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TWO DECADES OF RELUCTANCE: ANALYSING INDIA'S NON-MEMBERSHIP IN THE INTERNATIONAL CRIMINAL COURT

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Abstract

The International Criminal Court is the highest authority for International Crimes. The courts relies on the principle of complementarity, mentioned under Article 17 of the Rome Statute which ensures that ICC only intervenes when national jurisdictions are unable or unwilling to perform any action and fail to prosecute any serious international crimes for which it has jurisdiction. Complementarity princIiple is designed to respect state sovereignty, however, it has faced criticism for its varying application, different political influences and procedural ambiguities. Through various analysis of ICC case laws and national legal system, including India's non membership stance in implementing complementarity. This research discusses about the reasons of India for not joining ICC in last two decades.

Keywords

Complementarity, International Criminal Court, State Sovereignty, Legal Accountability, Rome Statute.

Resumo

O Tribunal Penal Internacional é a máxima autoridade em matéria de crimes internacionais. O tribunal baseia-se no princípio da complementaridade, referido no artigo 17.º do Estatuto de Roma, que garante que o TPI só intervenha quando as jurisdições nacionais não possam ou não queiram tomar medidas e não consigam julgar quaisquer crimes internacionais graves sobre os quais o TPI tenha jurisdição. O princípio da complementaridade foi concebido para respeitar a soberania dos Estados; no entanto, tem sido alvo de críticas devido à sua aplicação variável, às diferentes influências políticas e às ambiguidades processuais. Através de várias análises da jurisprudência do TPI e dos sistemas jurídicos nacionais, incluindo a posição da Índia, que não é membro, relativamente à implementação da complementaridade, esta investigação discute as razões que levaram a Índia a não aderir ao TPI nas últimas duas décadas.

Palavras-chave

Complementaridade, Tribunal Penal Internacional, Soberania do Estado, Responsabilidade jurídica, Estatuto de Roma.

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TWO DECADES OF RELUCTANCE: ANALYSING INDIA'S NON-MEMBERSHIP IN THE INTERNATIONAL CRIMINAL COURT

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Introduction

Seated in the city of Hague, in Netherlands, the International Criminal Court (ICC) is a treaty-based international organization governed by the Rome Statute. The ICC was established to investigate and prosecute individuals accused of genocide, crimes against humanity, war crimes, and crimes of aggression[1]. These crimes are considered the "most serious and of concern to the international community as a whole".[2] The jurisdiction of ICC is governed by the 'Principle of Complementarity[3].' This principle is laid down in Article 17(1) of the Rome Statute[4] which clearly states that the ICC cannot take up a case that has already been or is in the process of being investigated or prosecuted by a State with jurisdiction over the issue, unless the State is unwilling or incapable of genuinely carrying out the investigation or prosecution. Furthermore, Article 17[5] also lays down certain factors that the court must consider while determining the unwillingness of the respective State, such as whether there has been unjustified delay and if the proceedings are not being conducted independently and impartially, thus hampering the process of achieving justice. The implication of the Complementarity principle is that the primary jurisdiction of the States is recognized and respected, and the ICC steps in only if the State's legal system fails to do so[6]. Hence, the ICC is not a substitute for national courts and is intended only to complement national criminal justice systems[7].

The ICC can exercise jurisdiction over these crimes only if they were committed on the territory of a State Party (a state that has ratified and become a party to the Rome Statute) or by one of its nationals[8]. This jurisdiction can be expanded if a situation is referred to the ICC Prosecutor by the United Nations Security Council, whose resolutions

[1] International Criminal Court, 'The ICC at a Glance' (2023) https://www.icccpi.int/sites/default/files/ICCAtAGlanceEng.pdf
[2] International Criminal Court, 'The ICC at a Glance' (2023) https://www.icc-cpi.int/sites/default/files/ICCAtAGlanceEng.pdf
[3] 'Understanding the International Criminal Court' (International Criminal Court 2020) https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf
[4] Rome Statute of the International Criminal Court 1998, art 17(1)
[5] Rome Statute of the International Criminal Court 1998, art 17(2)
[6] 'Understanding the International Criminal Court' (International Criminal Court 2020) https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf
[7] International Criminal Court, 'The ICC at a Glance' (2023) https://www.icc-cpi.int/sites/default/files/ICCAtAGlanceEng.pdf
[8] International Criminal Court, 'The ICC at a Glance' (2023) https://www.icc-cpi.int/sites/default/files/ICCAtAGlanceEng.pdf

are binding on all UN member states[9]. In such cases, even a non-State Party may be subject to ICC jurisdiction. Additionally, the ICC can exercise jurisdiction if a State makes a declaration accepting it[10].

