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INDIA'S APPROACH TOWARDS ADJUDICATION BEFORE THE INTERNATIONAL COURT OF JUSTICE AND INTERNATIONAL CRIMINAL COURT: IN SEARCH OF UNIFORMITY

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Abstract

India's status as a significant world power has strengthened in the last few decades as a member state to various international treaties and conventions. However, its practice of instrumentalisation and withdrawal through the reservations imposed to the compulsory jurisdiction of the International Court of Justice and the resistance to becoming a party to the Rome Statute to join the International Criminal Court has been the subject of discussion. In this paper, the authors discuss India's approach to implementing the decisions arising from international disputes before the International Court of Justice by reflecting upon the history of its membership in the International Court of Justice and various bilateral and multilateral disputes to which India has been a party. Based on the specific cases, different arguments have been made to decipher the rationale behind the approach undertaken by India and the scholarly views on whether there is a need for change in its approach to establishing transparency about compliance with international law.

Keywords

India, International Criminal Court, International Court of Justice, India and International Law.

Resumo

O estatuto da Índia como potência mundial significativa reforçou-se nas últimas décadas enquanto Estado membro de vários tratados e convenções internacionais. No entanto, a sua prática de instrumentalização e retirada através das reservas impostas à jurisdição obrigatória do Tribunal Internacional de Justiça e a resistência em tornar-se parte do Estatuto de Roma para aderir ao Tribunal Penal Internacional têm sido objeto de discussão. Neste documento, os autores discutem a abordagem da Índia à aplicação das decisões decorrentes de litígios internacionais perante o Tribunal Internacional de Justiça, reflectindo sobre a história da sua adesão ao Tribunal Internacional de Justiça e sobre vários litígios bilaterais e multilaterais em que a Índia foi parte. Com base nos casos específicos, foram apresentados diferentes argumentos para decifrar a lógica subjacente à abordagem adoptada pela Índia e os pontos de vista dos académicos sobre a necessidade de mudar a sua abordagem para estabelecer a transparência em relação ao cumprimento do direito internacional.

Palavras-chave

Índia, Tribunal Penal Internacional, Tribunal Internacional de Justiça, Índia e Direito Internacional.

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Introduction

The states adopt the formal methods of international dispute settlement as a last resort after attempting all possible options for resolving the disputes through negotiations and consultations (Hegde, 2016) without the need for third-party intervention. However, the international community has attempted to bring about a mechanism through which the State's prior consent is obtained for certain kinds of disputes through Article 36 of the International Court of Justice (ICJ) statute, under which certain types of disputes relating to treaty interpretation; any fundamental questions concerning international law; violation of international obligation and the reparation to be made based on a prior declaration by the states (Stanimir, 2006: 29-38). In the larger interest, the states are expected to comply with the rules of international law to the maximum extent possible. This position was recognized in the Nicaragua case, where it was held that a rule may be considered customary in nature without the need for compliance by the member states in its entirety (ICJ, 1986). In this light, India's approach to implementation of the decisions arising from international disputes will be analysed by reflecting upon the history of its membership of the ICJ, the disputes to which it has been a party, and its approach to the ICJ and International Criminal Court (ICC). Based on the prior sections, the article considers the scholarly views on whether there is a need for change in its policy and the possible way forward.

Historically, India became part of the League of Nations before attaining independence as British India, as it was called back then. It accepted the jurisdiction of the Permanent Court of International Justice (PCIJ) on 19th September 1929 (Karamanian, 2007: 538-544).

Surprisingly, India's legal personality was independent of Britain under the Interpretation Act of 1889 (Kemal, 1986). The reasons for granting membership to India not as a colony but independently in PCIJ of the time were to increase the voting strength of Britain as well as to reward the contribution of colonial India to the British and its allies during the First World War(Chimni, 2010). It was in 1955, after India's independence, a need to relook at these reservations was felt when Portugal submitted a case before the ICJ

regarding the issue of the Right of Passage over the territory of Daman and the enclaved territories of Dadra and Nagar Haveli. During the proceedings, India raised objections against Portugal approaching the ICJ.

The basis of the objection was that Portugal did not negotiate with India before placing the dispute before the ICJ, which was a requirement under the 1940 Declaration (ICJ, 1957).

