

INDIA'S HOSTILITY TO INTERNATIONALIZE CRIMINAL JUSTICE- CALCULATIVE STRATEGY OR PREJUDICED RELUCTANCE?

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Abstract

On May 31, 2013 United Nations urged India to institute a commission of inquiry-serving as a transnational justice mechanism, into extra-judicial killings in its North-eastern states. It urged India to repeal the controversial Armed Forces Special Powers Act, 1958, and also asked India to ensure that the legislation regarding the use of force by the armed forces should enrhine the principles of proportionality and necessity. There are several reports that have highlighted the state perpetuated violence in Kashmir and North Eastern States of India wherein there was clear violation og human rights and other international rules of warfare. India has not signed the Rome Statute and it did not vote in 1998 when the statute was adopted. Few reasons being India's objection to some definitions, referral power of Security Council, delays and no specific provision to outlaw use of nuclear weapons. In light of the above facts, while India has ratified the Geneva Conventions, it has decided to overlook Common Article 3. With this background, this paper highlights why the emerging power India, abstains from joining Rome Statute and the possibility of India being brought under the scanner of International Criminal Court.

Key Words: Rome Statute, Kashmir, United Nations, Geneva Conventions, International Criminal Court

Introduction:

The Rome Statute for the establishment of an International Criminal Court (hereinafter "ICC") was voted in affirmative in July 1998, by 120 states, seven states voted against it and 21, including India, abstained. (Danilenko, 2000, p.446). As Ramanathan quotes the official statement of the Indian delegate at the Diplomatic Conference was that, " We can understand the need for the International Criminal Court to step in when confronted by situations such as in former Yugoslavia or Rwanda, where national judicial structures had completely broken down. But the correct response to such exceptional situations is not that all nations must constantly prove the viability of their judicial structures or find these overridden by the ICC." (Ramanathan, 2005, p.633).

Years after the establishment of International Criminal Court, India has no indication of becoming a State Party to the Statute. The paper would start by discussing why India continues to stay out of the Rome Statute. A special reference would be made to Common Article 3 of the Geneva Conventions and a look would be made into the conflict- situations in Kashmir and North Eastern States of India. After a a cause-effect analysis of these situations, a conclusion would be drawn as to the viability of India's stand in the era of international law.

I.Indian position on the Rome Statute

The establishment of the ICC came out of the need for an independent, permanent adjudicatory body with criminal jurisdiction to deal with heinous crimes of international nature. India's decision to remain out of ICC's jurisdiction is not something aberrant. India

has been hostile to the idea of internationalising criminal justice since long. Even when the International Military Tribunal for the Far East was established after the surrender of Japan at the end of Second World War, Dr. Radhabinod Pal, Judge from India gave a Dissenting Judgment and did not follow the charges that were brought against the defendants. He declared the accused Japanese leaders innocent of all charges. Both the Charters of the Nuremberg and Tokyo Tribunals had brought new offences and made several changes in the definitions and scope of international law. Justice Pal made a critical analysis of the nature and status of international law in the first half of the twentieth century and argued that international law could not be changed by mere *ipse dixit* (dogmatic pronouncement) of the authors of the Charter in question. (Rahman, 2010, p.1). The dissenting judgment of Justice Radhabinod Pal is of utmost importance in the history of international law for a novel interpretation of international events. (Pritchard; Zaide, 1981, p.21)

At the time of the drafting of the Rome Statute, some of the fundamental objections given by Indian delegates in their opposition to the Court related to the perceived role of the United Nations Security Council and its referral power. India had also proposed to include use of nuclear weapons as a crime under the jurisdiction of the ICC but that was not accepted. Thus, India abstained from the vote on the statute. Lahiri (2014) provides some of the main objections that India has to joining the ICC being that the Rome Statute:

1. Made the ICC subordinate to the UN Security Council, and thus in effect to its permanent members, and their political interference, by providing it the power to refer cases to the ICC and the power to block ICC proceedings.
2. Provided the extraordinary power to the UN Security Council to bind non-States Parties to the ICC ; this violates a fundamental principle of the Vienna Convention on the Law of Treaties that no state can be forced to accede to a treaty or be bound by the provisions of a treaty it has not accepted.
3. Blurred the legal distinction between normative customary law and treaty obligations, particularly in respect of the definitions of crimes against humanity and their applicability to internal conflicts, placing countries in a position of being forced to acquiesce through the Rome Statute to provisions of international treaties they have not yet accepted.
4. Permitted no reservations or opt-out provisions to enable countries to safeguard their interests if placed in the above situation.
5. Inappropriately vested wide competence and powers to initiate investigations and trigger jurisdiction of the ICC in the hands of an individual prosecutor.
6. Refused to designate the use of nuclear weapons and terrorism among crimes within the purview of the ICC, as proposed by India. (Lahiri, 2014)

Common Article 3

India has ratified the 1949 Geneva Conventions and has even enacted Geneva Conventions Act 1960. But, in practise, India has decided to overlook Common Article 3 in any of its legislative and adjudicatory decisions. Further, it has categorically argued that India has never met the threshold requirements of Common Article 3 and therefore, its application and usability in Indian situation is irrelevant.

Situation in Kashmir

There are several reports on hundreds of mass graves in Kashmir. Torture, hostage-taking, and rape have all been prominent abuses in the Kashmir conflict. Human Rights Watch (1996) reports that the security forces and armed militants have used rape as a weapon to perpetuate atrocities and take revenge. With the widespread and frequent fighting throughout Kashmir several measures have been taken like: recourse to its regular armed forces, use of insurgents with military commanders responsible for the actions of those forces,

military operations and the size of the insurgent forces and of the government's military forces: making Common Article 3 in principle applicable to the conflict in Kashmir. Despite all this, Indian government still argues that it does not meet the threshold for application of Common Article 3. (Wilson, 1988, pp.45-48). This is because India has viewed the conflict as a domestic issue of breach of law and order and not as non-international armed conflict.

Since the definition of non-international armed conflict is not provided for in the Common Article 3, the threshold of its applicability is usually quoted very high. Roderic (2004) says that governments are understandably reluctant because of sovereignty considerations to concede belligerency opportunities for the non-state groups who they accuse of posing an armed challenge to the state. (Roderic, 2004, p.120). This reluctance is despite Common Article 3 stating that its application 'shall not affect the legal status of the Parties to the conflict.'

Situation in North Eastern States

Another example is, Armed Forces (Special Powers) Act, 1958 (hereinafter 'AFSPA'), passed when the Naga movement in the North eastern States for independence had just taken off. AFSPA has just six sections of which the fourth and sixth sections create curiosity. The former enables security forces to "fire upon or otherwise use force, even to the causing of death" and latter says no criminal prosecution will lie against any person who has taken action under this act. While Common Article 3 prohibits killing of innocent civilians in non-international armed conflict, AFSPA under section 4(a) gives wide ranging powers to the armed forces to use force to the extent of causing death on mere suspicion. AFSPA has therefore, been applied without much accountability. Officers and military has not been prosecuted for murder, rape, destruction of property (including the burning of villages in the 1960s in Nagaland and Mizoram) for their actions and for this Hazarika (2013) provides a vivid description of the events saying that,

There has been regrouping of villages in both places: villagers were forced to leave their homes at gunpoint, throw their belongings onto the back of a truck and move to a common site where they were herded together with strangers and formed new villages. It is a shameful and horrific history, which India knows little about and has cared even less for.

Extrajudicial executions are prevalent, yet not reported. Infact, Justice Jeevan Reddy committee recommended the repeal of the AFSPA in 2005 but the findings and recommendations are couched in secrecy. (Hazarika, 2013)

Both Kashmir and AFSPA controversies point to the reluctance of India towards ICC. It is submitted that threshold is a weak argument particularly when evidence points to the contrary. In addition, a lower threshold is available under Additional Protocol II -Article 1(2). This again has not been ratified by India. But India has even gone further by signing a Bilateral Immunity Agreement with the United States of America in 2002, to nullify the ICC's impact as far as US personnel are concerned. As (Purohit, 2008) elucidates these agreements are also called "Article 98 agreement" because they refer to the provision of the Rome Statute that prohibits the ICC from prosecuting someone located within an ICC member state if doing so would cause the member state to violate the terms of other bilateral or multilateral treaties to which it may be a party. While condemning other countries of the atrocities, India needs to create its own accountability too.

