

# India's Hostility to Internationalize Criminal Justice- A 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. Urging India to repeal the controversial Armed Forces Special Powers Act, 1958, United Nations also asked India to ensure that the legislation regarding the use of force by the armed forces provides for the respect of the principles of proportionality and necessity. Various reports have shown that the state violence in Kashmir and North Eastern States of India was institutionalized through a culture of institutional impunity to the state forces which perpetuate the state of human rights violations. India has not acceded to the Rome Statute. It abstained in the vote adopting the statute in 1998, saying it objected to the broad definition adopted of crimes against humanity, the right given to the Security Council to refer cases, delay investigations and bind non-state parties, and the use of nuclear weapons or other weapons of mass destruction not being explicitly outlawed. Even though India has ratified the Geneva Conventions, it has decided to overlook the Common Article 3. In light of the above, this paper highlights why the emerging power India, abstains from joining the Rome Statute and the possibility of India being brought under the scanner of International Criminal Court.

**Keywords:** Rome Statute, Kashmir, United Nations, Geneva Conventions, International Criminal Court

## **Introduction**

The Rome Statute for the establishment of an International Criminal Court (ICC) was voted in, in July 1998, by 120 states, 7 states voted against it and 21, including India, abstained. The Indian delegate at the Diplomatic Conference stated in his official statement 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."

Years after the establishment of International Criminal Court, India has given 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 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.

### India's position on the Rome Statute

The establishment of the ICC came out of the need for an independent, permanent criminal court to deal with heinous crimes of international concern. India's decision to remain out of ICC is not something of an aberrant nature. India has been hostile to the idea of internationalizing 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. Radha Binod Pal, a Judge from India gave a dissenting judgment. He refused to be bound by the charges brought against the defendants by the Prosecution. Consequently, Justice Pal declared the accused Japanese leader innocent of all charges. Under the Charters of the Nuremberg and Tokyo Tribunals, radical changes were made in the definitions of international laws. These tribunals made definitions of new offenses and held individuals in power responsible for perpetrating such offenses. In his judgment, he made a critical and detailed study of the 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. This dissenting judgment of Justice Radha Binod Pal at the International Military Tribunal for the Far East is of unique importance in the history of international law as a new interpretation of contemporary (history of the pre-second World War era) history of international events.

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 (UNSC) and its referral power. The Rome Conference even evaded a vote on India's proposal to include the use of nuclear weapons as an ICC crime through a procedural 'no action' resolution. India eventually abstained in the vote on the Statutes, and has not taken any steps for its signature and ratification.

The principal objections of India to the Rome Statute are that it: made the ICC subordinate to the UNSC, 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. In addition, it provided the extraordinary power to the UNSC 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.

It blurred the legal distinction between normative customary law and treaty obligations, particularly in respect to 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 Statutes to the provisions of international treaties, they have not yet accepted. In addition, it permitted no reservations or opt-out provisions to enable countries to safeguard their interests if placed in the above situation. Furthermore, it inappropriately vested wide competence and powers to initiate investigations and trigger jurisdiction of the ICC in the hands of an individual prosecutor. It refused to designate of the use of nuclear weapons and terrorism among crimes within the purview of the ICC, as proposed by India.

### Common Article 3

India has ratified the 1949 Geneva Conventions, and has even enacted Geneva Conventions Act 1960, but in practice, India has decided to overlook Common Article 3 in its special enactments, applicability and Supreme Court rulings. Moreover, India categorically and more extensively argues that at no point has the situation in India met the threshold required for the application of Common Article 3.

### **Situation in Kashmir**

There are reports on hundreds of mass graves in Kashmir. Torture, hostage-taking, as well as rape have all been prominent abuses in the Kashmir conflict. Both security forces and armed militants have used rape as a weapon to punish, intimidate, coerce, humiliate and degrade, but India does not meet the threshold of Common Article 3. There is widespread and frequent fighting throughout Kashmir, recourse by the government to its regular armed forces, the organization of insurgents into armed forces with military commanders responsible for the actions of those forces and capable of adhering to laws of war obligations, the military nature of operations conducted on both sides, and the size of the insurgent forces and of the government's military forces, which makes Common Article 3 applicable to the conflict in Kashmir, nonetheless Indian government argues that it does not meet the threshold for application of Common Article 3. This is because India has viewed the conflicts it has been beset with as domestic affairs, maybe, above the 'law and order' level but certainly below that of a non-international armed conflict.

