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INDIA AND THE ICC

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India and the ICC

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Abstract

The Statute of the International Criminal Court (ICC Statute) would have been more acceptable to India if it had contained 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 conduct 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. The inclusion of 'armed conflict not of an international character' in defining 'war crimes' in Article 8 ICCSt. constitutes another reason for India's concern (that the conflicts that persist in Kashmir, the North-East and as was experienced in Punjab, as well as the violence of more recent vintage in Gujarat, could be referred to the ICC). 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.

1. The Reasons for India's Abstention on the Statute in Rome

When the Statute for an International Criminal Court was voted on in Rome in July 1998, India abstained. There was a sense of disbelief among the Indian delegation as the overwhelming support for the Statute moved through improbability, and possibility, to fact. It continues to be difficult for the Indian establishment to reorient reality to account for an international community that willingly hands over a mandate for justicing to an institution

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beyond the territory, amending ability and influence of the individual state. The state has been confronted with a Statute that goes beyond the standard setting, which has been the traditional tramping ground of international law; beyond reporting mechanisms, to which states are loosely bound by time, and where statements made to, and responses from, the committees concerned may travel across in parallel strokes; and beyond Special Rapporteurs, and others who may investigate and report on conditions and events within the state.

The shift in international law represented by the ICC, which creates a binding regime has, then, been a dominant concern. An alternative that could lend acceptability to the Statute for an ICC is an opt-in provision, where a state would accept the jurisdiction of the ICC by declaration, and this may be limited to particular conduct or to conduct committed during a particular period of time. The declaration could be for a specified period or for an unspecified period, in which case it might be withdrawn upon the giving of six months' notice of withdrawal to the Registrar. This is a sketch of the scheme as set out in Article 22 (read with Article 21) of the 1994 ILC draft Statute for an ICC, and was the preferred option as enunciated by the Indian delegation.

Inherent jurisdiction, and the notion of complementarity as it emerges from the Statute, represent the distance that the Statute travelled as it wended its way to Rome. As the Statute has evolved, and as the elements of crime and the thresholds have found expression and acquired potential meaning, the relevance of 'opt-in' has faded away. The disappearance of the opt-in provision, and the inherent jurisdiction which replaced it, are perceived as representing a violation of the consent of states, and so a threat to sovereignty. Opting in would hold within it the possibility of opting out, leaving states to decide upon their willingness to allow an international court to try cases in which they have an interest. Inherent jurisdiction, of course, removes this discretion and power.

2. The Indian Judicial System

The Indian establishment's resistance to accepting the inherent jurisdiction of the ICC is explained, in part, by anxieties about how investigation, prosecution and justicing in the Indian system may be judged by an international court. In attempting to understand this anxiety, it would have to be acknowledged that there are two discrete visages that the Indian justicing system presents. In one envisioning, the Indian judiciary is held in pride and esteem, as an innovative, inclusive, democratic institution. The development of 'public interest litigation' through the Supreme Court's efforts of juristic, and judicial, activism stands out as a process that was created out of constitutional spaces to reach rights to masses of people who stood excluded

from a constitutional dispensation. This was a process that concerned itself with the rights of prisoners, child labour, bonded labour, migrant workers and persons in non-punitive custody, or in mental health institutions. This was expanded to create an agenda for the environment and the ecology, and went further to deal with issues of corruption and nepotism in public life. The devising of 'constitutional tort' was intended both to acknowledge the victims of abuse of state power (especially in episodes of custodial violence and custody deaths) and to tame the nature of state power.

There is, however, another face that the system possesses, and that is not quite so flattering. Interminable delays, backlogs of cases that weigh the system down, low conviction rates and a troubled relationship between the criminal justice system and witnesses and victims are in evidence. The alarm about the state of the criminal justice system has provoked drastic reactions including, in the *Report of the (Malimath) Committee on Reforms of the Criminal Justice System* (March 2003), a spate of recommendations that would amount to a withdrawal from fundamental provisions in criminal jurisprudence. So, the Malimath Committee has found its solution, inter alia, in:

- the right to silence being replaced by the freedom to draw an adverse inference where an accused is silent;
- altering the presumption of innocence by shifting the burden of proof away from the prosecution to a general responsibility vested in the court to 'find the truth';
- the standard of 'beyond reasonable doubt' being replaced by a standard of proof that requires 'the inner satisfaction or conviction of the judge'.

These would be dramatic departures from the logic that informs criminal law and notions of fair trial as they have developed, and they speak to the shoring up of legitimacy of the system that is its evident aim, by making more convictions possible even if it denudes basic protections in the process. These recommendations have not yet been adopted, but they are indicative of the problems afflicting the criminal justice system in India.