Of the 124 countries party to the Rome Statute, India is not one of them[11]. India has consistently been at the forefront of advocating for international cooperation. India is a member of the United Nations and a signatory to numerous international treaties protecting and safeguarding human rights, such as the International Covenant on Civil and Political Rights[12]. For a country like India to continue abstaining from becoming a State Party of an international organization that seeks justice for heinous crimes and mobilizes resources through inter-state cooperation to achieve this goal raises some questions. This paper aims to lay out and examine the potential reasons for India's reluctance to become a State Party to the Rome Statute and its impact

Threat to Nation's Sovereignty?

Post-independence India has always prioritized its sovereignty and the primacy of the State in the international sphere. The preservation of its statehood and the avoidance of international or external influence over matters solely within India's jurisdiction are goals recognized in the Preamble of the Constitution of India[13]. These are essential for India to establish itself as a strong state in the international arena. The internationalization of criminal law can act as a threat to this very sovereignty, and a nuanced understanding of the International Criminal Court's (ICC) functioning and the Rome Statute, in addition to the internal peculiarities of India, helps us address the important question: Is the ICC really a threat to India's sovereignty or India just wants to avoid accountability?

Firstly, since its inception, it was well established that the ICC was never intended to replace national criminal justice systems[14]. This principle of complementarity, as laid down in Article 17 of the Rome Statute, is adhered to[15]. However, the gravity or intensity of the complementarity principle, as India wants it to be followed by the ICC, is different from how it is actually practiced by the ICC. While the ICC will not proceed with a case if a State is 'genuinely' carrying out an investigation or prosecution, India wants a stricter complementary principle and believes that the ICC should step in only if the legal machinery in a State has completely broken down and is non-existent. Additionally, considering that the type of crimes the ICC has jurisdiction over are of such heinous and serious nature, India believes that its courts and legal system are vigilant, sensitive, and capable enough to intervene in such crimes and bring the parties to justice, without requiring an external body to step in[16]. However, having to contest the ICC's jurisdiction

[9] International Criminal Court, 'The ICC at a Glance' (2023) https://www.icc-cpi.int/sites/default/files/ICCAtAGlanceEng.pdf
[10] International Criminal Court, 'The ICC at a Glance' (2023) https://www.icc-cpi.int/sites/default/files/ICCAtAGlanceEng.pdf
[11] 'The States Parties to the Rome Statute | International Criminal Court' (*asp.icc-cpi.int*) https://asp.icc-cpi.int/states-parties
[12] International Covenant on Civil and Political Rights 1966
[13] The Constitution of India 1950, Preamble
[14] 'About the Court' (*International Criminal Court*2024) https://www.icc-cpi.int/about/the-court
[15] Rome Statute of the International Criminal Court 1998, art 17
[16] Bais D, 'India and the International Criminal Court' (2016) https://www.toaep.org/pbs-pdf/54-bais

by proving before an external court that India is genuinely investigating a case of heinous nature occurring within its jurisdiction[17] to avoid intervention by that court in an internal matter undermines not just State sovereignty but also the State's image. The truth is that India's justice system can be slow and inaccessible, and cases may not be initiated or progress due to political influence. Since the ICC's threshold for "inability" does not require a complete breakdown of state and its legal machinery, India is concerned that the ICC may take on cases if the prolonged judicial process tests ICC's patience[18]. On the international stage, this could be seen as an embarrassment for India, giving the impression that India's state machinery is either ineffective in handling serious issues or indifferent to them. A counter to this is that the investigations and trials of the ICC itself are often prolonged and delayed and the mere inefficiency of Indian courts is not sufficient for ICC to take up the case[19]. So, as long as the Indian diplomatic and legal machinery is alert, careful and vigilant, the ICC will not directly investigate and prosecute crimes in India[20]. Even though the ICC Prosecutor will have the right to require periodic reports of the progress of the respective case, this should not be much of an inconvenience or burden for India[21].