The definition of non-international armed conflict not having been attempted in Common Article 3, the threshold of its applicability is pitched high by domestic states. 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. 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, 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. The most damning was the fourth and sixth sections: the former enables security forces to "fire upon or otherwise use force, even to the causing of death" where laws are being violated. The 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. This has occasioned the application of AFSPA without resorting to the emergency provisions that would then invite its accountability externally. Till date, not a single army, or paramilitary officer or soldier has been prosecuted for murder, rape, destruction of property (including the burning of villages in the 1960s in Nagaland and Mizoram). There has been regrouping of villages in both places where villagers were forced to leave their homes at gunpoint, throw their belongings onto the back of a truck and move to a common site. There they were herded together with strangers and formed new villages. It is a shameful and horrific history, which India has been accused to know little about and has cared even less for. There are extrajudicial executions, made emphatically in the north east region, which government normally remains silent about. Justice Jeevan Reddy committee recommended the repeal of the AFSPA in 2005 but the findings and recommendations are buried as the government has neither taken a call on them nor made them public.

The situation of conflict that persists in Kashmir and the North East explains the reasons for the state's anxiety that this manner of violence could be referred to the ICC. Always arguing that the threshold has not reached, India continuously evades application of Common Article 3. Some help could have been taken from Additional Protocol II, where a lower threshold is found under Article 1(2) but India has not ratified the same. Even, the inclusion of "armed conflict not of an international character" in defining

“war crimes” in Article 8 of the Statute in the ICC was met with resistance from the Indian establishment.

India has gone even further and in December 2002, India signed a Bilateral Immunity Agreement with the United States of America, which has signed over a 100 such agreements to nullify the ICC’s impact as far as its personnel are concerned. 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.

On signing up the Rome Statute, there is a fear India would immediately come under ICC jurisdiction 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 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.

India also looks for an opt-in provision whereby a state could accept the jurisdiction of the ICC by declaration (possibly for a specified period), and this might be limited to particular conduct or to conducts committed during a particular period of time. The lack of such a provision, and the inherent jurisdiction which replaced it, are perceived as representing a violation of the consent of states, and thus a threat to sovereignty. India’s resistance to accepting the inherent jurisdiction of the ICC is explained, in part, by anxieties about how investigation, prosecution and criminal proceedings in the Indian system may be judged by an international court. Further elements giving rise to India’s misgivings are the fear that the Court might be used with political motives, the power conferred on the prosecutor to initiate investigations “proprio motu” and the role allotted to the Security Council.

## Conclusion

Having become Party to so many human rights conventions, which requires India to submit a variety of periodic reports for UN scrutiny on domestic actions, it is scarcely appropriate that India should assert impunity for the commission of the most heinous crimes imaginable in the course of combating domestic insurgencies. The Indian position, that India does not need the ICC because it is perfectly capable of dealing with mass crimes, is misleading. The ICC only steps in when the state does not act, or acts in ways that shield perpetrators. Indeed, in normal circumstances, India would have wished to be among the first to join such a revolutionary initiative to improve the international system. 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.

There are a few concerns about Indian leaders and military commanders being prosecuted by the ICC, if India joins, but these concerns are highly exaggerated. ICC’s jurisdiction over India under the UNSC referral process would be theoretically possible whether or not India joins the ICC, but highly unlikely in practice. India should immediately ensure substantive and effective participation in ICC’s deliberative and negotiating bodies, which it is entitled to attend as an observer. Most of the objections and concerns highlighted in this paper, seem to have waned over the years. Moreover, heightened activities on the ICC in India in the past year have generated greater participation and interest from diverse constituencies including parliamentarians, academia, media and various civil society groups.

India has been subjected to international dispute settlement bodies, such as the Dispute Settlement Body of the World Trade Organization and the International Court of Justice, amongst others. State sovereignty is not compromised merely because a nation-state agrees to subject itself to an international court that can exercise jurisdiction over its officials. Several legal provisions found in the Indian Constitution and the criminal laws of India are antecedents to many of the principles found in the Rome Statute namely 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. Thus, India might have seriously prejudiced and misjudged the legal, political and social repercussions of opposing the Rome Statute, and risks further erosion 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.

Till India signs the Rome Statute it must be stated that the standards set by the Rome Statute could be of use in the region regardless of its poor record of ratification. For instance, the Rome standards have been used to promote law reform at the national level in India, as well as to provide redress to victims before National Courts in Sri Lanka. Thus, 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.

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