3. Some Episodes in India's Recent History

There are also the uneasy silences that inhabit the law's experience. There are episodes in India's recent history that weave themselves into tales of impunity. The anti-Sikh riots that raged for three days following the assassination of the Prime Minister, Mrs Indira Gandhi, on 31 October 1984, have left a legacy of the thousands of the targeted community of Sikhs who were killed; knowledge of the complicity of the state's police and active instigation and abetment by leading political figures; few prosecutions; fewer convictions; and an unfinished agenda for justice 20 years after.

The 'mass cremations' and 'disappearances' are an inextricable part of the history of the years when the State of Punjab was ridden with militancy. The state turned extremist to put down the extremism of the militant, especially between 1986 and 1992, and attempts to get these issues judicially addressed have faced dead-ends at every attempt. In March 2002, the complicity of the state in targeted violence against Muslims, who are a minority in the State of Gujarat, in avowed retaliation for the burning of a train carrying Hindu pilgrims from a site of political contest in Ayodhya in Uttar Pradesh, has been difficult to prosecute and punish.

These events, among others, rest uneasily amidst approbation of the justicing system and democracy. They reveal too the emergence of a certain culture of impunity which is finding its roots in political compromises and expediency. The inherent jurisdiction of the ICC would challenge these politics.

The possibilities held out by the ICC in denying impunity was explored by non-governmental organizations and civil liberties groups in the aftermath of the Gujarat carnage in 2002. This exploration acquires especial significance when we consider that many of these organizations and groups showed an indifference to the Statute when it was introduced to them in 1997–1998, even as it was being debated at the United Nations in New York. There was a range of reasons for this indifference. It was an alien law, being debated in a distant land, and popular prejudice had it that it was perhaps an American instrument being foisted on the rest of the world!

In any event, the Indian experience with co-opting international law has been, at best, sporadic and occasional, and there was no what one might term familiarity or sustained engagement with international developments in law. Since the system in India already had spaces for civil society intervention, the need to look outwards to an international court was not self-evident. All this changed with the Gujarat carnage, where the state, and dominant political personalities, were entirely unapologetic for the violence and mayhem that was visited on the Muslims in Gujarat with the connivance of the State police, bureaucracy and political leadership. It was a struggle to lodge complaints and have them prosecuted; and the sham trials that ensued needed the intervention of the Supreme Court to infuse seriousness into the investigation of the offences and trials of the alleged offenders. Yet, it is only the proximate and direct perpetrators who, in the few cases that survive, are being tried; the chain of command, complicity and connivance remain beyond the pale.

It is this that provoked the civil liberties adherents and non-governmental organizations to reach out to the possibility of the ICC to call the state to order. Although this episode could not constitute a case for the ICC, among other reasons because it occurred before the ICC came into existence, it was suggestive of what could happen if the ICC were able to move in. This has added to the anxiety of the Indian establishment that the ICC may be drawn into its domain.

4. The Process of Judicial Reform in India

These deficiencies in the system need not be insuperable obstacles to overcoming the sense of threat that an international court may step in, judging the domestic court to be 'unable' or 'unwilling'. Even as this is being written, judicial reforms in India are being debated, and various options are being mooted to bring efficiency and effectiveness into the justicing system. The ICC Statute presents a set of concerns which also must be inducted into this process of judicial reforms. The severity of the crimes and the high thresholds mean that no polity can afford to ignore, or downplay, these crimes. The contemporary efforts to restore legitimacy to the judicial system, and to make it responsive to the issues of the day, will have to be accommodative to only a slightly greater degree to meet the concerns that are set out in the ICC Statute. This is one element of complementarity. This exercise in reform would inevitably require revisiting the crimes listed in the penal law of the land, and acknowledging, by amendment, the crimes of severity that have become a part of the landscape of experience on Indian territory. These could include the crimes of genocide, forced disappearances, 'fake encounters' (shooting down by the police or the security forces in staged encounters, e.g. where the person is said to be shot while fleeing from custody), hostage taking and systemic torture. Once the offences are on the statute book, the Indian criminal justice system would be enabled to deal with them, making the possibility of intervention of the ICC even more remote.

5. Concerns about War Crimes in Internal Armed Conflicts

The inclusion of 'armed conflict not of an international character' in defining 'war crimes' in Article 8 of the Statute for an ICC has met with resistance from the Indian establishment. Yet, with India as a party to the 1949 Geneva Conventions, this is not a provision that is being brought in for the first time. The situation of conflict that persists in Kashmir, the North-East, and, for a while, in Punjab explains the reasons for the state's anxiety that this manner of violence could be referred to the ICC. The Indian state has been protesting the cross-border terrorism that infiltrates into India, especially Kashmir, from Pakistan. In the politicizing of the issue of Kashmir, Pakistan often adverts to the human rights violations that are projected as having become a part of the lives of people in the Kashmir valley. The ICC, it is expected, will be used for embarrassing India by attempts to make a case out of the violence in Kashmir. The exclusion of international terrorism from the crimes covered by the ICC appears to lend weight to the possibilities of misuse of these provisions of the Statute.

6. Apprehension about the Court's Possible Political Bias

This is connected with the more general apprehension that the Court may be used with politically inspired motives.

