

**Department of Political Science**

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**E-Content**

The following lecture pertains to M.A. - Semester IV: Paper IV (a)- “*Contemporary Issues in International Law*”, Unit IV. It is hoped that the interested students would benefit from this e-content.

**India and the International Criminal Court**

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*The prime objective of the current lecture is to examine India’s approach to the International Criminal Court, a historic and an unprecedented Court that, came into being on 1<sup>st</sup> July, 2002. The lecture would examine factors for India’s refusal to sign the Rome Statute- a momentous enactment which India had worked for, for almost four decades beginning the Nuremberg Tribunal. Besides, it will also take into account the response of the critics of India’s consistent to remain away from the ICC. It is noteworthy that the advent of the court created ripples in the world community in so far as it marked a new era in introducing national and international accountability on the part of egregious human rights violators, who had virtually become habitual to committing crimes against their own populace with impunity.*

The year 2018 marked the 20<sup>th</sup> anniversary of the enactment of the Rome Statute of the International Criminal Court. Adopted on 20th July 1998 by a vote of 120 to 7 and 21 abstentions including India, it came into force on 1<sup>st</sup> July 2002 following ratifications by 60 countries. The non-signatory states, comprising India, USA, Russia, China and Israel, raised important objections to the Rome Statute at the Rome Conference, 1998 and demanded suitable amendments to the ICC charter. However, when unheeded, India decided to abstain from the voting and since then it has remained silent on the issue of joining the ICC, citing resolution of the objections raised by it during the Rome Conference in 1998.

The Kampala ICC review conference held in 2010 also could not resolve India’s grievances. Today, once again the issue of India and other non-signatory states joining the ICC has arisen on the occasion of the 20<sup>th</sup> anniversary of the adoption of the Rome Statute in 1998. Year round celebrations by the *Coalition of the International Criminal Court (CICC)*, a major legal NGO working for the promotion of the ICC, has started with the holding of a two-day conference entitled: “*Rome Statute at 20*” (CICC, 2018).

Year round conferences, seminars, discussions and deliberations are scheduled to be held by the CICC in various parts of the world including the Hague (the ICC HQs) and

New York (UN HQs) United Nations to discuss the progress made in the direction of confronting impunity against genocide, war crimes, crimes against humanity and the crime of aggression- the principal mandate of the ICC. In addition, the status of international law, global justice and peace is also slated to be discussed threadbare. Besides, various unresolved issues relating largely to the objections of the non-signatory states is also proposed to be taken up. Considering the growing significance of the ICC together with the growing clout of India internationally, the CICC's initiative presents a significant opportunity to India as also the global community including the non-signatory states to come forward and join the ICC.

### **India's foreign policy and international engagement**

Before understanding the compulsions of India's abstention from the Rome Statute voting, it is pertinent to underscore India's foreign policy engagements with international institutions and affairs. Article 51 of the Indian Constitution obligates India to promote international peace and security; maintain just and honourable relations between nations; foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and encourage settlement of international disputes by arbitration. In keeping with this constitutional mandate, India has ceaselessly worked and cooperated actively with the global community in protecting, promoting and preserving the values of secularism, pluralism and human rights as enshrined in the UN Charter.

India's continued creative participation in the development and codification of international law at various international fora including the United Nations, aimed at deterring and suppressing the most heinous crimes beginning 1948, is a testimony to India's commitment to global peace and order. It has consistently held the view that the only way to establishing a long-lasting basis for development of such international cooperation is a conscientious regard for the basic principles of the United Nations Charter, namely the sovereign equality of States, non-discrimination and non-interference in internal affairs. These principles and beliefs have guided India's participation in various international forums and international behaviour. Lauding India's role, the former UN Secretary General remarked: *"Over the decades, India has made an enormous contribution to the United Nations, through the efforts of its Government, and the work of Indian scholars, soldiers and international civil servants. India's has been one of the most eloquent voices helping the United Nations shape its agenda on behalf of the developing world. And the experience and professionalism of its armed forces has proved invaluable, time and again, in UN peacekeeping operations - in which over a hundred Indian soldiers have given their lives."*

At the United Nations, India has supported and also actively participated in most of the United Nations' human rights initiatives in the form of declarations, conventions, covenants and treaties beginning 1945 for the maintenance of international peace and order, and for preserving and promoting human rights. The country gave its full support and cooperation to the U.N. Human Rights Commission under Mrs. Eleanor Roosevelt that created the Universal Declaration of Human Rights (UDHR). The UDHR has served as the principal human rights document of the United Nations since 1948. India has long held the idea that those who commit serious human rights violations should be held accountable. Indeed, it was India who throughout the Cold War insisted that both the superpowers- the USA and the USSR- should respect and work for the protection and promotion of human rights and fundamental freedoms the world over.

Even in the aftermath of the Cold War, India has actively supported the United Nations' initiative in establishing the various adhoc criminal tribunals and that included the adhoc International Criminal Tribunal for the former Yugoslavia (ICTY), 1993, International Criminal Tribunal for Rwanda (ICTR), 1994; Special Mixed International/ East Timorese Panels, 2000; Special War Crime Tribunals for Sierra Leone, 2002; Special Court for Cambodia, 2003 and the Iraqi Special Tribunal, 2003. Besides, India also contributed its troops to the various international peacekeeping missions under the aegis of the United Nations.

However, while taking the idealist route for the cause of global peace and order, India has also closely safeguarded its vital national interests and opposed efforts at the unwarranted international encroachment in its domestic affairs. This is borne out by the fact that India has put riders and conditions to many of the human rights treaties or covenants it has signed or acceded to from time to time. For instance, India's accession to the two international covenants- the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Social, Economic and Cultural Rights (ICESCR) of 1966, bears its reservations to article 1 of both the covenants. Likewise, the reservations/objections registered by India at the time of signing or ratifying various conventions, such as the *Convention on the Prevention and Punishment of the Crime of Genocide* (1951), the *International Convention on the Elimination of All Forms of Racial Discrimination* (1969), the *Convention on the Political Rights of Women* (1954), the *Convention on the Elimination of All Forms of Discrimination against Women* (1981) and the *Convention on the Rights of the Child* (1990) are further examples of India's national interest being reconciled with global humanitarian issues.

