

## INTERNATIONAL CRIMINAL COURT: UNPRINCIPLED OPPOSITION

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From times immemorial every civilized society has strived to eliminate use of force and violence to create conditions of peace and security in which the individuals or groups of individuals can sustain their pursuit of happiness without unacceptable interference from others. The most ancient device that mankind has discovered is some form of Government. It is only in democracies of long ago, for example in Greek times or the recent ones that government are formed by consent of the governed. Usually governments have been based not on consent but on force, or fraud or both. But then such governments have had their long tenures of existence due to the general perception of the governed that some government is better than no government.

Governments themselves have frequently behaved like unruly savages and brought forth colossal suffering, devastation of assets and destruction of human life. The world has never been free of wars and even peace has been only a tentative and highly unsafe interval between two wars.

Political writers, statesmen and philosophers inevitably arguing by analogy from experience within the nation state, have flirted with the idea of the creating a "World Government" to keep States, their instrumentalities and powerful war lords under some degree of control. With the concept of World Government inexorably goes the idea of other institutions as invariable concomitants of government. One cannot imagine a government without a criminal court.

You might well ask : But where is the World Government? Yes, it is not there. The United Nations and the Security Council are not a real world government but a heroic attempt at creating one. They are an imperfect world government but then an imperfect government is none the less a government. Some day it may flower forth into one but till then we have to make the best of it.

An international criminal court is one step in the right direction. When you erect a building you first set up the columns and the pillars which will hold the edifice. We are constructing an important, an absolutely essential supporting pillar and column.

What is a government if it has no mechanism for dealing with international criminals that threaten the whole of humanity, make its survival problematic or create a virtual hell on earth for a significant section of humanity. These criminals also often control nation states, receive active encouragement and resources from them and if pursued, find shelter refuge and protection under them.

The case for a Supra National Tribunal to prosecute and punish grave crimes against humanity was eloquently put by U.S. President Theodore Roosevelt in his State of the Union Message of 1904 in the following words: -

"...there are occasional crimes committed on so vast a scale and of such peculiar horror as to make us doubt whether it is not our manifest duty to endeavor at least to show our disapproval of the deed and our sympathy with those who have suffered by it... in extreme cases action may be justifiable and proper. What form the action shall take must depend upon the circumstances of the case; that is , upon the degree of the atrocity and upon our power to remedy it.

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The cases in which we could interfere by force of arms as we interfered to put a stop to intolerable conditions in Cuba are necessarily very few. Yet...it is inevitable that such a nation should desire eagerly to give expression to its horror on an occasion like that of the massacre of the Jews in Kishenev, or when it witnesses such systematic and long-extended cruelty and oppression of which the Armenians have been victims, and which have won for them the indignant pity of the civilized world..."

That this great task should be lodged in a judicial tribunal enjoying confidence across the board rather than left to the vagaries of individual nations has been a favourite theme of international intercourse but no Tribunal came to exist for long. The stumbling block has been the misguided notion of State sovereignty and the arrogance of powerful governments who would not get reconciled to the idea of their own national being tried in non domestic Court. To right thinking people this has seemed to be either an insane obsession with sovereignty or a symptom of super disease of regarding themselves as above all international law and control.

Speaking on 5<sup>th</sup> September 1997 to a Convention of International Des Advocates in Philadelphia, U.S.A. on the 'Role of the lawyer in defense of human rights'. I referred at length to what I regarded as an optimistic development in the field of human rights enforcement. This was the concept of the International Criminal Court. This is what I told the distinguished audience:

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

Some way has to be found to deal with terrible mass crimes including genocide and the ethnic and religious massacres that have come to characterize the last few decades. For reasons of domestic politics or the sordid importance of practical diplomacy, many nations are still not reconciled to the creation of one more supranational and trans-border institutions. The usual bug-bear is surrender of sovereignty. Both the large democracies – one mightiest and the other most numerous- are strangely allergic to the proposal. Both seem stuck on abstract sovereignty. I mean no disrespect to the leaders of the two democracies but it does appear to me that they don't know what they are talking about. International society is not possible without significant surrender of sovereignty. No Federations or Confederations can exist without partial surrender. Adherence to the U. N. Charter is itself surrenders of sovereignty".