This perception discounts at least two aspects of the ICC. First, it does not acknowledge the checks built into the procedure detailed in the Statute. These deserve scrutiny, and spelling them out may dispel doubts that are now clouding an understanding of the Court. Secondly, there is the legitimacy of the ICC which will be at stake in each prosecution that is launched, and upon which depends the capacity of the Court to obtain cooperation of states. Legitimacy is not an abstract proposition, but a prerequisite for the Court to function. Being seen to act upon motives that are oblique, and distanced from the objective of attacking impunity, are detrimental to the best interests of the Court. This self-interest, both in the matter of reputation and as pragmatism, is a real fetter which, with the procedural checks, will act as a restraint on the Court.

7. Misgivings about the Triggering of Prosecution

Two other features of the Statute where suspicion lurks about political or unfair use are in the office of the independent Prosecutor and in the role given to the Security Council.

It is in the triggering of prosecution that criticism is located. As the Statute stands, the Prosecutor 'may initiate prosecutions *proprio motu* on the basis of information on crimes within the jurisdiction of the court' (Article 15). This decisively negates the Indian establishment position that state consent should be a prerequisite to investigation and prosecution. The ICC Statute was expressly made to prevent the shield of sovereignty from sheltering those who commit crimes of serious magnitude. Deferring to sovereignty in launching investigation would contradict this intent. Depending on states, and their political compulsions, to reach out to the Court each time could leave crimes beyond the Court's ken. The ICC Statute does not charge or prosecute states, but individuals. And it acknowledges the victims as central to its justicing role. If victims of crimes are made to wait before states agree that a case may be tried by the ICC, then it is unlikely that impunity can be dealt an effective blow. The rise of the human rights community over the last five decades has in good measure been responsible for forcing a recognition that mass, widespread and systematic crimes exist which must be punished, and deterred, even as the human rights community work as lookouts where such crimes occur. To exclude them from the Statute altogether would weaken the potential of the Court considerably. It was this concatenation of circumstances and concerns which led to the Statute

providing that the Prosecutor may launch investigation *proprio motu*. This, it must be clarified, is not a licence to start a prosecution, but only to act on information received to investigate whether a case exists which may be presented to the Pre-Trial Chamber as a prelude to prosecution. This disjunction between initiating investigations and starting a prosecution needs to be brought into focus. It is the Pre-Trial Chamber which would be crucial in making the initial decision about prosecution.

The status given to the Security Council to act as a trigger, and to defer the prosecution in cases before the Court, left the Indian delegation unhappy through the PrepComs, as it did many others. Acting as a trigger, though, was an inevitable consequence of the power that the Security Council had acquired by setting up ad hoc Tribunals for the former Yugoslavia and Rwanda. The Indian delegate at the Rome Diplomatic Conference suggested that the setting up of the International Criminal Tribunal for the Former Yugoslavia did not constitute a precedent, and that with the ICC in place, 'the need for the Security Council to continue to establish ad hoc tribunals vanishes'. However, this position may have to be interrogated further to explain how keeping out any reference to the Security Council as a trigger could leave the Security Council free not to acknowledge the ICC as a recourse.

The power given to the Security Council to defer prosecutions by a year at a time is more contentious and less politically acceptable. However, the shrinking of this power by requiring unanimity from the Permanent Five to defer a trial — so that a single veto would cause the proposal to defer to fall — is of significance and could allay some of the worry about the dominance of the Security Council in cases before the court.

8. Fear of the Court as a Judicial Bully

It is not that the Indian establishment does not envision situations where the system may break down and international intervention may be the only recourse. 'We can understand,' the Indian delegate said in his official statement delivered at the Diplomatic Conference, 'the need for the ICC to step in when confronted by situations such as in former Yugoslavia or Rwanda, where national judicial structures had completely broken down.' 'But,' he continued, '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.' It is this perception of the Court not as a check on impunity but a judicial bully that has to be deconstructed. There is little in the Statute to justify this perception. And the vast storehouse of experience in the century just past, of large-scale, systematic and widespread violence and bloodshed makes deterrence, and challenge to these uses of power, an imperative.

9. The Need for a Universal Vision

There is a certain ethnocentricity that is in evidence in this response of the Indian establishment, and this encourages the perception that the ICC could be a mere tool in the political game-playing of nations. There is a cynicism that informs this perspective. This ethnocentricity prevents the Indian establishment from acknowledging that the problem of impunity has indeed acquired gargantuan proportions, and that the judicial process is less likely to politicize justice than victor's justice, or *post facto* criminal statutes and remedies, or the rule of might. It is, in fact, the existence of a relatively stable and strong democratic and judicial system in India that can make India's intervention in fighting impunity effective, or even possible. To realize this potential, and to contribute to the establishment of peace and the reduction of the abuse of power, it is necessary to adopt a universal idiom, where it is recognized and acted upon that peace anywhere requires justice everywhere.