Another concern is that even in cases that are wholly internal and do not involve nationals from other states, the ICC may still intervene. Understandably, this is perceived as a threat to India's sovereignty, as it opens the door for an international organization to investigate and adjudicate matters that are entirely domestic. India wishes to uphold the supremacy of its national courts and may see international meddling in wholly internal matters as a threat.

More importantly, India's ongoing counter-insurgency and militancy challenges, from Jammu and Kashmir to the North East, have led to allegations of human rights violations by other States, International Organizations and NGOs[22]. Considering the international pressure, the ICC Prosecutor may be particularly encouraged to pursue officers involved in these activities. The Office of the Prosecutor will have the power to try India's high-ranking civil leaders and military commanders for alleged crimes that are within the ICC's jurisdiction[23].

The Rome Statute adopts a restrictive approach towards immunity based on official capacity. Article 27[24] provides that the Statute applies equally to all persons irrespective of their official status and expressly stipulates that official capacity as a Head of State or Government, a member of a government or parliament, an elected representative, or a government official does not exempt an individual from criminal responsibility before the ICC. It further provides that immunities or special procedural rules attaching to a person's official capacity, whether under national or international law, do not bar the Court from

[17] Rome Statute of the International Criminal Court 1998, art 19(2)
[18] Bais D, 'India and the International Criminal Court' (2016) https://www.toaep.org/pbs-pdf/54-bais
[19] Bais D, 'India and the International Criminal Court' (2016) https://www.toaep.org/pbs-pdf/54-bais
[20] Lahiri D, 'The International Criminal Court: Should India Continue to Stay Out?' (2010) Vol. 5 Indian Foreign Affairs Journal, 181-188.
[21] Lahiri D, 'The International Criminal Court: Should India Continue to Stay Out?' (2010) Vol. 5 Indian Foreign Affairs Journal, 181-188.
[22] Lahiri D, 'The International Criminal Court: Should India Continue to Stay Out?' (2010) Vol. 5 Indian Foreign Affairs Journal, 181-188.
[23] Lahiri D, 'The International Criminal Court: Should India Continue to Stay Out?' (2010) Vol. 5 Indian Foreign Affairs Journal, 181-188.
[24] Rome Statute of the International Criminal Court 1998, art 27

exercising its jurisdiction. The position on immunity, however, must be read together with Article 98 of the Statute. Article 98(1) addresses the distinct question of State cooperation and provides that the Court may not proceed with a request for surrender or assistance that would require a requested State to act inconsistently with its obligations under international law concerning the State or diplomatic immunity of a person or property of a third State, unless the cooperation of that third State in securing a waiver of immunity is first obtained.

The relationship between Articles 27 and 98[25] is therefore particularly significant where the person sought by the ICC is an official of a State that is not party to the Rome Statute. Article 27 removes official capacity as a bar to the exercise of the Court's jurisdiction, whereas Article 98 recognises that the execution of an arrest or surrender request by a State Party may engage separate international obligations owed to third States. The interaction between these provisions has generated considerable controversy, most notably in the proceedings concerning former Sudanese President Omar Al-Bashir. In the Jordan Referral proceedings, the ICC Appeals Chamber held that Article 98(1) does not itself create or preserve immunity and concluded, in the particular circumstances arising from the Security Council's referral of the situation in Darfur, that Jordan was under an obligation to arrest and surrender Al-Bashir. The jurisprudence demonstrates that the absence of immunity before the ICC under Article 27 should not be equated automatically with an unrestricted obligation on every State to execute every arrest warrant irrespective of the international obligations implicated by Article 98.

This distinction assumes particular importance in the Indian context. India is not a State Party to the Rome Statute and is therefore not ordinarily subject to the Statute's cooperation regime merely by virtue of the treaty. Nevertheless, the possibility that the ICC could assert jurisdiction in circumstances permitted by the Statute over Indian military or civilian officials, including senior State officials, continues to raise concerns regarding sovereignty and the treatment of official immunities. India's concerns should therefore not be framed simply as a consequence of the Rome Statute "abolishing" immunity. Rather, they arise from the more complex interaction between the Court's jurisdiction over individuals under Article 27, the rules governing State cooperation and third-State immunities under Article 98, and the position of non-States Parties within the ICC's jurisdictional framework.

