available to victims of human rights violations and crimes under international humanitarian law
- the need for training on international justice mechanisms
- the need to push for bringing the national legislation in line with human rights and international humanitarian law standards

In addition, the FIDH delegation met with representatives from the Ministry of Justice, the Ministry for Human Rights and the Ministry of Foreign Affairs who expressed their will to organise training for government officials on the ICC and who committed themselves to re-launch an interministerial working group on the ICC. FIDH will be following the implementation of these commitments with interest.

A report of the workshop will be available very soon.