However, this argument was not taken seriously and was rejected by the ICJ. Consequently, India had a serious look at the reservations placed under Article 36 (2) of the PCIJ statute, which was recently modified on 27th September 2019, accepting without any special agreement the jurisdiction of the ICJ under Article 36 paragraph 2 of the ICJ Statute.

The earlier declaration was signed by India on 15 September 1974 and deposited on 18 September 1974 which replaced the previous declaration made by the Government of India on 14 September 1959 (Patel, 2016).

In the context of this background, it can be seen that the first experience of India at the ICJ made it realise to protect itself before the World Court or the ICJ that has contributed to the development of numerous areas of international law such as the law of treaties, the law of international organizations, the law of human rights,through its case laws. However, at the same time as will be seen through this article that India continued to be a party to the ICJ but resisted joining the ICC which also provides a forum for rule-of-law-friendly state like India to raise its voice at the universal level to manifest their commitment to the ideal of the rule of law.

Such an ambiguous approach has a lot to do with India's experiences at the international level over issues that have arisen from the municipal context that need to be further investigated.

Municipal Law, Kashmir, and International Law

To understand the approach of India towards ICJ and ICC, the understanding of the municipal law assumes significance. Under Article 51 of the Indian Constitution, a direct reference has been made to encourage the use of international law and foster respect for international law regarding treaty obligations and peaceful relations with other ations. Article 51 seeks to encourage the Indian State to make all possible endeavours to adhere to and respect international law. This non-binding obligation under Article 51 is read along with Articles 246 and 253 of the Constitution (Lavanya, 2017), which deals with demarcating the powers of the Union and the State governments for implementing international law in the form of any treaty, agreement, or convention. The soft approach to Article 51 is also attributed to India's complex engagements with its neighbours on issues such as Kashmir, which is heavily debated and continues to be a blot when India's engagement at the international level is concerned, and which has resulted in diversion from other urgent challenges that India has faced since 1947 (Stunkel, 2013).

It was in January 1948 that India submitted the Kashmir issue to the UNSC, and highlighted that military intervention by India was carried out at the request of the ruler

of the State who executed the Instrument of Accession. The United Nations Commission for India and Pakistan (UNCIP) was established with reference to the Kashmir dispute between India and Pakistan between June 1948 and until March 1950. At the same time, the UNSC Resolution 47 was adopted in 1948 and recommended to both parties solutions that required action on the part of both. To illustrate, Pakistan was asked to withdraw their nationals from the disputed territory, and simultaneously India was asked to proportionally reduce their forces and to appoint a plebiscite administrator (Ahmed *et al*, 2021).

In the aftermath of the war between India and Pakistan in 1965, the commitment undertaken regarding the plebiscite was done away with. The UN proposals regarding the plebiscite were not mentioned under the Tashkent Agreement that ended the 1965 atrocities (Paranjpe, 1985).

Similarly, the Simla Agreement, signed after the 1971 India-Pakistan War on 2 July 1972, ended the conflict and confrontation and ensured that the parties reached a mutual agreement only through bilateral talks (Jan & Ahmed, 2022 : 546-575). In this background, India has been forced to take a cautious approach before committing to any binding settlement of international disputes which has led to India playing a restricted role in the development of International law despite being one of the founding members of ICJ as the proactive engagement with international judicial mechanisms like ICJ has never been a priority for the government . Thus, there is no for¬mal structure to monitor the implementation of the ICJ judgements. In this regard, further analysis of the relationship between the ICJ and India will be carried out in the next section.

India and the International Court of Justice

It was in 1940 that India accepted the compulsory jurisdiction of the PCIJ. Despite being a founding member of the ICJ, the literature on the relationship between India and ICJ is scarce, which can be explained through the limited participation of India before the ICJ as an applicant or a respondent (Patel 2016). The primary reason for such a gap is the importance India has attached to settling international disputes bilaterally rather than through international dispute settlement mechanisms. However, in the disputes between India and Pakistan, there exist disputes where India approached the ICJ in 1971 and as recently as 2017 in the Kulbhushan Jadhav case. In the 1971 Appeal Relating to the Jurisdiction of the ICAO Council between India and Pakistan (ICJ, 1972), India filed an appeal against the decision of the International Civil Aviation Organization(ICAO) regarding the rejection of its preliminary observations concerning Pakistan's involvement in the hijacking of an Indian civilian aircraft.The ICJ rejected the Pakistani objections to its jurisdiction and the Indian appeal and upheld the Council decision.

