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## The Need for the International Criminal Court?

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# THE NEED FOR THE INTERNATIONAL CRIMINAL COURT?

Report of the colloquium held by IPCS & KAF on 12 December 2005

*KS Manjunath & Surabhi Sharma, Research Officer and Research Intern respectively at the IPCS*

## OPENING REMARKS

**Mr. Jorg Wolff**

Resident Representative to India, Konrad Adenauer Foundation

The Konrad Adenauer Foundation (KAF) strives to contribute to a large and sustained dialogue and contribute to a set of issues within the ambit of the German foreign policy's objectives, among which are security, international issues, economy and the rule of law. Therefore, the KAF is honoured by the International Criminal Court's President and Appeals Chamber Judge, Philippe Kirsch's acquiescence to take part in this round table on the topic of *The Need For the International Criminal Court?*

The expertise of the speakers assembled today will greatly enhance the dialogue that is to ensue.



**Maj. Gen. Dipankar Banerjee**

Director, Institute of Peace and Conflict Studies

The International Criminal Court (ICC) is one of the important issues unfolding in the world today. On behalf of the Institute of Peace and Conflict Studies, an autonomous think tank devoted to alternate policy formulations, it is our privilege to host this important



dialogue in India. The opportunity to interact with Judge Philippe Kirsch in the past in Geneva

enabled me to get a clear understanding of the ICC's evolution. I am sure this distinguished audience will be equally enriched by Judge Kirsch's observations on the ICC. This will also help in providing markers for India to evolve a positive framework to engage with the ICC.

## INAUGURAL ADDRESS

**Justice JS Verma**

(Former Chairman, Human Rights Commission, and former Chief Justice, Supreme Court of India)

The ICC is a matter of concern, not only for India, but also for the world at large. The query posed to us all is *The Need for an International Criminal Court?* To answer this query, one needs to start with the basic premise that accountability is one of the facets of the rule of law, as it is in international relations. This necessitates the need for a credible and effective mechanism for the enforcement of accountability. This is an obvious need. The question remains, what mechanism — when and how — can it be enforced?

The UN Secretary-General, Kofi Annan, in a letter (dated 15 May 2000) to various Heads of States



said with respect to the significance of the rule of law, "Sanction of rule of law has been due to the political, social and economic achievements in recent years and will hopefully facilitate further progress in the new millennium." The significance of accountability in this definition cannot be doubted. It was pointed out long back in the Nuremberg & Tokyo trials held in

1948, "Crimes against rule of law is committed by men and not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be upheld." The concept of individual criminal responsibility is traceable to these trials. The Pinochet case and the Gujarat riots of 2002 are recent examples of accountability of heads of government. This is an area that cannot be ignored any longer and the clamour for universal jurisdiction to punish offenders guilty of crimes against humanity is something that cannot be doubted. This being the basic premise, it cannot be disputed that there is a need for an effective and credible mechanism to enforce accountability.

The primary responsibility lies with the nation-state itself. Only when the mechanism available in a nation is unable to meet out justice or does not have the capacity, then the question of the ICC comes in. However, the standards are not uniform everywhere, hence a need for a standardised, international mechanism that can enforce accountability in the form of the ICC is justified.

At the time of obtaining the 60 signatures on 11 April 2002 to the Rome Statute, Kofi Annan said rather optimistically that, "Impunity has been dealt a decisive blow," the question is 'has it?' Because, if it continues to be victor's justice or selective justice, as the Nuremberg trials and the recently constituted ad-hoc tribunals for crimes in Rwanda and the former Yugoslavia have been called. It is desirable to have permanent tribunals as opposed to ad-hoc tribunals. A permanent institution that can ensure such justice is desirable. The age-old question of "Is international law a law?" is passé now as we have moved far ahead as a paradigm shift in a nation's sovereignty is taking place now. Unless all nations (including India) — irrespective of their power — are equally subject to application of laws by an institution, until then the last step will not be taken.

In conclusion, the universal jurisdiction must permeate throughout the so-called "global village" so that no alleged offender must find a safe haven in any corner of the world. An effective and credible mechanism for accountability, called in whatever name is hence the need of the hour.