By the beginning of the next year I had become a Minister for Urban Development. It was not easy to keep track of the fate of the International Criminal Court, but after I took over as the Minister for Law, Justice & Company Affairs, in 1999 I was disappointed beyond measure when I learned of our Government's foolish almost insanely irrational vote of abstention on 17<sup>th</sup> July 1998 at the Rome Conference. The Statute outlining the creation of the court was adopted on that day. After weeks of intense negotiations, 120 countries voted for adoption. Only seven countries voted against it (including China, Israel, Iraq and the United States) and 21 abstained, India was one of them.

What amazed me was the attempted explanation of this muddled international action. Speaking on the occasion our representative Shri Dalip Lahiri, first started with a major concession in the following words: -

"Throughout the long process of preparing for this Conference, India has negotiated in the expectation that an International Criminal Court will emerge

to which we can be a signatory... We would have wanted to be one of the first signatories of the ICC; equally, it should have been in the interests of the ICC to have country like India on board..”

In the rest of the speech, it frankly does not make much sense to me, he seems to have advanced the following four reasons: -

1. The Court might take on work for which it was not created;
2. The Charter does not give Council the power to set up a Court;
3. The statute of the Court will not bind non-parties;
4. Use of nuclear weapons should be declared a crime.

The first was based upon unfounded conjectures and was in any event easily preventable. The second is absurd because the Court was not being set up the Council but by international agreement. In 1999 the International Criminal Tribunal for Yugoslavia (ICTY) and for Rwanda (ICTR) were set up by Security Council Resolutions. The competence of the Security Council was challenged and the Appellate Chamber of both rejected the contention by reasoned Judgments. The reasoning binds both USA and India, the principal opponents of the ICC.

The third is an argument which applies to all statutes and is wholly irrelevant. The Fourth was not even honest, in the context of the Pokhran explosions only a few months earlier. Plainly the national interest of India was sacrificed for reasons which are better left unstated.

I urged the Prime Minister to reverse our public stand, forthwith accede to the statute and ratify it. We can thereafter strive to improve it. Elimination of international terrorism requires this court. Today we have neither the means nor the legal right to apprehend the hijackers who have succeeded in black-mailing us, tarnishing our image and escaping beyond our reach. My communication to the Prime Minister was long and elaborately argued. All that I got in reply was something which made still less sense. Through the Prime Minister bureaucrats explained that India had strongly pressed for inclusion of terrorism as one of the crimes within the purview of the International Criminal Court but this was not accepted. This is factually incorrect. Terrorism is one of the crimes against humanity which are expressly included in the Court's jurisdiction.

Since the United States had also not supported the creation of this Court, I got in touch with the United States Government. It was heart warming to hear from Ms. Madeleine Albright about their change of attitude. In fact the U.S. Government requested for Indian help in streamlining the Court. I regret that it has still not reconciled to its creation and is pressurizing those who cooperate with it.

I had also discussed it with the Lord Chancellor of England, the Right Honorable Lord Irvine of Lairg when I called on him in March that year. Soon after he wrote to me that the United Kingdom strongly supports the creation of the ICC.

“It is our strong hope that all countries, especially influential democracies such as India, will sign up to the Statute so that the Court becomes a truly global body. The ICC, with India as one of its members, would be all the stronger. And India, by becoming a State Party to the Court, would be in a better position to influence the ICC's future evolution and so contribute to this major development in international law. I hope India will work with to make the Court a real success”.

The United Kingdom signed the Statute on 30<sup>th</sup> November, 1998. The government was preparing the implementing legislation necessary for ratification. The Court has since started functioning and is by all accounts doing a excellent job.

The Court will be a permanent court obviating the need to set up ad hoc tribunals like the Nuremberg and Rwanda ones. Jurisdiction will be triggered on invocation by the Security Council which I hope is not rendered impotent by the veto. It will independently exercise jurisdiction if the offence is committed on the territory of a state party. The Public Prosecutor can take cognizance suo motu and his work will be supervised by the pretrial Chamber of the Court. Eighteen Judges of eminence and integrity will impart justice without fear or favour. The court's jurisdiction extends to genocide, war crimes involving serious breaches of Geneva Conventions and crimes against humanity including government-supported terrorism. It would take in the actions of terrorist groups like the one led by Osama Bin Laden who has trained thousands of adherents and indulged in bombing of U. S. Embassies and several places or the ones that have been operating in Kashmir and hijacked our plane to Kandhar. But international aggression will remain beyond its cognizance until it is defined later.

I would appeal strongly to the Bar and the Press to compel Indian Government to change course and confirm and ratify the Statute. It will add to the dignity of the Court and enhance the prestige of Indian democracy.