Similarly, to the dispute between India and Pakistan in 1971, India brought the Jadhav case before the ICJ (ICJ, 2019). On May 8, 2017, the Government of India brought forth the proceedings in the ICJ against the Islamic Republic of Pakistan for allegedly violating the Vienna Convention on Consular Relations (hereinafter VCCR). This case dealt with Mr.

Kulbhushan Sudhir Jadhav, an Indian national, who was sentenced to death by a Pakistani military court (Rao, 2016). The issue under consideration was that Pakistan denied Jadhav access to the Indian consular post during his arrest throughout the trial. In response, Pakistan raised the defence under Article 36 of the VCCR regarding its non-applicability for persons conducting subversive activities. On 17th July 2019, the ICJ ruled in favour of India and held its application admissible. The Court held that persons suspected of casuing a threat to national security are not excluded from the protection offered under Article 36 of the VCCR.

In contrast to the proactive attitude of India in bringing the ICAO dispute and the Kulbhushan Jadhav case before the ICJ, the general trend of India's reluctance to bring the disputes to ICJ and at most times, India has been compelled to appear before the ICJ to defend the case brought by the other member states such as the Indus Water Treaty dispute, Bengal maritime arbitration, The Atlantique case, and the Enrica Lexie case. In this light, the cases listed need an analysis to understand the manner in which these disputes were dealt with by India.

The foremost dispute was the Indus Water Treaty case, where Pakistan initiated the dispute settlement process after forty-five years in 2005 since 1951 (Hegde, 2005). Initially, India opposed the objections raised by Pakistan on the Baglihar Project. Subsequently, it came on board with the appointment of a neutral expert as opposed to its stand on a negotiated settlement of all differences under Article VIII of the Indus Water Treaty at the Permanent Indus Commissioners (PIC) level (Hegde, 2016). Pakistan again invoked Article IX of the Indus Water Treaty, which deals with the Settlement of Differences and Disputes in 2010, to resolve specific issues concerning the Kishenganga Hydropower Project. India insisted on a negotiated settlement of these issues at the level of the Permanent Indus Commission and opposed the creation of the Court of Arbitration (Desai and Sidhu,2014). The Court dismissed India's objections and in its award, the Court of Arbitration observed that Pakistan retains the right to receive a minimum water flow from India.

Despite the Indus Water Treaty cases not being in favour of India, the next case in line i.e. Bengal Maritime Arbitration dispute favoured India.This case was brought by Bangladesh against India under the UN Convention on the Law of the Sea (UNCLOS) to identify the land boundary terminus between the two states and delimit each state's territorial sea, EEZ, and continental shelf under Article 287 of the UNCLOS (PCA, 2014). India did not oppose the tribunal exercising its jurisdiction to identify the location of the land boundary terminus.

However, there was a dispute regarding the issue of a grey area where a dissenting opinion was given by Dr. P.S. Rao on the matter of law and policy regarding the creation of such an area (Kaldunski, 2015). The Court of Arbitration in the Bangladesh/India case stated that its grey area overlapped in part with the grey area determined by ITLOS in the Bangladesh/Myanmar case, thus creating a 'double grey area' that may violate the sovereign rights of the three different countries, i.e., India, Bangladesh, and Myanmar. This case is one of the few cases where India not only accepted the jurisdiction but also went ahead with the physical examination of the dispute to determine the terminus of

the land boundary. As a result, India benefited and Bangladesh relinquished its claim to a continental shelf extending beyond 200 nautical miles.