### **India's short-lived engagement with the ICC**

In tune with its policy of supporting the UNs' efforts, India initially became an eager participant in the effort to create an International Criminal Court in the 1990s. It

participated actively in the discussions on the establishment of an international criminal court in the meetings of the Ad hoc Committee and PREPCOM. Attended by 148-nations and described as a 'court of last resort' (Kirsch, 2005), the ICC was established on July 17, 1998 at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome, Italy, in June 1998. It came into effect on July 1, 2002. During the negotiations leading to the establishment of the ICC, India raised important objections to the ICC charter and demanded suitable amendments to it. But as they were not accepted and incorporated in the final draft of the ICC, India and 20 other countries abstained from voting at the Rome conference. Since its abstention, India has been disengaged with the ICC process. In December 2002, it concluded a pact with the US not to surrender each others' citizens to the ICC for prosecution.

At the conference, India was not the only one to express its anxieties about the ICC. USA, Russia, China and Israel were among the other major powers that refused to sign or ratify the Rome Statute on some or the other ground, the principal one being that it unduly infringes on their security and territorial integrity and also on their foreign and security policy decisions. These issues, they contended, are reserved to sovereign governments and over which the ICC should not claim authority.

### **The Disengagement: Objections to Rome Statute of the ICC**

Ever since the passage of the Rome Statute of ICC in 1998, India's policy towards the ICC has been clear and consistent and that it refuses to join the ICC on grounds that it lacks prudent safeguards against political manipulation, possesses sweeping authority without accountability to the U.N. Security Council, and violates national sovereignty by claiming jurisdiction over the nationals and military personnel of non-party states in some circumstances.

India's principal objections to the ICC mainly related to the issues of complementarity, the power of the prosecutor to initiate prosecutions; the right given to the Security Council to refer cases, delay investigations and bind non-State Parties; the non-inclusion of the use of nuclear weapons or other weapons of mass destruction in the ICC statute as a war crime, the inclusion of non-international conflicts - and hence Kashmir and other disputes within India - in the category of war crimes; and the apprehension of dilution of national sovereignty.

The persistence of these objections through the various stages of negotiations led India to drop sufficient indications of its reluctance to sign the ICC and finally, the non-resolution of these issues at the Rome Conference coupled with India's aspirations to have a permanent seat at the UN Security Council, made it not signing the ICC Statute. In India's view, as the final statute failed to address these concerns, it declined to sign it. Dilip Lahiri, the head of the Indian delegation at this conference, asserted "India fully endorses the agreed view of the non-aligned movement [...] which stressed the ICC

should be based on the principles of complementarity, state sovereignty, and non-intervention in the internal affairs of states and that its statute should be such as to attract the widest acceptability of states, with state consent the cornerstone of ICC jurisdiction".

India's Foreign Ministry too confirmed India's stand of not signing the ICC when it said: "We had three basic disagreements of issues not covered by the ICC. These were clear national jurisdiction rules, and the failure to include terrorism and weapons of mass destruction among the ambit of the court," said India's Foreign Ministry spokesman Navtej Sarna.

However, adopting a more critical attitude towards the ICC, S. Pal, India's deputy permanent representative at the U.N. in New York and also the deputy head of the Indian delegation to the Rome conference, claimed that the Statute would set up a "a European Criminal Court with universal jurisdiction". Expressing these sentiments in an interview at the conference, he dismissed the Court to be created, saying "the tribunal to be located in The Hague, the Netherlands, will identify, put on trial and sentence persons accused of committing a crime according to European standards.... Those found guilty would be jailed in cosy cells equipped, among others, with modern TV sets", he added. Doubting the credibility of the proposed ICC, he expressed fears that the ICC might in effect give a green light for "European neo-colonialism through the backdoor".

The following were India's objections to the Rome statute:

### **Inherent Jurisdiction of the ICC**

The real objection to India, as hinted out by the Indian delegation at Rome was that India did not want the ICC to have "any inherent or compulsory jurisdiction" that infringes national sovereignty. It was asserted by India that it should "be complementary or supplementary to the primary jurisdiction of nation states" and should not interfere into something that "is before the national courts, or decided upon, or the accused has been convicted or acquitted."

The Rome Charter provides that the ICC shall have jurisdiction only under the following limited circumstances:

- where the person accused of committing a crime is a national of a state party (or where the person's state has accepted the jurisdiction of the court);
- where the alleged crime was committed on the territory of a state party (or where the state on whose territory the crime was committed has accepted the jurisdiction of the court); or
- where a situation is referred to the court by the UN Security Council.(Rome Statute, Art. 12 & 13).

Criticising this provision, India argued that the ICC jurisdiction should be only complementary or supplementary to the primary jurisdiction of nation states. ICC can step in only when a national judicial system is nonexistent or unable to deal with the particular crimes covered by the Statute. In other words, once a case is before the national courts, or decided upon, or the accused has been convicted or acquitted, ICC should not assume jurisdiction in the same matter. This is in conformity with the principle of territorial jurisdiction well accepted by all legal systems and States as also with the principle of sovereignty of States. It is only when the ICC is facing situations like 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. Certainly, it is inconceivable to India, as it is to many other countries, that States with well established and functioning judicial and investigative systems should be subjected to a Star Chamber procedure. This would be a travesty of the concept of complementarity. We accordingly favor the approach of the optional jurisdiction of ICC adopted by the International Law Commission in its draft Statute. We do not favor any inherent or compulsory jurisdiction for ICC which dispenses with such an essential sovereign attribute. This will not result in an ICC which attracts universal international support.