**Amb Hans-Werner Bussmann**  
(Commissioner for the International Criminal Court, German Foreign Office, Berlin)

The ad-hoc tribunals for the former Yugoslavia and Rwanda would not have been established as quickly as they were in the 1990s were it not for the foundations laid by the war crimes tribunals of Nuremberg and Tokyo. The subsequent drafting of a court statute by the International Law Commission in the late 1940s – an achievement put paid to by the Cold War. These foundations greatly simplified the preparatory work on the Rome Statute, which was concluded in only four years and adopted by the Diplomatic Conference in Rome in mid-1998 in a mere five weeks. The



necessary 60 ratifications and even more were unexpectedly obtained in just three and three-quarter years, with the welcome result that the Statute entered into force on 1 July 2002, enabling the Court to start its work much sooner than envisaged even by optimists. The 18 judges, the chief prosecutor and the registrar were elected early in 2003 and the first situation was referred to the Court by Uganda in December 2003. The Rome Statute and the ICC can thus rightly be described as a success story born of the will of the community of nations to:

- Put an end to impunity for the most serious large-scale crimes,
- Promote law, justice, and respect for human rights and the separation of powers,
- And, thereby to create lasting peace and stability in post-conflict

situations as the basis for sustainable development.

Mexico became the 100<sup>th</sup> state to ratify the Rome Statute. All Latin American states, except Chile and three Central American countries are thus now parties to the Statute, as are all EU states apart from the Czech Republic. Some 27 of the 51 African countries have acceded to the Rome Statute. More than half of all UN member states have thus recognized the importance of ending impunity in order to create a stable foundation for recovery in post-conflict situations. It is regrettable that some important states have not yet taken this step, in particular the US and Asian and Arab states. These countries should not however be deemed to have a lesser interest in the aforementioned aims. They have fundamental objections to the Rome Statute, which I would now like to address.

One main argument advanced against acceding to the Rome Statute rests on an alleged loss of sovereignty. The states concerned

assume that they will no longer be able to determine whether and to what extent an international



prosecution should be pursued in parallel to or instead of a national one. This argument can be answered by saying that accession to the Rome Statute only involves a partial transfer of sovereignty to an international Court supported by a large body of states, and not to another state or to an international organization of a primarily political character. This is admittedly something that we Europeans find easier to accept, having had almost 50 years to get used to gradually transferring sovereignty to supranational executive, legislative and judicial institutions in what is now the European Union.

Above all, the attention of the doubters must be drawn to the principle of

complementarity, one of the basic precepts of the Statute. This states that the court only has jurisdiction if the state concerned is unable to prosecute or is simply going through the motions in order to protect the perpetrator from genuine prosecution. The ICC is not a court of final instance, but rather a "court of last resort". It is ultimately up to the states parties to decide whether they themselves want to prosecute or whether they should leave the case to the ICC – a decision that lies within the exclusive realm of their sovereignty.

In order to further strengthen this precept, and to help post-conflict states that are willing but unable to investigate and prosecute possible crimes against international law, a number of states parties have launched the "Justice Rapid Response Initiative". Under this initiative, experts would be seconded for short periods to assist states that are in principle willing but no longer able to undertake the necessary legal steps on their own, for example following a long period of extensive internal or regional strife. Mixed courts consisting of both national and international judges and prosecutors could rise to further prominence beside the ICC and national courts following the success of the Special Court of Sierra Leone.

Another objection to the Rome Statute concerns the lack of control over judges and prosecutors. But, is not it strange for democracies based on the separation of powers to be concerned about "controlling" a court? The judges of the ICC are elected pursuant to a complex set of rules to guarantee the appointment of highly qualified lawyers of international standing from as many legal systems as possible. Their integrity and diverse backgrounds provide an automatic self-correction mechanism within the court.

The chief prosecutor of the ICC acts with utmost circumspection, as has been shown in the past two and a half years. He relies not only on cooperation with the states affected by the crimes and their neighbours, but also on the support of the

community of states and international organizations. His political impartiality, his expertise and his scrupulous working methods are his main assets, and he is not going to jeopardize them by acting incautiously, let alone by pursuing political objectives. Furthermore, he has to date not made use of his right to initiate investigations *proprio motu*. He has so far only acted on situations that were referred to him by the relevant states parties or the Security Council. Should he feel compelled to act *proprio motu* in the future, he will be subject to even stricter supervision by the pre-trial chamber than he has been so far. This mechanism, too, helps ensure that the Rome Statute cannot be misused for political ends.

Further, alleged problems include the failure to define the crime of aggression and to add terrorism as an offence under the Rome Statute. Aggression is indeed one of the four crimes (along with war crimes, genocide and crimes against humanity) that the ICC in principle has jurisdiction over. But, the Rome Conference failed to come to any agreement on just what constitutes the crime of aggression. This omission should be rectified at the review conference in 2009. Admittedly, nobody can guarantee that agreement will be reached within the next four years, since the international community has famously failed to reach any consensus on the matter over the past 40 years. But, progress has been made at the intersessional meetings of the Assembly of States Parties that have, on German initiative, taken place in Princeton every June since 2004, and which are open to all UN member states. We therefore have reason to hope. However, tricky discussions lie ahead on key issues, such as whether the elements of the crime should be defined generically, in abstract, or whether an enumeration of specific actions is to be preferred, and what role the Security Council should have in determining whether aggression has occurred. By the way, all states may participate in the working groups and intersessionals, regardless of whether they have acceded to the Rome Statute or not.