Similarly, the Atlantique case between Pakistan and India was in favour of India. This case came up before the ICJ on 21st September 1999 through an application instituting proceedings against India by Pakistan, that raised a dispute relating to the destruction of a Pakistani aircraft on 10th August 1999 (Mani, 2000). Pakistan pleaded with the ICJ to adjudge and declare that the acts of India constituted breaches of obligations under article 2(4) of the UN Charter which deals with the non-use of force. The ICJ held that Pakistan's application failed to take into consideration the reservations made by India to ICJ's jurisdiction relating to disputes with a Commonwealth country, whereby the ICJ would not have jurisdiction. Thus, the ICJ held that it had no jurisdiction to entertain the dispute.

Finally, the most recent case is the Enrica Lexie Case, where India was a party to international adjudication (PCA, 2015). On May 21, 2020, a Tribunal was established under the United Nations Convention on the Law of the Sea that adjudicated the 2012 Enrica Lexie incident, which involved the death of two Indian fishermen at the hands of Italian Marines. Italy had pleaded for refraining from making or enforcing any judicial or administrative measures against the two marines, and to take all measures necessary to immediately to ensure the safety of the marines. As per the award, the marines were granted immunity as state officials and a right of relief at the hands of India was pronounced in the form of compensation for the loss of life, physical harm, damage to property, and moral harm suffered due to the incident.

Overall, whenever India has been brought independently as a party before the ICJ, the judgment has been in its favour; the situation is slightly different when it has been indicted as a party before the ICJ through its membership of a treaty with other members.

India as Party to a Treaty

India's position on cases before the ICJ either as a party to the international instrument upon whose violation the case has been brought before the ICJ or as a party who themselves has violated the provisions of a multilateral treaty. The first case that falls into this category is the Chagos Archipelago case (ICJ, 2019). This case originated on 22 June 2017, when the United Nations General Assembly (UNGA) passed a resolution requesting the ICJ to discuss the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965. The issues that were dealt with revolved around the decolonisation of Mauritius in 1968 and the consequences under international law of the UK's continued administration of the Chagos Archipelago.

The Indian perspective on the issue, revolved around the Mauritian Government's formal position of Chagos being illegally excised from Mauritian Territory and their repeated claim over sovereignty vis a vis the Chagos. India also relied upon the understanding reached between Mauritius and the UK in 1965, regarding the return of the Chagos when not needed for defense purposes (Colson and Vohrer, 2015) and upon the fact that the United Nations through General Assembly resolution 1514 dealing with the Declaration on the Granting of Independence to Colonial Countries and Peoples, had made it clear

that any partial attempt to violate the national unity and territorial integrity amounts to an unauthorised act.

However, India changes its position when it is a party to a multilateral treaty and being adjudicated before the ICJ. One such case was the Marshall Islands case (ICJ, 2016)where the Republic of Marshall Islands filed applications in the ICJ against the nuclear-armed states, including India, for violating their nuclear disarmament obligations under the Nuclear Non-Proliferation Treaty, 1968, and customary international law. The issue under contention was that the nuclear states, including India, had not kept their obligations under the Nuclear Non-Proliferation Treaty regarding ceasing the nuclear arms race at an early date (Bhatt, 2019).

India asserted that there exists no valid legal dispute, and the ICJ lacks jurisdiction to djudicate the case.

India raised its reservations concerning the multilateral treaty according to which the disputes concerning the interpretation or application of the treaty could be subject only to the jurisdiction of the ICJ if all the parties before the Court or Government of India expressly agreed to the jurisdiction of the ICJ(ICJ, 2016). Further, India also referred to the fact that the Republic of the Marshall Islands (RMI) accepted the Court's compulsory jurisdiction on 24 April 2013, one day before the 12 months set out in its reservation, which must also lead to the rejection of the RMI's application. Consequently, the ICJ held it did not have jurisdiction under Article 36 para 2 of the Statute to deal with this case(ICJ, 2016).

The ICC and India

With the rise of the new millennium, the entry of the Rome Statute on July 1, 2002, brought about a significant change in international dispute mechanisms (Bharadwaj, 2003). Although, the ICC does require the sacrifice of sovereignty by a member state if it refuses or fails to use its national mechanisms against those who commit crimes against humanity, Genocide, War crimes, or Crime of Aggression. With the existence of the principle of complementarity, the importance of national courts over the ICC is established. Through this principle, the ICC ensures that their respect and trust towards national judicial systems remain intact (Ramanathan, 2005). This has been made possible by restricting its jurisdiction to the most severe crimes of concern to the international community (Rosenne, 1999).