India does not believe that the court is of last resort, rather believes that it will exercise inherent or compulsory jurisdiction and given the troubled situation in Kashmir and North-East India, India is dead opposed to any inherent or compulsory role of the ICC over the national courts. India's stance directly affects her idealist position of adopting a universal system of justice under the authority of the UN.

### **Role of the Security Council**

India has vehemently criticized the role of the Security Council in the ICC. India took a lead role for the developing world on the issue of UN Security Council arguing that any role to this UN body could be possibly misused by the five permanent members of the Security Council. India rightly argued that this unwarranted provision enabling the Security Council to give a backdoor access to yet another international body- the ICC- was another attempt to maintain the post-Cold War power structure which so vehemently denied India access to the nuclear club.

India asserted that since the UN Security Council is a political body, and by concentrating unprecedented powers in the hands of this council, whose all five members are nuclear countries, the independence of the Court would definitely be compromised when a political body "gets to be the complainant, the policeman, the judge and the jury all rolled into one". Instances of selective justice at the hands of this body have already witnessed in the past when several resolutions sponsored by other countries on issues of human rights violations have been vetoed by the Security Council members having vested interest in such nations.

Explaining its vote against the final treaty, India asserted that "the Statute gives to the Security Council a role in terms that violate international law." India argued that the Security Council should have no role at all in the Court's operation as any role for the Security Council before the ICC would necessarily entail legal and political implications. Legally, the ICC is meant to have only a criminal justice function, i.e. to prosecute and punish serious international crimes. Maintenance of international peace and security is not its responsibility. There is no legal basis for the Security Council to either refer matters of peace and security to the ICC or to veto cases from coming before the ICC. The powers of the Security Council under the Charter are not at issue here. Any preeminent role for the Security Council in triggering ICC jurisdiction constitutes a violation of sovereign equality, as well as equality before law, because it contains an assumption that the five veto-wielding States do not by definition commit the crimes covered by the ICC Statute, or in case they so commit, that they are above the law and thus possess *de jure* impunity from prosecution, while individuals in all other States are presumed to be prone to committing such international crimes.

Besides, at the Rome negotiations, India and many of the non-Council nations opposed the US proposal that all proceedings before the Court must first be approved by the Security Council; the fact that it would take only one veto by one member of the Permanent Five to block an ICC proceeding, would have defeated the whole purpose in creating the Court, and India vigorously opposed this potential denial of justice. A compromise was eventually reached in Article 16 of the Statute, which allows the Council to request a 12-month suspension of a trial before the ICC if it constitutes a threat to peace and security; a veto by one of the permanent members, then, would enable the Court to proceed on a case.

India also criticized the ICC provision that the Security Council would continue to create ad-hoc tribunals, as it did in the case of Yugoslavia, followed later for Rwanda, unless the Security Council is satisfied with the statute even after the establishment of the ICC, does not carry the strength of reason or basis in law. It was never the understanding that the Yugoslav tribunal would constitute a precedent. Also, the very need for creation of ad-hoc tribunals arose because there was no permanent international criminal court in place. Obviously, with a permanent ICC, the need for the Security Council to continue to establish ad-hoc tribunals vanishes. Politically, the composition of the Security Council and the veto vested in five permanent members is an anomaly. This anomaly cannot be reproduced and recognized in an ICC. There cannot be one rule for some countries for the exercise of ICC jurisdiction and another rule for others.

## **The Prosecutor**

The Rome Treaty also permits the prosecutor to initiate an investigation on his own motion, *proprio motu*, subject to rigorous safeguards (Article 13(c); Article 15). Supporters of an independent and effective Court felt that a prosecutor with *proprio motu* powers was an essential complement to Security Council and State Party referrals.

However, India termed it 'inappropriate' to vest such a competence, which pertains to States, in the hands of an individual prosecutor to initiate investigations suo moto and thus trigger the jurisdiction of the Court. The distinction between the sovereign authority of the States on the one hand, and the professional role of a prosecutor on the other should be maintained. These two should be clearly distinguished and not confused. It is the professional responsibility of a prosecutor to gather evidence and conduct impartial investigations, once he has been authorized to do so, and to conduct the prosecution. The approach of Ad hoc tribunals cannot constitute a precedent or be considered automatically applicable or advisable for the establishment of a permanent international criminal court on a sound basis.

### **The inclusion of non-international armed conflict**

There is also no agreement about whether or not conflicts not of an international nature could be covered under the definition of such crimes under customary international law. There are similar differences on categories of weapons and on establishing an appropriately high threshold for such crimes to be dealt with by the ICC. In accordance with the fundamental requirement of trying to ensure universal support for the ICC, efforts to push beyond the highest common factor currently acceptable to the broad majority of nation States are likely to be counterproductive.

### **The non-inclusion of nuclear weapons as a war crime**

India argued hard for the inclusion of the use of nuclear weapons in the ICC statute as a war crime and clearly stated its position on the nuclear weapons issue. However, due to the lack of support from many delegations, India's views were not incorporated in the statute. The delegation-head Lahiri said "there was no convention yet to ban the use of nuclear weapons only because those who until recently had a monopoly on these weapons have refused to negotiate one". Without specifically naming any country, he clearly hinted at the five permanent UN Security Council members- the U.S., Russia, China, France and Great Britain. But India's stand on the inclusion of nuclear weapons in the ICC charter had been welcomed in the earlier part of the conference at New Delhi by both the developing and developed countries.

The Indian representative, Dilip Lahiri at the Rome Conference argued that the non-inclusion of cross-border terrorism to the list of crimes covered by the Rome Statute, which is a grave violation of human rights and a challenge to a nation's sovereignty, is unfortunate and unacceptable. But the omission of terrorism from the ICC was in large measures on the inability of the States to agree on a definition for terrorism. Much to India's embarrassment, 'drug trafficking' was also not included in the charter. This was also due to states not reaching on a common definition of drug trafficking and it was thus decided to not to include drug trafficking as this might overwhelm the court's limited resources (United Nations Dept. of Public Information, 2002). However, this was not a



setback only for India but for many states too who wanted terrorism and drug trafficking to be included in the Rome statute.