But, is the definition of the crime of aggression really the crux of the matter? If we look at the situations currently pending before the Court, in particular from the victims' perspective, the prosecution of political and military leaders does not depend solely on such a definition. As far as it can be judged from outside, the acts under investigation in the current situations that might be described as aggression, also constitute one of the other three crimes.

Greater difficulty may well be posed by the demand that a balanced definition of the offence of terrorism be included in the Rome Statute. It



should not however be forgotten that certain terrorist acts are typical forms of the crimes already defined by the Rome Statute.

All in all, it can be said that the reservations against joining the Rome Statute are understandable, but are not of such a fundamental nature as to preclude accession in the long term. If the principle is accepted that political and military leaders should not be allowed to repeatedly commit crimes against international law with impunity, thereby inflicting untold suffering on thousands of people across generations, robbing their countries of stability and preventing sustainable development, then the arguments against the Court lose some of their force.

The prime goal remains strengthening the ability of the states concerned to prosecute international crimes at home. The Rome Statute firmly promotes this goal by obliging States Parties to incorporate its terms into national law so that international law crimes can be effectively prosecuted by national courts. To this end, Germany did not simply amend its Penal Code, but also passed a new Code of Crimes Against



International Law. This was done for two reasons:

- First, to avoid gaps or duplication in our legislation, and to have one clear source text for the whole field – with the advantage, for example, that German soldiers participating in international peace missions can be given a copy of the Act to take with them as part of their rules of engagement;
- Secondly, to try to harmonize the new offences with standard German criminal law, which sets out more precise sentencing guidelines than are contained in the Rome Statute, in order to meet the constitutional requirements of our Basic Law as interpreted by the Federal Constitutional Court. When transposing the definitions of the offences and the procedural rules into German law, the structure and terminology were also adapted, without altering the substance, so that the law can be more easily applied by the German courts should that ever become necessary.

The Basic Law – the German constitution – had to be amended to unambiguously permit the surrender of German nationals to international courts. In addition, the German rules on court jurisdiction were amended and a comprehensive law on cooperation with the ICC adopted as the foundation for smooth collaboration between all German authorities at all levels and the Court.

In post-conflict situations, the prosecution of crimes against international



law is only one, albeit important, tool for strengthening law and justice and making a lasting contribution to preventing resumption of old conflicts. Practice will show how prosecutions can be coordinated with other parallel peace-building efforts

and what role traditional forms of justice or truth and reconciliation commissions can play. Only one thing seems clear today – the international community will not be able to cope without an International Criminal Court.

In many respects, the adoption of the Rome Statute presents a quantum leap forward. The ICC is a permanent court, not confined to any particular time or region. Investigations are, therefore not conducted under such intense time pressure. Nor are they dependent on political decisions by the Security Council or other fora. As a result, they are less affected by changing political allegiances. And, for the first time ever, the victims of the crimes are given a special role in the hearings and at the reparations stage.

However, the ICC does not have any executive organs of its own. It has to rely on the cooperation of States Parties and international organizations in order to prosecute and arrest perpetrators, transport them to the court and enforce sentences. It also has to approach Parties and organizations to provide victim and witness protection. Of prime importance in this regard is the Relationship Agreement between the ICC and the United Nations, which gives the Court access to UN facilities and services on a reimbursable basis. The President of the ICC, like the Presidents of the other International Tribunals, submits an annual report to the UN and addresses the General Assembly during the subsequent debate. President Philippe Kirsch submitted the Court's first annual report earlier this year to the 60th session of the General Assembly. The Court also has observer status to the General Assembly.

The 100th ratification by Mexico on 28 October 2005 is a milestone in our efforts to achieve universality. We are convinced that the Rome Statute is a crucial instrument that serves to deter wrongdoers and thus ultimately prevent crimes such as genocide, war crimes and crimes against humanity. The ICC is making a major contribution towards ensuring that the political and

military leaders responsible for such international crimes can no longer be shielded by state immunity and their immunity as office-bearers. The prosecution of the principal perpetrators is, along with other measures to strengthen law and democracy, a prime prerequisite for establishing peace and lasting stability as a basis for sustainable development. This is an unambiguous, political message. It is thus worth defending the integrity of the Rome Statute and the ICC, as the states of the European Union are determined to do.