Regarding the Indian perspective toward the ICC, during the negotiations for adopting the Rome Statute, it always favoured having an international court to investigate, prosecute, and sentence the individual committing heinous crimes. In contrast to its stand, India declined to vote in favour of the Rome Statute in 1998, citing the variance between what was envisaged and how it subsequently developed and came into being(Hall and Jeferry, 2021). On issues like the ICC's mandate of exercising inherent jurisdiction, over armed conflicts not of international character further distanced India which was accompanied by the exclusion of international terrorism from the crimes covered by the ICC (Banerjee, 2011).

In practice, India's reluctance to accept the inherent jurisdiction of the ICC is linked with how an international court will carry out prosecution, and criminal proceedings in the Indian system.

On the other hand, the concern regarding the inclusion of armed conflict not of an international character is linked to the conflicts that persist in Kashmir. There are apprehensions that if India ratifies and becomes a member state, the ICC will attempt to embarrass India on the Kashmir issue by making a case out of the violence (Lahiri, 2010).

An often talked about issue in India that does not find a place in the Rome Statute is terrorism, possibly due to the absence of an internationally acceptable definition of terrorism. It is believed by many countries that terrorism is an individually driven project that private individuals carry out in an isolated and not widespread or systematic manner(Golder and George, 2004). This stand of the ICC was apparent in the First Review Conference in Kampala, Uganda, in 2011, where India continued to protest the lack of ICC's jurisdiction over the crime of terrorism. In addition, India's insistence on including the first use of mass weapons, especially nuclear weapons, went unheeded through a 'no action' procedural resolution.

Lastly, the issues that have prevented India from becoming a part of the ICC are the power of the UNSC to refer the case to the ICC and the powers vested with the Prosecutor to initiate proceeding on their motion, i.e., proprio motou. As per the Indian perspective, the Vienna Convention on the Law of Treaties 1969 was violated by compelling the States to accede or be bound by treaty provisions without their consent. On the contrary, however, there is the presence of the complementarity principle under Article 17 of the Rome Statute that states that only in cases of a total collapse or a substantial collapse of the national judicial system, the ICC will exercise jurisdiction.

Coming back to the case of Proprio motou, which refers to powers vested with the Prosecutor to initiate proceedings on their motion, under Article 15(3) of the Rome Statute. India's objection in this regard is that the sovereign authority of the states on the one hand must be safeguarded and the role of a prosecutor on the other hand should not interfere by initiating investigations suo moto and trigger the jurisdiction of the court(Olasolo, 2003). These objections do not hold ground as under the Rome Statute, as the authorisation from the Pre-Trial Chamber is required to initiate any sort of investigation by the Prosecutor. The above discussion on India's position on ICC reflects the continuation of colonial selectivity in a post-colonial context.

Scholarly Views on India's Attitude Towards the International Law and Adjudication

In light of India's attitude towards the ICJ and the ICC and the overall significance of the ICC and ICJ, it is vital to understand from a scholarly point of view regarding the attitude of India as a member state before both these bodies. This analysis relates itself to the development of international law as modern international law as it has shaped the policy and orientation of countries like India, which gained independence from the British empire and excluded several countries under the garb of the standard of 'civilization' that

was put forth as a criterion to justify the exclusion of the peoples of Africa and Asia(Anghie, 2005) from the ambit of international law.

At the same time, some scholars in India have pointed out the need for more institutions and procedures to adjudicate international disputes (Anand, 2004), some of which include the ad hoc nature of arbitration courts and the ineffective utilisation of the Permanent Court of Arbitration. For example, Professor R. P. Anand points out that in the Canal Water dispute of 1950, due to the inefficiency of the international dispute mechanism, India had advocated for a tribunal consisting of judges from both countries and allowing arbitration or referring the matter to the ICJ in case no amicable solution is reached(Anand, 1961). This case dealt with the disruption caused to the irrigation system of Punjab province post-partition as on 1 April 1948, India stopped the water flow to put pressure on Pakistan.