### **India's Objections Challenged**

Notwithstanding India's arguments in staying away from the Rome Statute of the ICC, critics hold that India's attitude towards the Rome Conference was negative from the very beginning and India's stark refusal to sign the ICC and preferring instead to stand among the ranks of such non-signatory states as Iraq, Yemen, Pakistan, Israel, China and the United States, noted for their anti-human rights stance has only served to expose India's real intentions for the ICC. Usha Ramanathan, a scholar working on ICC, observes that though India had been involved in the drafting of the Statute for several years prior to the Rome Conference in 1998, it had been complacent that the ICC would never see the light of the day. When Indian delegates went to Rome, they were shocked to see the overwhelming support of countries to the ICC, and thereafter, used several unconvincing arguments to disengage from the process. She said that the government continues to project the ICC as violative of Indian sovereignty, even though the ICC deals with heinous crimes, while India has been signing away Indian sovereignty with regard to workers' rights, patent rights, environment and so on. She also termed the Indian government's decision to enter into a bilateral non-surrender agreement with the U.S., as a shameful act. Such an agreement prevents either party from handing over a national to the ICC for prosecution.

Hailing the setting-up of ICC as a watershed development in the annals of the international criminal justice system, Saumya Uma, coordinator of the Mumbai-based ICC-India, the Indian Campaign on the International Criminal Court observes, "The ICC represents a major advance over existing arrangements. It allows individuals to be prosecuted fairly and in conformity with international law in a genuinely global forum on the principle that crimes against humanity and war crimes are the concern of the entire world and not one specific nation-state. Yet, some states have been opposing it on spurious and narrow grounds of sovereignty".

Critics have accused New Delhi of opposing the Rome treaty and falling in line with the United States. They argue that while India talks of global justice, on the other hand it withdraws from such international institutions aiming to punish international criminals and perpetrators of violence. "This is what makes the Indian government's position utterly hypocritical," says Prashant Bhushan, a leading advocate and an activist of ICC-India campaign. "It has failed to punish the criminals of the Gujarat carnage. And yet, it mouths empty rhetoric about the rule of law and the importance of multilateral institutions. It is not enough for India to 'regret' Saddam Hussein's hanging. It must act by supporting the ICC". Charging the United States of double standards, he asserts, "It is arguable that the U.S. and its allies are prima facie guilty of precisely such crimes.....The ICC is the appropriate forum to try them. And President Bush and Prime Minister Tony Blair of Britain are suitable candidates for such prosecution for their acts

in Iraq, including torture at the Abu Ghraib prison and killings in Fallujah and many other places".

India's stand in seeking the banning of the use of nuclear weapons too was criticised, but Indian officials rubbished the criticism saying that a provision against the use of nuclear weapons would constitute an "additional bar" to criminalising the use of such weapons. It would also test the commitment of the other nuclear states to set a clear timetable for eliminating nuclear weapons. Although India was supported by several countries, including its non-aligned allies and the European countries, during the initial stages of the Rome negotiations about inclusion of the use of nuclear weapons as a war crime in the ICC statute, towards the end of the conference, certain European countries, critical of India's stand, accused India of being an obstacle to the agreement. The attitude of certain India-friendly countries too turned critical terming "India's 'obsession' with the nuclear arms provision when it was not the main issue at the ICC". Sabelo Sivuyile Maqungo from South Africa's foreign ministry said that while the African group on the whole favoured the inclusion of the use of nuclear weapons, "we cannot allow the Conference to be wrecked" by that issue. He questioned: "How are we going to tell the people in Burundi that we could not agree to establish an International Criminal Court because India insisted on the inclusion of nuclear weapons?" Other African delegates voiced similar concerns and one of them questioned, "After all, the Rome Conference was not about nuclear disarmament but about establishing an International Criminal Court which several countries in Africa looked up to.

However, analysts hold that India's objection to the nuclear issue was not the central one and cannot account for any serious disappointment for India. The principal objection to India at the Rome Conference was, that it did not want the ICC to have "any inherent or compulsory jurisdiction" that infringed national sovereignty. India's hypersensitivity to the issue of national sovereignty was owing to the peculiar circumstances in the northern and eastern parts of India where the country has long been fighting cross-border terrorism. Hence, India vehemently opposed any inherent or compulsory jurisdiction of the court. But critics argue that if this is the case, India should be outspoken about its fear of political manipulation. Instead of concealing its real concerns that invite charges of hypocrisy, she should enact protective domestic legislation like the US.

India's stand on the ICC has invited the wrath of the human rights groups too, who hold India responsible for its unwarranted abstention. According to Human Rights Watch, the Indian stand on the ICC during the Rome Conference was both contradictory and defective. It argued that while India mentioned about its support for human rights and its contributions to the development of international criminal law, it paradoxically called for the Statute's definition of crimes and rules of procedure to subscribe to as low a threshold as possible, in order to attract the participation of the majority of States. This was 'ridiculous'. Commenting on the Indian delegation's speech at the Rome Conference, the HRW said: "We also hope that many states sign and ratify this treaty. But the price of wide participation should not be the quality of the Court. It's more important to have a good court, than to have a bad court with a lot of signatures on it".

Further, India's concern about the independent office of the Prosecutor and allowing him to act on his/her own initiative to launch an investigation or prosecution has also been criticized. The Indian Government apprehensions that charges brought against Indians by some countries could be politically motivated has not been accepted by the critics. It has been held that there are more than adequate safeguards written into the Statute to protect against such bias: for example, a panel of three judges must give approval to the Prosecutor to proceed with such an investigation; these justices, like all the 15 others that will sit on the Court, will be independent, elected by the majority vote of the countries that have formally adhered to the ICC; and finally, any case brought by the Prosecutor can be directed only against the nationals of a country that has signed the Rome Statute, which India finally chose not to do.

