attempt, now.

Can our government officials - especially those referred to in Bruce Fein's letter to the ICC - be arrested and prosecuted overseas, in foreign courts of law?

The law is somewhat clear only in relation to one category of persons; incumbent Heads of State/Government and Foreign Ministers. Such persons, holding office, cannot be arrested/prosecuted in a foreign country; one of the most compelling contemporary authorities for this proposition being the decision of the Arrest Warrant case (Congo vs. Belgium) of the International Court of Justice (ICJ); wherein the ICJ held that the arrest warrant issued by Belgium against Abdoulaye Yerodia, Congo's Foreign Minister for crimes against humanity, was unlawful, for such officials are immune from criminal trial abroad.

But what of a 'former' Head of State? The House of Lord's decision on the 1998 arrest of Chile's former President, General Augusto Pinochet, while undergoing medical treatment in the UK - who had left office in 1990, had visited Britain many times before and had been a personal friend of Margaret Thatcher - answers the question to a great degree. It was firmly held that while immunity of a current Head of State was absolute, a former Head of State could not claim immunity from criminal proceedings for grave international crimes.

The position as regards senior government officials is also unclear. The trend appears to be one that is heading in the direction of the Pinochet case. Numerous are the instances when courts have declared that senior officials (especially Ministers and senior Government officials) do not have immunity from foreign criminal prosecutions for international crimes. Various European jurisdictions have developed their laws, consistent with this position. Spain, for instance, has tough criminal laws concerning universal jurisdiction, but recent developments suggest that these laws might be subject to reformation or amendment, given the activism shown by certain Spanish judges in trying to open investigations and inquiries relating to Israeli Ministers for their alleged involvement in assassinations of certain Hamas leaders, based on universal jurisdiction.

Also, in the Arrest Warrant case mentioned above, a minority of the Judges, led by the British Judge Rosalyn Higgins (later President of the ICJ) argued that even an incumbent official might not have complete immunity while overseas if such an overseas visit was for private purposes, and should it appear that a State was keeping a Minister in office artificially in order to maintain his immunity from suit, that immunity would be void. The Rome Statute which creates the ICC is very clear on this no immunity, even for Heads of State. Hence, the legal trend is not favourable to those constantly accused of serious international crimes.

International Law, Politics and Double-Standards

That then is the law, and it ought to stop there concerning Sri Lanka, for numerous reasons. We had just come through a horrible phase of our history, having grappled with terrorism for over three decades. We had defeated a terrorist group which was banned as such in many countries; a group which killed a Sri Lankan Head of State, a former Indian Head of State; a group which during the era of the 2002 ceasefire agreement chased away foreign monitors belonging to the Nordic countries; countries which these same terrorists had visited before and continued visiting, and which had strong laws concerning universal jurisdiction. Where was the law then?

In a world that the arm of the law doesn't reach those leaders of the US, the UK, for crimes committed against Sovereign States, such as Iraq in particular, no arm of the law could extend to the leaders of our country.

That then is the law, and one cannot proceed beyond this point; for if Anton Balasingham could have lived in London, if K Padmanadan could roam the world, if M Sornarajah could travel to Europe, if Eelam flags can be waved in Europe, one simply cannot try and punish leaders and officials, of a democratic State, who defeated a terrorist organisation. In a world that the arm of the law doesn't reach those leaders of the US, the UK, for crimes committed against Sovereign States, such as Iraq in particular, no arm of the law could extend to the leaders of our country. It's the universality of international law, its application that concerns us, that deeply worries us.

And do not throw Pinochet at us, too, for we wouldn't buy it. Pinochet overthrew Chile's democratically elected Socialist regime of Selvador Allende. Pinochet's destructive 'Operation Condor' was not an operation directed against the most brutal terrorist group in the world which was trying to create a separate State. The contrast is obvious.

If the realisation dawns upon a people, a nation (as it usually does, when there is unnecessary prodding and pushing in the wrong direction, at the wrong time, at the wrong place, for the wrong reasons) that all these attempts are made with the sole intention of punishing us for defeating a terrorist organisation, let there be no doubt that such attempts will be met with the strongest possible response imaginable. Such a scenario will be extremely unfortunate, for we greatly value diplomatic relations. Certain States need to be mindful of this, too.

This article was first published in The Island, Sri Lanka.