However, we should not forget that accession to the Rome Statute offers a chance to directly influence the further development of international criminal law. For this reason, too, we would especially welcome the involvement of new States Parties from the Arab and Asian world, the cradle of a number of ancient legal traditions.

**Philippe Kirsch (President and a Judge on its Appeals Chamber, International Criminal Court, The Hague):**

#### Why the ICC is Necessary

The need for the court will not be dwelt into as Justice Verma and Herr Bussmann have extensively covered this topic. A simple point must be taken into account is that a look at history reveals that when genocide, crimes against humanity or war crimes are committed on a large-scale, the consequences are tremendous at the individual, national and regional levels. Of course, with respect to commission of massive crime, the states have the first responsibility to deal with it by means of action against the perpetrators. But, it is also at such times that national mechanisms are often unlikely, unwilling or incapable of meting out justice as per the rule of law. In such circumstances, an international mechanism is necessary.

Earlier, references were made to ad hoc tribunals (Nuremberg & Tokyo tribunals after WW-II and the tribunals for war crimes in Rwanda and the former Yugoslavia). The tribunals are testimony to

the effective functioning of international criminal courts. Inevitably, all ad hoc tribunals have and will suffer from severe limitations. First, only a few states participate in its creation as in the case of Nuremberg and Tokyo, where the victorious Allied Forces created the tribunals. The UN Security Council created the tribunals in the case of Rwanda and the former Yugoslavia. Second, these tribunals are limited to a specific geographic location and specific demographics. Every time an ad hoc tribunal is established, it involves extensive costs, delays and logistical problems. Every time, its creation depends upon the political will of the international community to deal with a particular situation, sometimes it conjures up the necessary will, other times it does not. Hence, there is an element of selectivity and specificity inherent to the process.

Thus, there is a need for an international criminal court that overcomes the above shortcomings. Bussmann said that the ICC was born out of the will of nations. This is an important point as it is the first and only international court established because of an enforceable treaty that nation-states have signed. All states were free to participate during the deliberations about the treaty; as they were free to finally join or opt out. In Rome, 120 countries voted for the creation of the statute, with the number climbing to 139 a year-and-a-half later. Now, there are 100 full time signatories to the statute, Mexico being the 100<sup>th</sup> state to recently sign the statute. Therefore, the court is created by the states for themselves.



The jurisdiction of the ICC is not limited to pre-determined situations. The jurisdiction is defined by the statute but without reference to any particular reference to any situation. The ICC has been functioning since 1 July 2002 and is ready to take on

cases assigned to it. Its jurisdiction also begins since this date, events happening before this date cannot be brought to the court's attention.

The ICC is formed on the principle of complementarity. This means that the ICC will not intervene when the national judicial systems are functioning effectively. Only if the national judiciaries are unable or unwilling to take action against genocide, crimes against humanity or crimes that are exceptional. All the four cases brought before the court now have been brought by the concerned states; the court itself has not taken up any case yet.

#### Design & Features of the ICC

The jurisdiction of the ICC is limited to the most serious crimes known to the international community. They are genocide, crimes against humanity, war crimes and aggression. The court's jurisdiction is not universal. This issue was discussed at great length at the Rome Conference. Eventually, states decided that at the initial stages, the court must act only on the grounds of the two most widely recognised grounds for criminal jurisdictions accepted in all states, that being the nationality of the accused and the territory where the crime is committed. Hence, the ICC can function only when a case is referred to the court or when the accused's country and the country where the crime was committed have acquiesced to submit to the court.

Amb. Bussmann also mentioned that the ICC is the 'court of last resort'; this is the cornerstone of the system. In an ideal world, the ICC has no function at all! It is because either massive or grave crimes are not committed or if they are committed, effective national systems exercise their jurisdiction.

One of the reasons the ICC was created as it is, was because the states wanted the new court to be independent and not depend on a political body. You have to keep in mind that in 1998, it was impossible for states to know what exactly

the court would deal with since the jurisdiction was not specified. States were clear about establishing independent court acting in accordance with the statute. The last thing the states would have wanted in 1998 was the remote chance for carrying out political prosecutions. All measures have been taken to mitigate those legitimate apprehensions.

The judges and the prosecutor ensure the free and impartial nature of the court. Protection of the victims is paramount to the ICC. One key feature of the ICC system is the place accorded to victims. In all previous international tribunals, the victims came before the court as witnesses for the prosecution or for the defence. In the ICC system, victims can participate in the proceedings on their own behalf even when not called as witnesses. The court also has the powers to order reparations to the victims, order restitution, compensation, etc. The ICC has the obligation to take into account the particular special status accorded to women and children. The system also takes care of physical protection and psychological counselling to victims traumatised by respective crimes they have been subjected to.