On 17th March 2023, the ICC issued arrest warrants for Vladimir Putin and Maria Alekseyevna, the Commissioner for Children's Rights in Russia, for the alleged forced deportation of children from Ukraine to Russia[26]. The ICC also issued arrest warrants for Israel's Prime Minister Benjamin Netanyahu and Israel's former defence minister Muhammad Deif on 21st November 2024 for 'crimes against humanity' and 'war crimes' in Gaza[27]. This shows that implicating the topmost political brass and heads of state is neither unprecedented nor impossible for the ICC in the future. Though the warrants have not been enforced by the State Parties, an international tribunal issuing such a

[25] Rome Statute of the International Criminal Court 1998, art 98
[26] Beaumont P, 'What Does the ICC Arrest Warrant for Vladimir Putin Mean in Reality?' *The Guardian* (17 March 2023) https://www.theguardian.com/world/2023/mar/17/icc-arrest-warrant-vladimir-putin-explainer
[27] Duster C, 'What Is the ICC and Can It Really Arrest Israeli Prime Minister Benjamin Netanyahu?' (*NPR*21 November 2024) https://www.npr.org/2024/11/21/nx-s1-5199669/icc-arrest-warrants-netanyahu-gallant-hamas-israel-war-deif

warrant for a state leader does have diplomatic and political implications considering that State Parties are obliged to follow such instructions. The ICC also has mechanisms to respond when States Parties fail to comply with their obligations to execute arrest warrants, as it did with Mongolia upon its refusal to arrest President Putin by referring it to the ICC Assembly of State Parties[28]. The catch is that even if India does not become a State Party, the ICC can still issue arrest warrants for its leaders, officials, and citizens; neither Israel nor Russia were State Parties. The only difference is that if India becomes a State Party, it will be obliged to follow the arrest warrants, whereas as a non-State Party, it is optional.

Upon determining that an accused is guilty, the ICC trial chamber can impose up to 30 years of imprisonment or even life imprisonment under exceptional circumstances[29]. Letting an international court exercise such power over a country's nationals can also be viewed as an affront to sovereignty.

Sovereignty is no longer absolute

The post-World War II international legal order fundamentally altered the traditional understanding of sovereignty. The Nuremberg Trials established the principle that individuals, including senior state officials, could be held personally responsible for international crimes irrespective of their official position. The Rome Statute builds upon this principle through Article 27, which rejects immunity based on official capacity before the ICC. The underlying rationale is that allowing sovereign immunity to protect those accused of atrocity crimes would perpetuate impunity and undermine the universal prohibition of the gravest crimes.

Accordingly, many scholars contend that sovereignty should be understood as responsible sovereignty rather than absolute sovereignty. States retain primary authority over criminal justice, but that authority carries a corresponding obligation to genuinely investigate and prosecute international crimes committed within their jurisdiction.

Non-International Armed Conflicts

A Non-International Armed Conflict (NIAC) is defined as a 'protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State.[30]' NIAC are currently governed under Article 3 of the Geneva Conventions[31]. This is different from an International Armed Conflict (IAC) as an IAC defined as, 'all cases of declared war or

[28] https://www.chathamhouse.org/2024/05/icc-prosecutors-applications-arrest-warrants-explained#:~:text=The%20arrest%20warrants%20have%20both,relation%20to%20the%20arrest%20warrants.
[29] International Criminal Court, 'Understanding the International Criminal Court' (2020) https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf
[30] UN Office for Disaster Risk Reduction, '**Non-International Armed Conflict (NIAC)**' (UN Office for Disaster Risk Reduction, December 2024) < https://www.undrr.org/understanding-disaster-risk/terminology/hips/so0002> accessed 30 December 2024.
[31] Geneva Conventions, 1949, Art.3.

of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'[32].

A significant point of contention for India is the inclusion of NIAC in the definition of war crimes under Article 8 of the Rome Statute which state as follows:

> *Article 8(bis): An 'act of aggression means': (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;*

This provision implies that the ICC could assert jurisdiction over internal conflicts within a state, not solely those between states. The Rome Statute blurs the distinction between NIAC and IAC. Going by this definition under Article 8, nothing stops the ICC from taking up or having the Kashmir issue referred to it. India perceives conflicts in regions such as Kashmir and the Northeast as domestic law and order issues rather than non-international armed conflicts that fall under international law. By maintaining that these conflicts are domestic in nature, India seeks to prevent external scrutiny and interference from international bodies like the ICC[33]. However, by joining the Rome Statute, India fears that ICC involvement in its internal conflicts could undermine its sovereignty and ability to maintain stability in sensitive regions. The potential for external intervention raises concerns about political motivations, where adversaries could exploit ICC mechanisms to target India politically. This fear is compounded by the belief that the ICC's jurisdiction over internal conflicts could challenge India's own legal system's efficacy and independence.