Critics argue that such resistance to a principled body like the International Criminal Court suggests that "countries thus opposing the Court actually expect that they will have something to fear, i.e. that their own citizens are inclined to commit war crimes. As the fourth-largest contributor of troops to United Nations peacekeeping operations, India is sending the wrong message to the world" (Fowler, 2007). India's arguments about the backdoor entry of the UN Security Council in the Court, and the resultant abuse of the Court's mandate could prove injurious to individual countries has also been challenged by the critics who argue that "India has adopted double standards, as on one hand, it calls for reforming the Security Council and on the other, it criticizes the same institution for its vested interests."

Observers also point out that India's charge of not including terrorism in the list of ICC crimes also led India not to sign the ICC charter was misleading as a closer examination of the Rome statute aptly makes it clear that the inclusion of war crimes, genocide, crimes against humanity and crimes of aggression- the main issues of the ICC's reveals that the definition of these terms include virtually all aspects of terrorism, viz- torture, killing the innocent and unarmed civilians, willful destruction of civilian property and areas, outraging the modesty of women, and enslaving women and children as sex slaves; torturing, wounding or maiming the civilian population etc. is all a grave violation of human rights. Are these consequences that the same as of terrorism which India has perennially raised at various international fora?

With regard to India's concerns about the principle of complementarity being applied to the Indian criminal justice system, it has been claimed that this suspicion is unwarranted and misplaced as the ICC charter clearly states that the ICC would step in only where the national courts have become dysfunctional, or have collapsed or a miscarriage of justice. Advocate Mihir Desai, co-founder of India Centre for Human Rights and Law, Mumbai argues that unlike some of the other international criminal tribunals, the ICC does not assert primacy over national legal systems. The international court would step in only if domestic justice is not forthcoming. This is why the ICC has often been described as a court of last resort. Only when domestic courts are, for a multitude of possible reasons, unable or unwilling to prosecute crimes themselves, the ICC will be allowed to step in.

India's contention that the International Criminal Court must not intervene in the internal affairs of States has too been challenged by the scholars working on the subject. They assert that by taking this ground, India has unwittingly landed itself in the company of countries that have highly-criticized human rights records, like Israel, China and Pakistan. Such a position, they contend, casts a shadow of doubt on the Indian Army's actions in Kashmir. Arvind Narain of Alternative Law Forum, Bangalore says, "If Indian soldiers, as the Vajpayee government has vehemently defended, are not committing war crimes in the Valley, then India should have nothing to worry about in being asked by the ICC to try an accused before India's own courts, with all their procedural guarantees of fairness".

Saumya Uma of 'ICC-India campaign' argues that India's stand appears to be seriously flawed. She asserts that by taking this position, "India is suggesting that crimes committed during a conflict within the borders of a nation are somehow lesser offences than those perpetrated in the course of war among other countries. The Court was conceived with the very purpose of prosecuting only the very worst acts of inhumanity that are repugnant to all "civilized" nations, including: killing members of a national, ethnic, racial or religious group, deportation of a civilian population from its occupied territory, torture, sexual violence (whether committed against a group during peacetime or against an individual during war) and attacks against peacekeeping or humanitarian personnel; human beings who commit such extreme crimes should therefore be called to account regardless of who or where they are".

Expressing similar sentiments, Usha Ramanathan, a New Delhi-based independent law researcher, opines: "Infact, the ICC is the best international forum for combating impunity and bringing to book perpetrators of serious crimes, which often go unpunished. It is ideally placed to achieve justice for all, to act as a court of last resort, to remedy the deficiency of ad hoc tribunals, to deter future perpetrators of heinous crimes, and to have true and lasting peace, based on justice".

### **The ICC Kampala Review Conference, 2010**

Under the provisions of the Rome Statute of 1998, the ICC Review Conference was to be held after seven years of the coming into force of the ICC (Article 123). Thus, a review conference was held in Kampala from May 31 to June 11, 2010 to consider amendments to the Rome Statute of the International Criminal Court. . Three major issues about which decisions were taken were:

- a. Extending the jurisdiction of the Court to some war crimes committed in non-international conflicts for which it already had jurisdiction in international conflicts (Article 8).
- b. The Crime of Aggression was defined and conditions for the Court's jurisdiction under this crime was laid down.
- c. The proposal to delete Article 124 of the Statute (which permits States to opt out of the war crimes provisions of the Statute for seven years) failed.

From India's perspective, the Kampala Conference was not of much significance as the objections that were raised by India at the 1998 Rome Conference were not taken up in this conference. Perhaps, this may be one of the reasons why India did not participate in the conference.

### **Refuting the Critics' Arguments: The Implications of the ICC**

The moot question here, however, is to what extent India's grievances are justified? Is it prudent for India to stay out of ICC indefinitely? Notwithstanding India's intense criticism for abstaining from the ICC, and the pressure being brought on it to join the ICC at the earliest, the long-term implications of joining the ICC for countries like India who are facing multifarious challenges on several fronts would be quite alarming. The following could be the implications for India and the international community:

#### **Threat to National Sovereignty**

A fundamental principle of the international legal system is that treaties, and the decisions and judgments of treaty organizations cannot be imposed on states without their consent. In certain circumstances, the ICC will have the authority to detain and try military personnel, officials, and nationals of countries even though they have not become a party to the Rome Statute. Such a system poses a grave threat to the independence and territorial sovereignty of nations.

It is pertinent to observe here that while sovereign nations have the authority to try non-citizens who have committed crimes against their citizens or in their territory, India has never recognized the right of an international organization claiming to try nationals of non-signatory states to such treaties or organizations. As such, the Rome Statute violates international law as it has been traditionally understood by empowering the ICC to prosecute and punish the nationals of countries that are not party to it. In fact, Article 34 of the Vienna Convention on the Law of Treaties unequivocally states: "A treaty does not create either obligations or rights for a third State without its consent".