#### Where the Court Stands Today

The developments ever since the Rome Statute was negotiated and enforced have been tremendous. The court is in a process of judicial incorporation just two years after the election of the judge and the prosecutor. The prosecutor has received 1,600 communications of allegations of crimes. Of these, over 80 per cent of the allegations have been dismissed by the prosecutor on grounds of allegations not standing scrutiny to the court's technical requirements and jurisdiction. This also reflects the efficient and meticulous functioning of the court.





Four situations have been referred to the court. Three are from state parties — Uganda, Democratic Republic of Congo and the Central African Republic — and the complaints are based on basis of territory of the crimes committed. The fourth is with respect to the situation in Darfur, Sudan. Sudan is not a state party. The prosecutor is also monitoring eight other situations.

The pre-trial chambers have held the first hearing and have issued a number of rulings. They are comprehensive and available for public scrutiny (visit the ICC website). Parts of the rulings are confidential in nature to protect the concerned victims, witnesses, etc, but the information will be made public eventually.



In July 2005, the court issued its first arrest warrant in relation to a case in Northern Uganda. The warrant is against five members of an organisation alleged to have committed crimes against humanity, war crimes, sexual crimes, enlistment of child soldiers, etc.

In comparison to ad hoc tribunals and other international tribunals, it must be noted that the ad hoc tribunals tried cases that were committed 'in the past' and in the context of conflicts that were over. However, the ICC is distinguishable in nature as it can prosecute cases related to conflicts that are 'ongoing'. This creates a situation of extreme fear and stress, especially for victims and witnesses. Hence, the level of confidentiality associated here is self-explanatory. The area the court is operating in is extremely difficult; and the court has a daily struggle in creating and maintaining adequate logistics, communication and security.

The court accepts the responsibility to first establish its credibility by its own actions by conducting fair, impartial and professional proceedings. The rights of the

accused must be respected and the movement of proceedings in the most efficient manner. The previous experiences of other international and ad hoc tribunals have also been judiciously incorporated into the functioning of the ICC.

Clearly, the states wanted a court that could be in a position to function effectively but would clearly not have an operational arm. Anything that concerns operations is within the purview of the states and the information provided by the states. These actions have to be taken by sources external to the court. Hence, the court is solely based on the principle of cooperation. The system is such and it is time to deliver cooperation as it is in an operational phase. The cooperation of states, international organisations and the UN is paramount for this operational deliverance.

Creation of the ICC took more than half-a-century. Efforts were made immediately after the Nuremberg trials but the Cold War paralysed further efforts. During this period, the major powers did not cooperate on many issues, let alone international justice. Now, we have the ICC and its time for its effective functioning by building upon the culture of accountability and eliminating impunity for international criminals.

#### INDIAN PERSPECTIVE

**Ram Jethmalani (MP, Parliament of India & Senior Advocate and former Union Law Minister):**

It is very easy to speak about the ICC. But, it is difficult to give an Indian perspective on the ICC because one might not exist. It can be compared to the legend of the abominable snowman – whom no one has seen. Thus in repetition of what I stated at the September 1997 Philadelphia conference. This would remain my abiding perspective on the ICC.

*"The state and its instrumentalities are the chief menace to human rights, whether it is a case of democratic tyranny, insurgent insurrection or civil war or an armed*

*conflict between two or more states. A condition of anarchy and lawless violence are totally incompatible with human rights. It is a matter of satisfaction and pride that the legal community has been working hard on a blueprint for the world's first truly international criminal court. Some way has to be found to deal with 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 practical diplomacy, many nations are still not reconciled to the creation of one more supranational and trans-border institution. The usual bugbear is the surrender of sovereignty. Both the large democracies (India and the US) are strangely allergic to the proposal. Both are stuck on abstract sovereignty. International society is not possible without significant transfer of sovereignty. No federation or confederation can exist without partial surrender. Adherence to the UN charter is itself a surrender of sovereignty. The argument of sovereignty is sheer poppycock.

India has supported the US in opposing the creation of the ICC. The world democracies must swim or sink together. However, our commitment to the truth must be greater than our commitment to democracy.

The real cause for the US opposition to the ICC is the fear that some day, its citizens, in particular its soldiers operating in various theatres of the world, might be brought before the ICC on charges, which according to the Americans may not be justifiable or justified.