ICC Subservient to UNSC?

There are three ways in which the Prosecutor of the ICC can initiate an investigation: upon referral by State Parties to the Prosecutor; upon *suo moto* cognizance by the office of the Prosecutor based on information from a reliable source; and, lastly, upon referral by the United Nations Security Council[34]. In this way, the Rome Statute has given the UNSC the power to bring non-members of the ICC under its jurisdiction, as long as they are members of the United Nations. So even if India is not a State Party, it is still possible for the UNSC to refer a case of the nature described in the Rome Statute to the ICC and, in turn, bind India. This is a violation of the principle of the Law of Treaties which means

[32] UN Office for Disaster Risk Reduction, '**International Armed Conflict (IAC)**' (UN Office for Disaster Risk Reduction, December 2024) < https://www.undrr.org/understanding-disaster-risk/terminology/hips/so0001> accessed 30 December 2024.
[33]Shriya Maini, William Nunes, 'India Versus the International Criminal Court' (2018) Vol.8, National Law University Delhi Student Law Journal, < https://heinonline.org/HOL/Page?handle=hein.journals/nludslj5&id=1&collection=journals&index=> accessed 30 December 2024.
[34] International Criminal Court, 'The ICC at a Glance' (2023) https://www.icc-cpi.int/sites/default/files/ICCAtAGlanceEng.pdf

that "the state cannot be forced to accede to a treaty or be bound by the provisions of a treaty it has not accepted"[35].

The UNSC can also block proceedings being conducted by the ICC[36]. Such power in the hands of the Security Council calls into question the so-called independence of the ICC.

This is particularly upsetting for India, considering that it is not a permanent member of the UNSC. Despite its constant efforts and contributions to becoming a permanent member, the most populous democracy in the world is unable to secure permanent membership. India does not have veto powers and hence has little to no control over cases referred to the ICC.

The Security Council's Political Manipulation

The Power of Referral

One of the ways in which a crime would fall under the jurisdiction of the ICC is if the UN Security Council refers the case to the ICC under Article 13(b) of the Rome Statute which states as follows:

> *13(b): A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations;*

The authority granted to the UNSC has led India to harbour significant concerns that the Rome Statute effectively places the ICC under the influence of politically motivated actions by the UNSC, particularly its permanent members. This apprehension is underscored by the fact that the UNSC has exercised its referral authority to the ICC only twice, as specified in Article 13(b) of the Rome Statute[37]. The first referral occurred in 2005 concerning the genocide against ethnic Darfuri people in Sudan, and the second in 2011 regarding the civil war in Libya[38]. Both situations involved African nations that lacked the political clout necessary to secure support from more powerful countries, rendering them vulnerable to what many perceive as a politically biased ICC.

In stark contrast, consider the situation in Syria. On May 22, 2014, China and Russia vetoed a UNSC resolution that sought to refer the Syrian civil war to the ICC. Russia, a staunch ally of President Bashar al-Assad's government, has provided extensive military

[35] Lahiri D, 'The International Criminal Court: Should India Continue to Stay Out?' (2010) Vol. 5 Indian Foreign Affairs Journal, 181-188.
[36] Lahiri D, 'The International Criminal Court: Should India Continue to Stay Out?' (2010) Vol. 5 Indian Foreign Affairs Journal, 181-188.
[37] Rishav Banerjee, 'Rome Statute and India: An Analysis of India's Attitude towards the International Criminal Court ' (2011) Vol. 4 Issue 1, Journal of East Asia and International Law https://heinonline.org/HOL/Page?handle=hein.journals/jeasil4&id=452&collection=journals&index= accessed 29 December 2024.
[38]Security Council Report, 'In Hindsight: The Security Council and the International Criminal Court' (Security Council Report, 31 July 2018) < https://www.securitycouncilreport.org/monthly-forecast/2018-08/in_hindsight_the_security_council_and_the_international_criminal_court.php> accessed 30 December 2024.

and political support throughout the conflict. This veto reflects a broader strategy by Russia to protect its interests in Syria and maintain its regional influence.

