



Statement by Hon'ble Mr. Ravi Shankar Prasad, Member of Parliament and Member of the Indian delegation, on Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 [Agenda item 72]; & Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 [Agenda item 73] at the 61st Session of the United Nations General Assembly October 9, 2006

Madam President

First of all, I would like to thank the Presidents of both the Tribunals for their Reports to the UN General Assembly.

Madame President

International criminal law has assumed increased prominence with the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and, later, the International Criminal Tribunal for Rwanda (ICTR). These were the first international criminal tribunals established since the Nuremberg and Tokyo tribunals of World War II, and because of the manner of their creation, they have faced a great number of political and legal challenges in establishing their legitimacy. In questioning the competence of the Security Council to establish these tribunals, many legal scholars, after an extensive analysis of the *travaux préparatoires*, came to the conclusion that it was not the intention of the drafters of the Charter to endow the Council with such competence. However

some scholars rely on other concepts to justify the attribution of legislative functions to the Council, namely, the concepts of “implied powers” and “subsequent practice”.

The concept of implied powers is derived from the idea that organizations or their organs must have the power and competence, which is necessary or essential for the execution of their functions. In the *Reparation for Injuries* case, the ICJ stated that “under international law, the Organisation must be deemed to have those powers which though not expressly provided under the Charter, are conferred upon it by necessary implication as being essential to performance of its duties”.

This doctrine and Article 29 of the charter under which the Security Council can establish subsidiary organs necessary for its functions, is often used in the context of justifying setting up of ICTY. This doctrine has been also confirmed by the ICTY in the Tadic case. However, this ignores the basic legal principle *nemo dat quod non habet*, which means you cannot give what you don't have. The Security Council has not been assigned any judicial functions under the Charter, therefore under Article 29, or under the concept of implied powers, it cannot set up a subsidiary body entrusting to it the functions which the Council itself does not possess. In so doing the Council did not take a legitimate peace-enforcement measure under any article or articles of Chapter VII, notably under article 41. It took, simply, a law-making (not to mention law-determining and law-enforcing) measure which fell outside its functions under Chapter VII or any other provision of the Charter or general international law.

Madame President,

International humanitarian law requires that trials for violations must be scrupulously fair and consistent with contemporary international standards. Therefore the tribunals, in bringing to justice those who bear the greatest responsibility for serious violations of international law, must ensure that they provide for the highest standards of fair trial.

The purpose of prosecution is to accomplish at least two goals. The first is to punish the guilty. The second is to promote a range of socially desirable results, including deterrence of future offenses and fostering an overall respect for the rule of law. In instances where the cases grow out of profound national traumas, such as civil war or a period of repression, the reassurance of the citizens, promotion of national/ethnic/political reconciliation, and fostering of national catharsis are also seen to be critical goals. Although international prosecutions can perhaps achieve the first goal—punishing the guilty—they are often not equipped to deliver on the others. There is a view that when such “international” prosecutions are undertaken by foreign judicial systems or

Tribunals , with little or no connection to the perpetrators, victims, or offenses, they are invariably decoupled from the political, social and economic context of the affected country.

Further, given the challenges associated with investigating and prosecuting international crimes, the international tribunals cannot prosecute all perpetrators. Therefore, strengthening of national judicial systems to prosecute these crimes is extremely essential. Creating effective and lasting legal and judicial institutions that uphold the rule of law is essential for the maintenance of peace. Therefore, the international community must continue to strengthen the national justice system by building local capacity of judicial personnel. This includes the further training and mentoring of the local judiciary, as well as a timetable to gradually introduce local judges and prosecutors into sensitive cases. According to the reports of the tribunals, the ICTY has developed a cooperative relationship with neighboring States and regional institutions, and the ICTR, through its outreach program, has worked on capacity-building by training of Rwandan Jurists, advocates and human rights practitioners through seminars and workshops aimed at strengthening knowledge of international humanitarian law and criminal law. These are commendable efforts. In this regard the establishment of War Crimes Chamber of the State Court of Bosnia and transfer of cases by the Yugoslav Tribunal to this Chamber is a further step in the right direction, though the ICTY should have been set up by the General Assembly.

We hope that both the Tribunals are able to complete their work within the time frames stipulated by the relevant Security Council Resolutions.

Thank you, Madam President.

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