The arguments of the supporters of the ICC that the court would seek such prosecutions only if a country is unwilling or unable to prosecute those accused of crimes within the court's jurisdiction--the principle of complementarity--are insufficient to alleviate sovereignty concerns. As a scholar notes:

"Complementarity applies only if the state in question handles the particular case at issue in a manner consistent with the ICC's understanding of the applicable legal norms. If the court concludes that a state has been unwilling or unable to prosecute one of its citizens or government officials because it does not consider the questioned conduct unlawful, based on its own interpretation of the relevant international legal requirements, the court can proceed with an investigation.

## **Obstruction to India's fight against insurgency, secessionism and terrorism**

For the last nearly three decades, India has been fighting subversive and disruptive elements out to dismember India's unity, sovereignty and integrity. Cross-border terrorism promoted by Pakistan and China has kept India burning and bleeding. Terrorism in Kashmir, Punjab (now suppressed), insurgency in North-East India and violent Naxalism prevailing in many central and southern states of India has forced the government to employ military power and security forces to control these anti-national forces which, at times, has resulted in the loss of civilian lives and property. NGOs have raised allegations against the security forces for committing excess and have demanded initiation of criminal cases against them. Already, western human rights NGOs have vehemently criticized India's so-called heavy handedness against the 'so-called terrorists', and have shown veiled sympathy for terrorist organizations operating against India. They have consistently failed to appreciate the incitement caused by these organizations which have led the Indian security forces to launch widespread operations against them. Under such circumstances, if India joins the ICC, it will come under the obligation to hand over Indian nationals to the court, regardless of India's objections and protestations.

## **Complications in India's military and strategic relations with other countries**

The last two decades have seen a phenomenal growth in India's military and economic power. From a conventional military power it has risen to the status of a nuclear state. Today, India has joint military exercises with major powers such as, the USA, UK, Russia, France, Israel and China and has peacekeeping and humanitarian operations with the UN. All this with a vision that India has a unique role and responsibility in preserving international peace and security and also to safeguard its own vital national interests. This worldwide extension of India's military and strategic capability is a unique feature of India's foreign policy. Under such circumstances, it becomes essential that India must ensure that its forces and government officials are not exposed to politically motivated investigations and prosecutions.

## **The Crime of Aggression**

One of the grounds of the ICC's jurisdiction over crimes is the 'crime of aggression'. The ICC can open investigation against a national of any party on grounds of crime of aggression. At the Kampala review conference, amendments have been made to the Rome Statute which defines and lays down the conditions for the Court's jurisdiction under the crime of aggression (Article 124). However, it is felt that if India joins the ICC, it would face the possibility of the crime of aggression if its security forces fighting against cross-border terrorism ever decide to resort to hot pursuit of terrorists across its international borders and to destroy their camps in the enemy side. Such an action would be branded as a hostile invasion by that nation and therefore illegal under international law. All the deaths resulting in the process, whether of the terrorists or the common civilians would fall under the category of aggression. The crime of aggression as stated in the ICC, according to experts, would be very near to such an Indian action,

as it would include, when finalized, among other things, any military action conducted by a state party without Security Council authorization as that would violate international law. Such an act would be labeled as an act of aggression by that country and that could warrant an ICC indictment. It would be hard for India to defend its military and civilian officials against frivolous and politically motivated charges submitted to the ICC prosecutor. The international political pressure would compel the ICC's prosecutor to file charges against India's armed forces.

Given such grim reality, it would be imprudent for India to sign the ICC and expose its armed forces to such an indictment under the crime of aggression, particularly at a time when India is fighting a full-scale war of terrorism on its international borders in the northern and eastern parts of India. Hence, until the crime of aggression is defined, it would be premature for India to consider joining the ICC.

### **Politicization of the Court**

Nations having vested interests and a desire to interfere in the internal affairs of other countries to settle scores with their rival neighbours would find the ICC as a convenient weapon to initiate proceedings against their adversaries. For instance, Pakistan, in a well-crafted and strategic move, brought a resolution in the Security Council in 1995 against India for the latter's so-called human rights violations in Kashmir. It was only after intensive diplomatic efforts that India managed to defeat the resolution that had multifarious objectives to be achieved against India. The possibilities of the misuse of the ICC are quite likely given the fact that issues of terrorism and human rights have been politicized by countries having such vested interests.

### **The Controversial role of the Prosecutor**

The problem of politicization and the misuse of the court is further aggravated given the power of the prosecutor to initiate an investigation based solely on his own authority or on information provided by a government, a nongovernmental organization (NGO), or individuals is an open invitation for political manipulation.

In the aftermath of the Iraq war, the ICC received numerous communications alleging crimes against the Bush administration officials' and demanded the Prosecutor to open an investigation against the crimes committed by USA in Iraq and Afghanistan. However, till now the ICC has avoided initiating investigations into such demands for various reasons, including that the ICC does not have "jurisdiction with respect to actions of non-State Party nationals on the territory of Iraq," which is also not a party to the Rome Statute.

Given the unprecedented powers of the prosecutor, the ICC may face severe criticism and opposition from nations in future. Such a situation may arise if the prosecutor

decides to investigate (and the court's pre-trial chamber authorizes) a case involving a non-ICC party without a Security Council referral or against the objections of the government of the involved territory. For instance, if the Prosecutor decides to investigate the Palestinian problem, things can become very complicated (Philip and Hinder, 2009). Even though Israel is not a party to the Rome Statute, the ICC prosecutor is exploring a request by the Palestinian National Authority to prosecute Israeli commanders for alleged war crimes committed during its operations in Gaza.