The disparity becomes evident when comparing these cases: while conflicts involving less influential African nations are prioritised for ICC referrals, more powerful states like Russia and China can effectively shield their allies from similar scrutiny[39]. Scholars argue that this pattern highlights a troubling bias within the UNSC's referral process, where geopolitical interests dictate which situations are addressed by international justice mechanisms. As a result, serious human rights violations in politically connected countries often go unpunished, raising critical questions about the credibility and impartiality of both the UNSC and the ICC in their pursuit of justice.

Power of Deferral

The second power given to the UNSC is the power to defer cases. Under Article 16 of the statute, the UNSC can pass a resolution to defer actions for a period of one year, citing reasons related to the maintenance of international peace and security. The provision is stated as follows:

> *Article 16: No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.*

This provision allows the UNSC to exercise its influence over ICC proceedings, effectively enabling it to postpone judicial actions subject to political manipulation as evidenced in the case of Kenya, where during the early 2010s, the African Union expressed significant concerns regarding the ICC's disproportionate focus on African nations and that it should refrain from prosecuting sitting heads of state.

This stance fuelled growing discontent among several African Council members towards the ICC[40]. The negative sentiment became particularly pronounced following the UNSC's refusal to defer the Kenyan situation on November 15, 2013. In 2010, the ICC prosecutor launched an investigation into the violent aftermath of the disputed December 27, 2007, elections in Kenya, a state party to the Rome Statute. On March 8, 2011, six prominent individuals were summoned by the ICC[41], including then President Uhuru Kenyatta and

[39] Ian Black, 'Russia and China veto UN move to refer Syria to International Criminal Court' (The Guardian, 22 May 2014) https://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court accessed 30 December 2024.
[40] Brendon J. Cannon, Dominic R. Pkalya, Bosire Maragia, 'The International Criminal Court and Africa: Contextualizing the Anti-ICC Narrative' (2016) Vol.2, African Journal of International Criminal Justice, https://www.jstor.org/stable/48581885?casa_token=DsszNdBYRWoAAAAA%3ASnC6Qw6Hswl1qhJk6JANpdR3x2KvMbQ_281Lu5iNG-jZ2jSjOS_ztSOdKeykkoSwbJw4SwzymtTT1xOsB0xnBMF7CXeXNNx7yXKojqpaBZ-4Ba3-jcI accessed 30 December 2024.
[41] Security Council Report, 'In Hindsight: The Security Council and the International Criminal Court' (Security Council Report, 31 July 2018) <https://www.securitycouncilreport.org/monthly-forecast/2018-08/in_hindsight_the_security_council_and_the_international_criminal_court.php> accessed 30 December 2024.

Deputy President William Ruto, for alleged crimes against humanity. In response, Kenya appealed to the UNSC to exercise its authority to defer these proceedings to maintain peace and stability in the country. However, Council members firmly rejected this request, stating they would not take action to defer the case.

This situation highlighted a broader issue regarding perceived bias in the ICC's operations. The Court's focus on African leaders exemplifies political manipulation within the UNSC, as cases involving powerful nations or non-African leaders are often overlooked or deferred. The AU's dissatisfaction with the ICC continues to shape its relationship with the Court and influences its members' willingness to cooperate with international judicial processes[42].

What it Means for India

India should be concerned that this could allow powerful nations to obstruct justice for their own nationals or allies. India contends that allowing the UNSC to bind non-state parties to the ICC violates fundamental principles of international law, particularly those outlined in the Vienna Convention on the Law of Treaties[43]. Given these concerns, India advocates for an ICC that operates independently from political institutions like the UNSC. Indian officials have expressed a desire for a judicial system that does not allow for external political pressures or influences on its proceedings.

More Concerns Regarding definitions

Article 6 of the Rome Statute defines genocide as acts such as killing, causing bodily or mental harm, inflicting physically destructive conditions, imposing measures to prevent births, and forcibly transferring children of a national, ethnical, racial, or religious group with the intent to destroy such a group[44]. This criteria is distinctly analogous to the caste-based and communal violence that has been prevalent in India since its inception. Inter-caste and inter-religious strife, along with the rise in violent conflict between ethnic communities, as seen in Assam and Manipur, often share the same motivations as the crime of genocide. India is apprehensive about the possibility that such conflicts, which are local and unique to the Indian context, will be adjudicated at an international level.