On the other hand, at the time when the jurisdiction and powers of the ICC were to be dependent on the Security Council, the US fully supported its creation, because it has veto power in the Security Council. But, as a result of legitimate world pressure, this plan was abandoned and it was decided that the ICC would draw its jurisdiction from a convention and that it would decide when state (i.e. national)

courts are unable or unwilling to deal with crime. Then the US started opposing the creation of the court.

However, one cannot fathom what national interest the Indians were serving when they opposed the creation of the ICC. They do not have veto power in the Security Council; they are not even members of the Security Council. Thus, it can be said that in this case we have just blindly followed the US.

India's representative at the 1998 Rome conference was Mr. Dilip Lahiri. He had justified India's opposition to the creation of the ICC. There were no reports of his speech in the media. Lahiri's stand was never discussed in Parliament or even in the cabinet.

No minister knew of it. It is possible that even the new Law minister, Home minister or Foreign



minister did not know about it. Thus, there was no mandate from the government.

Going through his speech at the Rome conference one comes to the conclusion that opposition to the creation to the court is thoroughly unjustified. The reasons given against its creation are spurious, untenable and hurtful of national interest. They are also inconsistent with our constitutional obligations under Article 51 of the Indian Constitution.

Lahiri said at the 1998 Conference that, "The only durable basis for our cooperation is scrupulous regard for the fundamental principles of the U.N. charter." However, he understood the fundamental principles of the U.N. charter as the sovereign equality of all states and non-interference in internal affairs. He failed to notice the glaring inequality between states in the text of the charter itself. Some members are members of the Security Council, some have a veto and there are the others that are outside these two

privileged categories. It seems that he had not recovered from the clichés of the NAM and Panchsheel even in 1998.

By 1948, the world had come to recognize that habitual suppression of human rights of its own citizens by a government was no longer a matter of exclusive domestic concern. It could evoke humanitarian intervention and collective Security Council action under the charter itself.

Lahiri did not recognize the essence of the U.N. system; that is surrender of sovereignty, at least partial, to a common pool. There can be no ICC without voluntary and partial submission of state sovereignty to a supranational body. There can be no ICC unless you have power to deal with states that encourage international crime and provide safe asylum to criminals. Lahiri went on to say that the conference would produce a stillborn baby (if we succumb to hest or the blandishments of ideological purity).



The Treaty of Versailles had mandated the creation of an ICC for the trial of German war criminals as far back as 1919.

The International Law Commission had been grappling with the idea since 1948.

He also opposed the creation of the ICC because of the Doctrine of Complementarity. However, this doctrine is often misunderstood. The ICC can exercise jurisdiction when the domestic court is unable or unwilling to do so. A public prosecutor will decide this question. A distinguished public prosecutor has been appointed. His record and that of the court, which has been functioning for two years now, is impeccable. Thus, the argument that the court might take cognizance of a matter, or act on political grounds is unfounded.

Lahiri said that the court might take on matters for which it was not created. But, the court has enough work to do as it is. And, it is the job of our diplomats to see to it that Indian interests are safeguarded and that the court takes up matters of interest to us. Moreover, the court does not have sweeping contempt powers the way our Supreme Court does and hence critics can speak out against it fearlessly. Lahiri also said that the charter does not give the Security Council the power to set up a court. But, the Security Council has not set up the court. A voluntary charter has set it up. Sixty-six nations out of 120 voted for the creation of the court, six more than the required 60, and the court came into existence. Seven nations had opposed its creation and 21 had abstained (including India).

Another argument given by Lahiri for opposing creation of the court was that the use of nuclear weapons had to be declared a crime. This was when the Pokhran blasts had taken place just three months earlier.

Lastly, Lahiri said that the jurisdiction of the court should be expanded. In particular, terrorism should be included. Nevertheless, at the 1998 Rome conference itself, a resolution had been passed saying that a unanimous definition of terrorism must be evolved, and that once this had been done, terrorism could be included in the list of crimes of which the court could take cognizance.

We do need the ICC for the suppression of terrorism. So let us support it and work for expansion of its jurisdiction. If there is any Indian perspective then it is that "we wish your court well; we wish that it has a glorious existence, a long tenure and that it can command the respect and admiration of all people and can inspire fear among the musclemen of the world who hold the world to ransom."

**Maj. Gen. Nilendra Kumar (Judge Advocate General, Indian Army):**

Initially, the ICC was viewed as a product of agitations by NGO groups. The USA on one hand and the EU on the other conducted the real bargaining. The statute should have been based on principles of state sovereignty, non-interference in internal matters of the state, state consent and the text should have the widest acceptability.

India is not opposed to the statute but has certain major reservations. The reasons given for not joining are not in public domain. But they can be discerned from Lahiri's statements at Rome and answers given to questions asked in Parliament in December 2004 and March 2005.

