


## **Article in the Times of India dated 6<sup>th</sup> September, 2004 to which the campaign responded**

UNSC's role in ICC charter objectionable 

Rakesh Bhatnagar

NEW DELHI: That there exists the International Criminal Court (ICC) is not common knowledge, at least in this part of the world. That the ICC, which is located in The Hague, Netherlands, is vulnerable to the UN Security Council's commands and is yet designed to adjudicate on crimes against humanity across the world is also hard to believe.

New Delhi has already expressed its opposition to the role of Security Council in the charter of ICC. The statute gives the council a role in terms that violate international law. The charter did not give it the power to set up international criminal courts. The council has often tried to block or bind non-state parties through the court.

It is an irony that an institution established to defend the law strayed from its course before it tried its first case and claimed its first victim — the Vienna Convention on the Law of Treaties. Would the Security Council ever allow the ICC to prosecute the US or its allies for their suspected involvement in a variety of crimes in different countries? The answer can't be in the affirmative.

An Indian delegation of senior legal luminaries such as the Chief Justice R C Lahoti, Soli J Sorabjee, R K Jain, Justice Y K Sabharwal, Justice Arun Kumar, C S Vaidyahathan, Justice Sujata Manohar and Justice Vijendra Jain recently participated in crucial deliberations abroad on making the ICC jurisdiction acceptable to every nation having faith and respect for one another's sovereignty and independence.

The discussions which culminated in a guiding document for the ICC, carries India's opposition to giving more powers to the Security Council than the ICC.

"How can the victims, who may not get justice in their own nation, expect justice — free and fair — from the ICC in the prevailing circumstances?" asks Jain. "Independence from any influence is the basic rule for an independent justice dispensation system," he said. Should 'forced pregnancy' be made a crime — a crime that can no longer be denied after the experience in Bosnia or in Bangladesh? The interpretation of this term necessarily requires state policies of abortion in the case of women who have been forcibly made pregnant.

The Women's Caucus, a part of the NGO coalition having the largest delegation at the ICC conference two years ago, ensured that the crime was kept under wraps.

Though the ICC statute does recognize 'forced pregnancy' as a crime, it explains it as "the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law". Unfortunately, India like some of its neighbours, have not been able to have a fair justice delivery system and that might cause a little embarrassment for them if they demand a model dispensation from an international body like ICC.

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### **Response sent by the ICC-India campaign**

13 September 2004

To  
Letters  
C/o The Resident Editor  
Times of India  
D.N.Road, Mumbai 1

Dear editor,

I am writing in response to the article 'Security Council role in ICC working opposed' (7 September 2004). The article carries inaccurate statements about the functioning of the International Criminal Court, which ICC-India: the Indian campaign on ICC, wishes to counter.

- The article says the ICC Statute "gives the council a role in terms that violate international law" and that the UN Charter "did not give the Council the power to set up international criminal courts". The fact is that the ICC has NOT been set up by the Security Council. The ICC is a treaty-based body – an independent judicial institution, and hence is not a part of the U.N.
- The article also says that the "council has often tried to block or bind non-state parties through the court." This is surprising, as the ICC has begun functioning only recently and is yet to try its first case. So there exists no history of the Security Council doing so in reality.
- The article further states that the ICC has violated the Vienna Convention on the Law of Treaties by binding non-states parties. This is a fundamentally flawed argument. First, the UN Charter, and thus the Chapter VII powers of intervention (for maintenance of international

peace and security), have the authority of universality at customary international law. Secondly the authority afforded the Security Council by the Statute has already been exercised in the establishment of the ad hoc International Criminal Tribunals, the ICTY and ICTR, under Article 42 of the Charter in order to protect international "peace and security". Thirdly, it is incorrect that the ICC would exercise absolute jurisdiction over individuals whose nationality is that of a non-state party to the treaty. In cases other than those referred to the ICC by the Security Council, the Court is empowered to exercise its jurisdiction by Article 12 either with the consent of a State in whose territory the crimes were committed or of the State of nationality of the accused.

Incidentally, the 'ICC Treaty violates states parties' consent' is an argument that the United States has used to exempt itself from the rule of law. We in India should not be using this argument when we want to make the powerful countries accountable for the heinous crimes they commit.

The article ends with an acknowledgment of the fact that India does not have a fair justice delivery system, and further comments that it would be an embarrassment to India if we get model dispensation of justice from the ICC. If it would cause India embarrassment to wash its dirty linen in public, it should make sure its own laundry systems are sound. Dispensing justice domestically in a fair, efficient and impartial manner is the best safeguard against being made accountable in any international forum, including the ICC. Perhaps we should channel our efforts into improving the Indian justice system.

Lastly, parts of the article are repeated verbatim from the concerns expressed by the head of the Indian delegation, Mr. Dilip Lahiri, at the Rome Conference on 17<sup>th</sup> July 1998. We wonder if the Indian mindset has remained static from 1998 to 2004, while the international community has taken giant leaps forward and endorsed the ICC as a welcome step to end impunity worldwide for heinous crimes?

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Coordinator, ICC-India

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