The request is supported by 200 complaints from individuals and NGOs alleging war crimes by the Israeli military and civilian leaders related to military actions in Gaza. Palestinian lawyers argue that the Palestinian National Authority can request ICC jurisdiction as the de facto sovereign even though it is not an internationally recognized state. By accepting Palestine's claims, the ICC prosecutor has brought pressure on Israel over the latter's alleged war crimes, while ignoring Hamas's incitement of the military action and its commission of war crimes against Israeli civilians. Furthermore, by seemingly recognizing Palestine as a sovereign entity, the prosecutor's action has arguably created a pathway for Palestinian statehood without first reaching a comprehensive peace deal with Israel. This determination is an inherently political issue beyond the ICC's authority, yet the prosecutor has yet to reject the possibility that the ICC may open a case on the situation.

It is to be noted that once a case is brought to the ICC and the Prosecutor has suo moto initiated investigations against a country, there is little opportunity to resolve disputes, conflicts, or sensitive political issues diplomatically. Furthermore, the ICC prosecutor and judges are unlikely ever to be held accountable if their decisions lead to greater carnage or prolong the conflict, for instance, in Darfur or Uganda. They are free to act without considering the potential consequences.

### **The Role of the Security Council**

The Rome Statute empowers the ICC to investigate, prosecute, and punish individuals for the as yet undefined crime of "aggression." This directly challenges the authority and prerogatives of the U.N. Security Council, which the U.N. Charter gives "primary responsibility for the maintenance of international peace and security" and which is the only U.N. institution, empowered to determine when a nation has committed an act of aggression. Yet, the Rome Statute "empowers the court to decide on this matter and lets the prosecutor investigate and prosecute this undefined crime" free of any oversight from the Security Council.

Likewise, there has been a great controversy with regard to the indictment of Sudanese President, Moh. Al Bashir by the ICC and the subsequent arrest warrant issued against him by the ICC. The case to open an investigation against Bashir for his role in Darfur, Sudan was referred by the Security Council to the ICC in July 2002 which was ultimately taken up by the ICC in March 2005 (Secretary General, 2009). The prosecutor announced his decision to proceed with an investigation in June 2006.



Arrest warrants were issued against him and three others by the ICC. The decision to issue an arrest warrant against a sitting head of state was very controversial and led the African Union (AU) to request that the ICC withdraw the warrant out of concern that it could impede the Darfur peace process--concern echoed by aid workers who have since faced increased harassment in Darfur--and undermine the 2005 peace agreement that ended the decades of civil war between Khartoum and southern Sudanese rebels.

The AU also decided to refuse to cooperate with the ICC (BBC News, 2009) and several African leaders have argued that the African states party to the ICC should withdraw from the Rome Statute.

The African Union (AU) also criticized the Security Council's move for referring the case to the ICC and made attempts to have the Security Council defer the case 2.

### **The ICC's Unbridled Power**

The ICC lacks effective checks on its authority, despite strong efforts by India to insert them during the treaty negotiations. The court is an independent treaty body. In theory, the states that have ratified the Rome Statute and accepted the court's authority control the ICC. In practice, the role of the Assembly of State Parties is limited. The judges themselves settle any dispute over the court's "judicial functions." The prosecutor can initiate an investigation on his own authority, and the ICC judges determine whether the investigation may proceed. The U.N. Security Council can delay an investigation for a year--a delay that can be renewed--but it cannot stop an investigation. As Grossman noted:

"Under the UN Charter, the UN Security Council has primary responsibility for maintaining international peace and security. But the Rome Treaty removes this existing system of checks and balances, and places enormous unchecked power in the hands of the ICC prosecutor and judges. The treaty created a self-initiating prosecutor, answerable to no state or institution other than the Court itself."

### **Erosion of Fundamental Elements of the U.N. Charter**

The ICC's jurisdiction over war crimes, crimes against humanity, genocide, and aggression directly involves the court in fundamental issues traditionally reserved to sovereign states, such as when a state can lawfully use armed force to defend itself, its citizens, or its interests; how and to what extent armed force may be applied; and the point at which particular actions constitute serious crimes. Blurring the lines of authority and responsibility in these decisions has serious consequences. As Grossman notes, "with the ICC prosecutor and judges presuming to sit in judgment of the security decisions of States without their assent, the ICC could have a chilling effect on the willingness of States to project power in defense of their moral and security interests" .

## **India's Accession to the ICC: Future Prospects**

The ICC is undoubtedly a unique institution in the history of post-Second World War international system. It is based on the principle that instances of grave human rights violations are crimes against mankind at large and, therefore a legitimate cause of concern for the international community irrespective of nation, place or time of their commission. As such, its objectives to punish the dictators and tyrants for committing genocide, war crimes, crimes against humanity and crimes of aggression against the innocent and unarmed civilians is indeed laudable and worth supporting. To effectively provide justice to one and all, the court is equipped with revolutionary features such as the provisions for the protection of victims and witnesses of crimes, reparation for the victims by the offenders, gender protection etc. To this extent, the court is greatly relevant for India and all nations across the world.

However, the performance of the ICC has not been significantly better than the ad hoc tribunals which it replaced after its establishment. Like the Rwandan and Yugoslavian tribunals, the ICC has been slow to act. The ICC prosecutor took six months to open an investigation in Uganda, two months with the DRC, over a year with Darfur, and nearly two years with the Central African Republic. It has yet to conclude a full trial cycle more than seven years after being created. The fear of the ICC has not really worked to serve as deterrent in ending atrocities in the DRC, Uganda, the Central African Republic, or Darfur- the countries currently under the ICC investigation. Further, the ICC has failed to deter violence in Burma against its own people, crimes committed during Russia's 2008 invasion of Georgia (an ICC party), ICC party Venezuela's support of leftist guerillas in Colombia, or any of a number of other situations around the world where war crimes or crimes against humanity may be occurring. The ICC has not overcome many of the problems plaguing the ad hoc tribunals established for Yugoslavia and Rwanda. It remains slow and inefficient.