There are various structural infirmities in the statute. It should have had consent based on optional jurisdiction. Domestic jurisdiction is seen to be overridden by the ICC. Crimes against humanity are defined in very general terms. Also, there are wide powers against a sovereign state vested in an individual prosecutor. The statute suffers from various



inadequacies like non-inclusion of trans-national terrorism; drug trafficking, war crimes by peacekeepers and use of WMD. There is lack of attention given to enforcement. Treaties tend to be "all or nothing". No reservation may be made to Article 120 of the statute.

Allegations motivated or otherwise, of human rights violations in J&K, Assam and the Northeast could be a cause of concern.

There are also differences regarding what is an appropriately high threshold to bring in the jurisdiction of the Court. Another contentious issue is regarding the inclusion of international armed conflict.

Looking at the pendency and disposal figures for Indian courts, one cannot say

that the 'state is unwilling or unable' to exercise jurisdiction.

A political reality is that other countries in the region and some of the major powers have not yet joined the ICC. All these are factors in India's position on the ICC and have to be kept in mind while deciding whether or not to join it.

But on the other hand, there have been some indisputable achievements. The Court exercises jurisdiction over all serious violations of law of war, in civil conflicts, and international engagements as well as the crime of genocide. Secondly, it is a permanent court. Thirdly, it can punish crimes against humanity, even when they occur outside a state of war. Fourthly, it covers sexual offences as a weapon of war. Fifthly, it effectively tackles "command responsibility". Lastly, one should keep in mind that it cannot be a remedy for all ills.

Looking at the conflict and crimes that have taken place in Bosnia, Uganda, Cambodia, and Guatemala etc. one can see that the requirements for an ICC are not abstract.

India is the largest democracy. It has one of the most independent and farsighted judiciaries. It has a stable and effective government. In India, the gravest crimes cannot go undetected because it has an independent judiciary, alert political parties, a watchful media, an effective NHRC and assertive NGOs. India is one of the largest troop contributing countries to the United Nations. It has taken part in 38 out of 58 UN peacekeeping missions.

Thus it is not only in our interest to join the ICC, but we must take a proactive stand. If India joins, it will reaffirm India's resolve to support international cooperation for the promotion and protection of human rights. It will lead to speeding up of the justice delivery system. It could also contribute to improved relations with China and Pakistan, and improve its image as a contender for a seat in the Security Council.



The ICC has already started functioning. A large number of countries have joined. It has already received referrals from Uganda, Sudan, Republic of Congo and the Central African Republic.

But there is still need to create awareness and thereby initiate, generate and galvanize public opinion. The language of the statute is complex and technical. It could be made simpler so that it is easy to assimilate. Another suggestion is that the judges and staff for the ICC be recruited from amongst the non-states to encourage wider acceptance for the role of the court.



## DISCUSSION

### Questions:

- The Security Council can refer any matter to the ICC. It can also block consideration of prosecution by the ICC. Is this true and if so, what are the conditions under which this can happen?
- The question of human rights is often used as a jimmy in the law of sovereignty. Therefore, we cannot dismiss the sovereignty issue. Is not the ICC primarily a political body? What is the role given to the Security Council in the jurisdiction of the ICC?
- What is the definition for declaring a state as unwilling or unable to take up a criminal case?
- The state courts could hold mock trials or procrastinate indefinitely. What is the monitoring mechanism of the ICC regarding prosecution by domestic courts?
- The experience of India has been that powerful nations have always dominated international organizations. How will the ICC be able to provide justice to weaker nations and hold the powerful nations to their rightful role?

- A.Q. Khan, by proliferating has committed an act of terrorism and a crime against humanity. At least the countries where he has proliferated are under the ICC. What is the jurisdiction of the ICC in this matter? If it is not within its jurisdiction, what can be done?
- Is there consensus among major political parties regarding how the ICC issue is to be treated, or are there differences?
- 1998 and 2005 are two different eras vis-à-vis terrorism, especially after September 11. Is there any initiative from the U.S. to re-examine terrorism of the kind India has been facing?
- What is the future of the ICC in the event of the U.S. not signing the charter?
- Conflicts in South Asia and Arab nations are very different from those in Europe. How important is it for these countries to sign the charter given this fact?
- Why has aggression been set aside from the ICC's jurisdiction for now?
- Do you see any clash between the need for confidentiality to protect victims and transparency required under international standards?
- If the fact that the ICC is a permanent court gives it an excuse for delays, will it lead to a situation where justice delayed is justice denied?
- The Rome conference took place in 1998, 7 years ago. India had a chance to change its stand. Where does India stand today?
- If there is a continuous criminal wrong can the ICC assume jurisdiction *suo moto*? For instance, in case of continuous economic deprivation of a country causing



tremendous violation of human rights and the country is too poor to afford lawyers to plead before the ICC. Or, in case of international intervention in internal matters of a country on grounds which later turn out to be false, like in the case of Iraq

### Answers:

First, the ICC is not a political organization. It is a judicial institution. But, if states are not yet convinced about the legal foundations of the court then the ICC should demonstrate it in practice- that it is a judicial body, not influenced by politics.