Most recently, in November 2021, international law practitioners and scholars were concerned about India's inability to utilise its inherent strengths in creating international jurisprudence and play an essential role in International law-making. Being the largest democracy in the world, it has instead played a limited role in framing international law-making in the past few decades. The scholars and practitioners of International law have petitioned the Ministry of External Affairs, Government of India (MEA) for more transparency in international law with an aim to ensure more significant documentation of the State practice regarding policy interventions and treaty decisions (Agarwalla, 2021). It is particularly important as most international forums including the ICJ and ICC heavily rely upon customary international law as a source of authority while adjudicating disputes, resulting from general state practice accepted as law by the states contributing to the universalisation of international law. The petition notes that the lack of state practice from India and the Global South has led to increased reliance on scholarship and norms set in the Global North devoid of the context and geographical relevance for the region, leading to international law continuing to remain euro-centric with marginal participation of the states from the Global South. The MEA was requested to curate the state practice that allows scholars and international law practitioners to understand its decision-making systems and processes, allowing them to study its impact on laws domestically and internationally through public consultations and deliberations.

As India's approach to international law development has been primarily reactive since its independence, as it mainly adopts defensive positions to negotiate many proposals and initiatives originating from other nations without clearly spelling out its interests. Many scholars and commentators have started questioning India's reluctance to engage with international law because there was a need for pluralistic, community-led bottom-up approaches rather than formalistic ones involving not only academic experts but also government officials, law practitioners, and members of civil society organisations (Sukumar, 2018).

In this context, the scholars have pointed out the relevance of Third World Approach to International Law (TWAIL) for India to strenghthen its voice at the international forums like the ICJ and ICC. Historically, TWAIL emerged as a response to the decolonization and end of direct european colonial rule over non -Europeans.(Mutua, 2000) It developed as an approach to dismantle the prevailing norms that benefit the powerful few to offer

a life of dignity for the poor, deprived ,oppression and subjugated in the Third World. (Chimni, 2007) Generally, the TWAIL movement works towards the reconstruction of international law by developing an alternative legal framework that would form the basis of an equal and fair world. (Okafor, 2005). TWAIL as a school of thought highlights the thought process of TWAIL scholars about the existing state of international law and what it should aim to achieve by putting forth the concerns of the Third World including India. Through TWAIL, India must put forth the views on international bodies like the ICJ and by joining the ICC to shed light on the asymmetries and post-colonial continuities of international law resulting in subordination and subjugation of the States of the so-called Global South by international law and international organisations.

By putting forth a TWAIL perspective, India can offer fresh perspectives in the realm of international law, with an aim to reform and reshape international law before the ICJ and by joining the ICC , the safeguarding of the ideals of self-determination, sovereign equality, justice and human rights could be further strenghtened.

Conclusion

As a member state of various international instruments, India's status as a major world power has gained strength in the last couple of decades, possessing rich democratic political traditions, military strength, nuclear weapons capabilities, and potential for growth in the coming decades. However, its practice of instrumentalisation and withdrawal, highlighted in this article through the reservations imposed by India to the compulsory jurisdiction of the ICJ and the resistance to becoming a party to the Rome Statute, must be relooked at by acknowledging and accepting the international dispute settlement mechanisms. At the same time, the government needs to make its workings in international law at the domestic level more transparent.

Further, India as a member state must remember that most such pronouncements involving India have been in its favour, such as the Bengal Maritime Arbitration or the Jadhav case between India and Pakistan. Being a developing country, as India moves into the elite club of the developed countries, it needs to keep in mind that its domestic requirements are more aligned with the developing countries, and in such a situation, the way it has approached its International dispute settlement by adopting a dual approach of representing the interests of developing countries that was the contention in the Chagos case along with its self-interest and ambition seen through the case of Marshal Islands case, there is a need to bring clarity in its approach. Considering the colonial past of various nations and repeated undermining of the role of ICC and limited interaction with the ICJ by India, the objective and role of international dispute settlement mechanism in general has been undermined.

In the future, India needs to utilise the available international dispute resolution mechanisms including the ICJ and ICC and extend the ambit to other mechanisms under international law to reflect India's commitment to maintaining international peace and security. It is only by bridging this gap and by making the institutions less eurocentric that we can strengthen the universal international law and dispute resolution frameworks, where India must play its role in achieving the said aim.

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