An ICC Investigation: why it is doomed to fail

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(Colombo, Sri Lanka Guardian): As the LTTE’s defeat draws ever so near, the campaign to tarnish the image of Sri Lanka gains momentum. Such a state of affairs doesn’t shock or disturb me much. It is to be expected, from the innumerable pro-LTTE, pro-Eelam groups and individuals around the world whose decades-long dream of an Eelam State is being snatched away so suddenly. But we need to be vigilant, ever mindful. And our response should be one supported by compelling facts and evidence based on action, and not merely one of angry rhetoric and harsh words. A firm but careful, reasoned and balanced approach needs to be adopted at a time such as this when our emotions do tend to run wild with anger, reaching a state of mind that compels us to resort to extreme responses, which is exactly the kind of trap that our enemies want us to get entangled in. We are winning this battle, and we need to stay poised.

Bruce Fein, in a letter (made public on 4 May 2009 according to Tamilnet) addressed to the Chief Prosecutor of the International Criminal Court (ICC), requests the Prosecutor to ‘open investigations under the Rome Statute’ of President Rajapaksa, Defence Secretary Gotabaya Rajapaksa, MP Basil Rajapaksa and Army Commander Sarath Fonseka, for alleged ‘war crimes, crimes against humanity and genocide of Sri Lankan civilian Tamils unconnected with the conflict between the government and the LTTE’. I will deal briefly with some procedural and related issues here.

International Criminal Court

The ICC is the permanent treaty-based international court, established to end impunity for perpetrators of the ‘most serious crimes of concern to the international community’. Article 5 of the Rome Statute, which governs the ICC, sets out the crimes over which the court has jurisdiction: genocide, war crimes, crimes against humanity and the crime of aggression. A number of cases are being heard at present, relating to Uganda, the Democratic Republic of Congo and the Central African Republic. It also issued a warrant for the arrest of Sudanese President, Omar Al Bashir, alleged to be criminally responsible (Arrest Warrant of 4 March 2009) for war crimes and crimes against humanity.

Investigations: 3 ways

Now, what Bruce Fein asks the ICC Chief Prosecutor to do is to open an investigation concerning Sri Lanka. 3 principal ways in which the ICC could exercise jurisdiction in respect of alleged crimes committed are set out in Article 13 of the Rome Statute. As per Article 13, paragraph (a), the first is when a State Party to the Rome Statute refers a situation, as was done by Uganda, DRC and Central African Republic. As Sri Lanka is not a State Party to the Rome Statute, this first option is not applicable.

The second method (Art. 13, para (b)) that triggers the ICC’s jurisdiction is when the UN Security Council refers a situation to the ICC under Chapter VII of the UN Charter (as it did in the case of Darfur, Sudan). The LTTE and its supporters would have certainly desired this, and would have even tried to make out a case to fit the Chapter VII requirement, but their failure is all too obvious. Two veto powers and close friends, China and Russia, are with us.

Third way, the last resort

The third way (Art. 13, para (c)) is when the Chief Prosecutor decides to launch an investigation on his own initiative - an investigation proprio motu. This is what Fein requests the Prosecutor to do – under Article 15. But there is a process that should be followed, a somewhat cumbersome one, as set out in Article 15. What is it? Firstly, the Prosecutor needs to analyse the seriousness of the information he receives (Article 15(2)). For this, he could seek information from numerous sources - the UN, intergovernmental organizations, NGOs - and can even receive oral/written testimony. After considering the information/evidence the Prosecutor could, if convinced there is a reasonable basis to proceed (as per Article 15(3)), submit a request to the Pre-Trial Chamber for an authorization of an investigation. Thereafter, it’s only if the Pre-Trial Chamber decides that there is a ‘reasonable basis to proceed with an investigation’, that authorization for the commencement of an investigation takes place (Article 15(4)).

But, for such an authorization, the case should also ‘appear to fall within the jurisdiction of the Court…’ (Article 15(4)). Now, Article 12, which deals with ‘preconditions to the exercise of jurisdiction’ states that in the case of the first and third ways of triggering ICC’s jurisdiction referred to above, the court can exercise jurisdiction only if: i) the State on which the crimes were alleged to have been committed is a State Party, or ii) the person accused of the crime is a national of a State Party, or iii) if the State which is not a Party may by declaration lodge acceptance of the jurisdiction of the court with the registrar. Sri Lanka is not a Party to the Rome Statute and has not accepted its jurisdiction. Therefore, Bruce Fein’s attempt to get the ICC to open an investigation, in all probability, is doomed to fail.

Related issues, beyond the ICC

Even if the Rome Statute looks to be kind towards us, there are other issues which need to be borne in mind, which should be of concern.

Firstly, we cannot leave any room for China and Russia to doubt us, for if the Security Council decides to refer Sri Lanka to the ICC, the above jurisdictional issues would not apply, as such a referral is an exceptional case. While the current state of affairs does not seem to precipitate a crisis for Sri Lanka because of China and Russia, we should not leave room for them and other close friends to wonder whether their staunch defence of us is a fruitless, unconvincing endeavour. Our action in the battlefield, the methods we adopt to defeat the terrorists, should further convince China, Russia and others (as done, until now) that their stern defence of Sri Lanka is based on good and credible reasons because Sri Lanka practices what it preaches about respecting international humanitarian norms, and is not an exercise solely undertaken due to their own misgivings about Western attitudes and double-standards. It would be wholly unfair, and even damaging, if at this closing stage of the armed conflict, we deviate from our cherished and avowed principles, believing that whatever we do we still could rely on their support.

Secondly, we should ensure that our rejection of an ICC or any other investigation is not a rejection of multilateralism, or of our respect for international rules and institutions. One way of avoiding this is to be mindful of how we project and convey this rejection to the world. Sri Lanka did not sign and ratify the Rome Statute due to certain reasons. Sri Lanka’s demand to include terrorism as a crime within the Statute proved futile, and Sri Lanka, along with many other NAM states held deep reservations about ICC possessing jurisdiction over war crimes committed in internal armed conflicts. Today, when we reject any ‘intrusion’ by the ICC, we should be convincing in

stating that being a State Party to the Rome Statute would have most unfairly opened up the possibility for terrorists to approach the court and exploit the law for their own illegal purposes, to tarnish the country’s image, and not because we are opposed to the very idea of an international criminal court. Unilateralism, or an emotive rejection of international institutions, is not an option. Thirdly, not every kind of external pressure is directed with the intention of halting our military victory over the LTTE. The external pressure that comes in the form of the ICC, etc. is done with a long term purpose in mind, of tarnishing the image of the country, of trying to persecute and prosecute the leaders that defeated a most brutal terrorist organization in the world, of paving the way to further the goal of Eelam in the future. Today, we have a case to prove that our battle against the terrorist group has been carried out in an ethical manner which is way superior to those conducted by the Big Powers. Someday, we should be able to remind the world that even during the last stages of our victory we never resorted to unethical and indiscriminate means of warfare. If we are convinced within ourselves, and have further evidence to strengthen our case, that we defeated the LTTE in the most practically correct and ethical manner, that we kept our promise of respecting humanitarian principles/law even when defeating a brutal terrorist organization - that is rich enough, and effective, arsenal for us to counter any pressure directed from anywhere in the world, anytime in the future. (The writer holds an LLM degree from University College London)Courtesy: Srilankangaurdian.org