Secondly, the ICC has jurisdiction only over individuals, not over states. The International Court of Justice has jurisdiction over states.

The level of apprehension over the court, in the U.S. and elsewhere has decreased especially during the last year. In addition, the court has been in existence only for two and a half years. We should give it time to develop. In the Long Term, the court should expand its jurisdiction.

### Role of Security Council

The reason the Security Council can refer matters to the court is that the court does not have universal jurisdiction. It depends on the consent of one of the two states. If neither of the two gives consent there could still be a serious situation that merits attention. For example, take the case of Darfur. Moreover, the Council can only refer matters to the Court but the court decides whether to entertain the matter. The Council can also ask the Court to defer exercise of its jurisdiction by 12 months, in situations covered under Chapter 7 of the Charter. The rationale for this is that the situation might be in the middle of delicate peace negotiations and the timing of ICC intervention could cause problems.

### Mock trials

Mock trials are anticipated under 'complementarity'. The court must decline to exercise its jurisdiction if the state is exercising its jurisdiction, except in two cases. Firstly, when the state is unable to exercise its jurisdiction. For instance, in the case of internal conflict when the judicial system has collapsed. Secondly, the state is unwilling to exercise jurisdiction.

There was a proposal that as soon as the state exercises its jurisdiction, the ICC should move out or stay away. However, this would not work. Historically, in all cases where massive crimes were committed – Yugoslavia, Nazi Germany, Uganda, the states were involved in some way in the commission of the crime.

### Justice for Weaker Nations

One of the reasons that the ICC could be created was the massive support of Africa. They felt that they understood the consequences of massive crimes on their territory much better than other states. The most represented regional group in the ICC is Africa- they have 37 states in ICC. And it has been seen that it is precisely these weak states that came to the court to deal with crimes. The court did not go to them. Thus, weaker states do see the ICC as offering protection and assistance.

However, if a country does not ratify the statute, the ICC will not be able to intervene.



Then the only option is that the Security Council refers the matter to the ICC, and as we know, the Security Council tends to be rather selective in its approach.

### Human Rights

The ICC is not a Human Rights court in the strict sense. It is a criminal court. It is true that massive crimes against humanity like war crimes are also human rights violations. The ICC does not have jurisdiction over

violation of human rights as such but only as 'crimes'.

**Aggression**

The reason that aggression was not included in the statute was that states could not agree on a definition. In addition, before an individual can be tried for a crime of aggression, there is sequence that needs to be followed. First, the Security Council has to determine that it was an act of aggression by the state. However, the history of the Security Council shows that the Council has very rarely determined a situation to be an act of aggression, even in situations where aggression is evident- like Iraq.



**Confidentiality and Transparency**

Transparency is the rule. Confidentiality is applied on a temporary basis for the safety and protection of lives. The Court cannot take steps to the detriment of the rights of the accused.

**Justice Delayed**

Questions have also been raised about why there are not any cases before the court yet. There are differences between the ad-hoc tribunals and the ICC. Firstly, the ICC is very careful in recruiting personnel. Secondly, the ICC selects only the gravest cases. They can involve leaders

in positions of highest responsibility. They need time to see whether the charges brought against the person are viable. Thirdly, unlike the ad-hoc tribunals it cannot make use of UN missions.

**CONCLUDING REMARKS:**

**Dr. Subhash C. Kashyap** (Former Secretary-General of Lok Sabha, Parliament of India & Member Board of Directors – IIDEA):

Many words were said in favour of the ICC, of which India has so far chosen not to be a partner. Very few were said of doubt and suspicion. The ICC is a reality now and has been functioning for more than two years and a large number of countries are party to the Charter.

But a major part of humanity is still outside the ICC. Something needs to be done. What we are doing today is a brief effort in that direction, and this should be taken further. Justice Verma has mentioned a paradigm shift in our concepts of national sovereignty, international law, and individual crimes in different parts of the world.

There is a need to increase awareness and understanding about the ICC, especially in India, and in other countries that have not joined it. There is need for a national debate on the issue.