On signing up the Rome Statute, there is a fear India would immediately come under scanner for violations under Common Article 3 and crimes against humanity during non-international armed conflict. This may be said to be a major reason for staying out of ICC as Lahiri (2010) substantiates in effect that since Articles 7 and 8 of the Rome Statute include such crimes, and no reservations are permitted, except that under Article 124 of the Rome

Statute, States are permitted at the time of joining to opt out of war crimes jurisdiction for seven years.

Solutions are discussed time and again for the reluctance and prejudice that India shows towards the ICC. As has been suggested by the eminent Indian scholar Ramanathan (2005), India seeks for an opt-in provision whereby a state could accept the jurisdiction of the ICC by declaration and this might be limited to particular conduct or to conduct committed during a particular period of time. Further she points that because there is a lack of such provision, it violates the consensual nature of state sovereignty. However, it would be these specific conducts and specific time periods because of which India is choosing not to be a signatory. Partial acceptance would still not be in favour of India. In case, it is pick and choose for conducts and events, the whole exercise would again be futile and bureaucratic. The result of what such investigation may lead to is the core of India's decision to be a non-party to the statute irrespective of time and event. Lahiri (2010) has provided other elements like the political motives of the court, role of the Security Council and the prosecutorial powers for initiating investigation.

Conclusion:

India has a long tradition of protecting human rights and has been signatory to multiple human rights conventions, that require submission of periodic reports for UN scrutiny. When it asserts impunity for the commission of the crimes in Kashmir and North Eastern States, the argument fails drastically as the matter is not merely domestic anymore. The Indian position, that there is no need for the ICC because it is perfectly capable of dealing with mass crimes, is misleading. Indeed, in normal circumstances, India would have wished to be among the first to join such a revolutionary initiative to improve the international system. As Lahiri (2010) seems hopeful, maybe in the future meetings of the ICC, Assembly of Parties could well consider, for example, extending the Kampala 'opt-out' provisions. Terrorism and the use of nuclear weapons could be taken up for consideration for inclusion in the ICC's purview.

India must show solidarity to the global human rights values and ensure a more fruitful and effective participation in deliberative and negotiating bodies of the ICC which it is entitled to attend as an observer. If that seems far fetched, India can develop domestic policies and set example by prosecuting illegal executions and crimes similar to those of international nature particularly in conflict zones. Organisation of conferences, seminars including articulation of views by the academia with a heightened activity on the ICC in India definitely points to greater participation and interest from diverse society.

India has been subject to international dispute settlement bodies, such as the Dispute Settlement Body of the World Trade Organization and the International Court of Justice, amongst others. Being subject to these, it has not lost its sovereignty in any account. Further, there are several provisions for creation of accountability that are found not only in the Indian Constitution but several other laws of the country. Indian rules of warfare as found in ancient texts and furthered by fundamental rights in the Constitution of India are antecedents to many of the principles found in the Rome Statute. Abraham (2005) enumerates these principles being the presumption of innocence, principle of legality, proof of guilt beyond reasonable doubt, fair trial, legal aid and the right to remain silent, amongst others. Also contemplating India's reluctance, Banerjee (2011) rightly notes that India might have seriously prejudiced and misjudged the wide ranging socio-political and legal repercussions of opposing the Rome Statute accompanied with a loss of credibility if it altogether repudiates the Statute, and with it, its sizable practical advantages for protecting the dual interests of its nationals as individuals serving their country abroad, and of its national security.

The impact of Rome statute is not absent in India. The Rome standards have been used to promote law reform at the national level in India, and to provide redress to victims before national Courts in Sri Lanka as well. As the International Bar Association (2008) rightly notes that although the importance of the Court in fighting impunity worldwide is undisputable, the ICC also exists as a tool to strengthen national legal systems and provide redress to victims. Thus, while India may still be reluctant to sign the Rome statute and can have its prejudices, it must imbibe and infuse the standards of justice that the international community envisages in its legal system and take relevant steps for protection and promotion of rights of relevant subjects.

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