Additionally, India has framed many national and state laws, along with court judgments and army and police vigilance, to deal with such issues. If the ICC still decides that India's mechanism is insufficient and there are no genuine steps to bring justice to the victims by taking up the matter, it can be viewed as undermining national court and justice systems and may take the form of international embarrassment, giving the impression

[42] Brendon J. Cannon, Dominic R. Pkalya, Bosire Maragia, 'The International Criminal Court and Africa: Contextualizing the Anti-ICC Narrative' (2016) Vol.2, African Journal of International Criminal Justice, https://www.jstor.org/stable/48581885?casa_token=DsszNdBYRWoAAAAA%3ASnC6Qw6Hswl1qhJk6JANpdR3x2KvMbQ_281Lu5iNG-jZ2jSjOS_ztSOdKeykkoSwbJw4SwzymtTT1xOsB0xnBMF7CXeXNNx7yXKojqpaBZ-4Ba3-jcI accessed 30 December 2024.
[43] John Mark, 'Rethinking the Authority of the UNSC to Refer Nationals of Non-State Parties to the ICC' (2019) Vol.66, Netherlands International Law Review, https://link.springer.com/article/10.1007/s40802-019-00144-4 accessed 30 December 2024.
[44] Rome Statute of the International Criminal Court 1998, art 6

that the Indian State is incompetent or not interested in solving such grave issues. It is also possible that caste, community, ethnic, and religious conflicts that are a result of decades of social, economic, and political developments are not well understood at the international level.

Moreover, Article 7 of the Rome Statute which deals with 'Crimes Against Humanity' threatens it's sovereignty by forcing it to ratify and implement laws for crimes that India argues are already covered under it's domestic laws. India argues that Article 7 repeats crimes that have already been covered under other international legislations that India has ratified and will only lead to conflict if India joins the Rome Statute. For example, Article 7(1)(f)[45] of the Rome Statute covers torture as a crime against humanity. India argues that ratifying the Rome Statute is redundant as India has already signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1997. However, India is yet to ratify it.

India firmly believes that states hold the primary right to exercise jurisdiction over crimes committed within their territories or by their nationals. India maintains that national legal systems are better equipped to prosecute such crimes effectively and has advocated for the primacy of national jurisdictions over international intervention[46]. Furthermore, India asserts that current international instruments adequately cover crimes against humanity. It believes that the treaties that it is a signatory to, cover the crimes of humanity and there is no reason to join an additional statute that would not only place more legal burden on India, but also give power to an international court to prosecute it's nationals for crimes it believes to be covered under its own national laws[47].

Scope for arbitrary jurisdiction?

India's reluctance to ratify the Rome Statute is also due to the potential for bias in the selection of cases. The USA, Russia, and China have not ratified the Rome Statute. They are permanent members of the UNSC and thus hold veto power. Hence, no case involving these countries can ever be referred to the ICC if they choose to exercise their veto. This allows the permanent members to avoid accountability. This is a matter of concern for countries like India, which without any veto power, are more at risk of scrutiny. Additionally, the Office of the Prosecutor has inappropriately broad powers to initiate investigations into criminal cases, which India finds concerning[48]. This power is prone to be misused for political purposes. The ICC has frequently faced allegations of bias, particularly regarding African nations, and many UNSC referrals to target African and

[45] Rome Statute 1998, Article 7(1)(f).
[46] Dr, Kajal Bhatt, 'Crimes Against Humanity' (Sixth Committee of the 77th Session of the UNGA, 10 October 2022) https://www.un.org/en/ga/sixth/77/pdfs/statements/cah/10mtg_india.pdf accessed 03 January 2025.
[47] Aman Kumar, 'Finding India's International Criminal Law Obligations in Its Domestic Laws' (SSRN, 22 February 2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4977668#:~:text=Aman%20Kumar,-Australian%20National%20University&text=India%20has%20not%20signed%20the,domestic%20legislation%20in%20this%20regard. accessed on 03 January 2025.
[48] Lahiri D, 'The International Criminal Court: Should India Continue to Stay Out?' (2010) Vol. 5 Indian Foreign Affairs Journal, 181-188.

other non-Western countries[49]. As a non-permanent and non-Western country, India is understandably apprehensive.

Terrorism and Nuclear Weapons not heinous enough?