But for India, the slow pace of ICC's response to conflict situations and the insufficient deterrence of the court for the prospective perpetrators are not as much bigger issues for its opposition to the ICC as much as the compulsions of a nation fighting numerous challenges posing grave threats to its sovereignty and independence. For such a nation like India, the question of safeguarding and preserving its statehood and nationhood assumes a more critical dimension vis-à-vis the humanitarian aspects of the court. The serious flaws that India highlighted at the Rome Conference of ICC in 1998 that impinged critically on India's sovereignty continue to exist even today. India's then decision to abstain from the ICC was prudent and in the best interests of India, its officials, and particularly its armed forces. Unless these issues are sorted out to the satisfaction of India, which appears to be a distant possibility, it is difficult to imagine India signing the treaty.

Pratap Bhanu Mehta, president of the New Delhi-based think tank, the Centre for Policy Research says, "India is not opposed outright to international collective action on issues

such as genocide. But there is a historic view of foreign policy shared across party lines that the mechanisms for action cannot infringe upon the standing of the state. India is a democracy with the rule of law and would oppose any system that infringes upon that foundation." Mehta notes that after independence, there was intense reluctance by Nehru to align with any power bloc or system that seemed to have colonial overtones. More importantly, India wanted any forum to give the country equal footing with the major powers in reviewing collective action - essentially granting states with the majority of the world's population an equal voice with those that had more money and greater military strength. While India's foreign policy has evolved along with its view on international agreements, it has refused to sign the nuclear Non-Proliferation Treaty, calling it "discriminatory" and has looked to the Swadeshi, or self-reliance, movement pursued by Mahatma Gandhi as an expression of national self interest regarding international agreements, from trade to arms control.

These aspirations came to the fore when India test fired a nuclear device in May 1998 for India faced a severe backlash from the Security Council that included economic sanctions and verbal rebukes for stirring up a nuclear arms race in South Asia. Pakistan responded to India's test with a similar nuclear test the same month. In 2002, when India sided with the United States' hard-line stance against the ICC by signing a pact under which they agreed not to send each other's nationals to any international tribunal, it could have been seen as a step in reversing that pressure and paving the way for India to renew claims on a Security Council seat, Mehta said. From isolation in 1998, India managed to engage Russia and the US simultaneously, including high-level talks with the US that led to a landmark deal on civilian nuclear technology in July 2006 that recognized India's nuclear weapons status and promised to amend or kill US laws that forbid the sale of civilian nuclear equipment to India.

Offering an almost similar logic, Usha Ramanathan, south-India based international legal affairs lawyer, asserts: "The ICC should be seen against India's moves to play a larger role on the global stage commensurate with its population, economy and military standing. India has issues that put it between developing countries and developed. For instance, it categorically opposed any role for the Security Council in the ICC. But it believes that the Security Council should be widened to make it more effective and representative." To Ramanathan, India, even if given a Security Council seat, with veto power like the five permanent representatives, its views on the ICC may not change. "Kashmir would remain an issue".

Raman Bhalla, a senior leader of the ruling Congress Party in Kashmir said there is "no scope for ICC in a sovereign and democratic country like India. We have a free judiciary where everyone gets justice. If people have been victimized they should approach courts." Yet justice in these cases has been patchy.

Notwithstanding, India is constantly under pressure from its domestic NGOs to sign the ICC charter who reject India's objections as willful and arbitrary. They have appealed to the government to sign the Rome Statute and fully embrace the ICC. But given the flaws particularly in how the ICC could affect national sovereignty and other challenges

confronting India, the government has ignored their protestations and has made clear of its intentions of not joining the ICC till India's objections are addressed by the court.

At all future conferences of the ICC relating to its review and reform, India should clearly establish its priorities and objectives to be addressed with a view to reduce current and potential problems posed by the ICC to its core national interests. This should include agreeing upon a definition of terrorism, which could not be then included by the participating countries at the Rome conference, and addressing vital issues like inclusion of the 'Weapons of Mass Destruction' (WMD), nuclear weapons and drug-trafficking as constituting war crimes under the ICC charter.

India should also effectively work for devising more checks and balances in the Rome Statute by limiting the suo moto power of the Prosecutor in initiating investigation against a state party, limiting the ICC's jurisdiction only to nationals of those states that have ratified or acceded to the Rome Statute, and ending the role of Security Council in the functioning of the ICC. Last but not the least, India should encourage other member and non-member states to support reforms to the Rome Statute at the review conference that is expected to address India's and other nations' concerns. The failure of the Kampala review conference in 2010 to satisfactorily address these issues has rendered ICC largely ineffective. Therefore, unless powerful countries like India itself takes initiative in reforming the ICC just as it has advocated for reforming the UN Security Council, India's global clout would remain incomplete.

And until relevant changes are made to the ICC charter, India should continue to insist that it is not bound by the Rome Statute and does not recognize the ICC's authority over Indians. India should reserve its right, by way of legislative and policy measures, of protecting its military personnel, officials, and nationals from the court's claims of jurisdiction. Perhaps, in tune with this realization, India entered into an agreement with the United States under which both nations agreed not to surrender each other's nationals to the ICC. Many skeptically termed it as a victory for Washington's efforts to scuttle the International Criminal Court. However, this assertion is not true as every nation has the right to realistically assess the compelling requirements of its country and to take decisions accordingly. The recent instances of domestic courts and prosecutors claiming extraterritorial jurisdiction, such as those by judicial authorities in Spain, emphasize the need for India to protect itself and its citizens and soldiers from claims of jurisdiction under international law by the ICC and other foreign judicial authorities.

To sum in the words of an eminent jurist, Y.K. Sabharwal, the former Chief Justice of India: "If one is truly seeking a strong and effective International Criminal Court, then the question raised by some of the countries, their domestic concern and interest, the question raised about sovereignty of responsible governments and the apprehension that their military personnel or political leaders may be targetted for criminal investigation and proscution may have to be addressed.

**(SANJAY GUPTA)**