The use of nuclear weapons, weapons of mass destruction, and terrorism are not included among the crimes within the ICC's purview, though both were proposed for inclusion by India[50]. Although India is a nuclear power, it has adopted a 'No First Use[51]' policy, meaning that India would never initiate a nuclear attack but would retaliate if attacked by nuclear weapons in case deterrence fails[52]. Also, under this nuclear policy India would not use nuclear weapons against a country that is not a nuclear power, or is not aligned with nuclear weapon powers[53]. India's commitment to global nuclear disarmament recognises the indiscriminate, destructive, and inhumane nature of nuclear weapons. Even the International Court of Justice, in an advisory opinion, stated that "the use of nuclear weapons was contrary to international humanitarian law"[54]. The ICC's exclusion of the use of nuclear and mass destruction weapons as war crimes, therefore, does not align with India's vision of the crimes the ICC should safeguard against. Considering the rise of nuclear powers that do not follow policies like India's 'No First Use,' nuclear weapons pose a grave threat to international peace and human rights.

Additionally, due to the lack of consensus on its definition among State Parties, terrorism has not been included in the ICC's scope[55]. This exclusion is despite the 9/11 attacks and the rise of both national and international terrorism. India has long faced the threat of terrorism and incidents like the 26/11 attacks prove the point. The exclusion of terrorism, despite its prevalence and urgency, leaves India with little incentive to become a State Party to the ICC.

No way to opt out?

Under Article 124 of the Rome Statute, a State Party may opt out and exempt itself from the jurisdiction of ICC for a period of seven years after the State enters the Statute with respect to War Crimes and Crimes of Aggression[56]. Apart from these exceptions, the ICC does not allow reservations or opt-out provisions that would enable countries to safeguard their interests[57]. Apart from these exceptions, the ICC does not allow reservations or opt-out provisions that would enable countries to safeguard their

[49] International Criminal Court, 'Understanding the International Criminal Court' (2020) https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf
[50] Lahiri D, 'The International Criminal Court: Should India Continue to Stay Out?' (2010) Vol. 5 Indian Foreign Affairs Journal, 181-188.
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[55] Bais D, 'India and the International Criminal Court' https://www.toaep.org/pbs-pdf/54-bais
[56] Rome Statute of the International Criminal Court 1988, Art. 124.
[57] Lahiri D, 'The International Criminal Court: Should India Continue to Stay Out?' (2010) Vol. 5 Indian Foreign Affairs Journal, 181-188.

interests. In fact, after the Amendment of State Parties to the ICC in 2015, even Article 124 is to be officially non-existent and deleted once the amendment is ratified by 7/8th of all the State Parties, as per Article 121 of the Rome Statute[58]. This is detrimental for India because even if India would wish to handle certain cases and investigations on its own, it cannot opt out of ICC jurisdiction in case ICC does decide to take up the case. Also, the opt-out system applies only to *suo moto* investigations by the Office of the Prosecutor and State referrals, not to UNSC referrals[59]. This limitation again defeats the purpose of the Law of Treaties.

Conclusion

India stands to gain little by joining the International Criminal Court (ICC) that it cannot achieve outside of it. While ICC membership would provide India a platform to influence the Court's policies and operations, these objectives can be more effectively pursued through direct engagement with other nations. Moreover, India has demonstrated a strong capacity to manage its internal issues, such as the insurgency in Kashmir, without the involvement of international bodies like the ICC or the UN Security Council. The potential for external intervention could complicate rather than resolve these sensitive matters. India has also raised valid concerns regarding the Rome Statute's lack of explicit provisions addressing terrorism. Joining the Statute does not guarantee that reforms will occur, such as recognizing terrorism as a crime under international law. There is a significant risk that political dynamics within the Assembly of States Parties could hinder progress on a comprehensive definition of terrorism. Ultimately, joining the ICC could mean ceding aspects of sovereignty and becoming entangled in a treaty that might create more challenges than it resolves. India's interests may be better served by maintaining its current stance and fostering bilateral relationships rather than committing to a multilateral framework that may not align with its national priorities.

Power dynamics between the UNSC, its permanent members, and the ICC place India at a disadvantage. The Office of the Prosecutor wields a questionable amount of power and discretion that can be exploited. Joining the ICC, where India may face arbitrary scrutiny without any opt-out option, does not appear to be a promising prospect.

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