

# India and the International Criminal Court

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## 1. Introduction

India has neither signed nor ratified the Rome Statute ('Statute') of the International Criminal Court ('ICC'). It actively participated in the Preparatory Committee for the Establishment of International Criminal Court ('Prep Com') and the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court ('Rome Conference'), however, India abstained from the motion to adopt the Statute at the conclusion of the conference.

This policy brief studies the positions taken by India in the Prep Com and the Rome Conference, identifies the primary reasons for India's abstention, and analyses their context and merit. Further, this brief looks at the developments in India with respect to the ICC and speculates on the stance which India is likely to adopt in the future.

## 2. Reasons for Abstention

In the lead up to the final vote for the adoption of the Statute and immediately after the vote, Indian delegates insisted that the reasons for India's abstention were the powers given to the United Nations Security Council ('UNSC') and the non-inclusion of nuclear weapons and other weapons of mass destruction as weapons whose use would constitute a war crime.<sup>1</sup>

While these were very important factors in forming the Indian position, other factors were equally influen-

tial. Foremost among them was the fact that India favoured an ICC which could not have jurisdiction over acts committed on Indian territory or by its subjects, but for exceptional scenarios.<sup>2</sup> These exceptional scenarios according to India consisted of situations where the State machinery had collapsed, that is when a "State's administrative and legal machinery had ceased to function".<sup>3</sup> To prevent such an eventuality India had strong views on the jurisdiction of the ICC.

Additionally, India wanted to include in the Statute a crime which it finds most relevant, and for which it has been making efforts in other fora, namely the crime of terrorism.

## 3. Objections to the Role of the Security Council

India vehemently opposed powers given to the UNSC in the Statute or that the Statute would recognize explicitly such powers. India tabled two proposals to remove them.<sup>4</sup> She wanted the Court to be an impartial judicial institution completely independent of political institutions like the UNSC.<sup>5</sup> Thus, India rejected the power of referral and deferral of the UNSC in the Statute.<sup>6</sup> India believed that the UNSC had to establish *ad hoc* tribunals as no alternative judicial institution existed which could address those crimes. ICC States Parties could refer any future matters to the ICC and there was, therefore, no need to vest such power in the UNSC.<sup>7</sup> The power to defer proceedings was unacceptable as the Court was

<sup>1</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998. Official Records. Vol. 2, Summary Records of the Plenary Meetings and of the Meetings of the Committee of Whole, p. 360, A/CONF.183/13 (Vol. II) ('Rome Conference Vol. II') (<https://www.legal-tools.org/doc/78fea6/>). The ICC Legal Tools Database contains the full preparatory works of the ICC Statute, Rules of Procedure and Evidence, Elements of Crime, and Statute amendments on the crime of aggression. CILRAP's CMN Knowledge Hub contains a service ('IC-CPWS') through which you can find documents in the ICC preparatory works by searching on the basis of article in the ICC Statute, see <https://www.casematrixnetwork.org/cm-n-knowledge-hub/icc-pws/>.

<sup>2</sup> Rome Conference Vol. II, *supra* note 1, p. 86.

<sup>3</sup> *Ibid.*, p. 323.

<sup>4</sup> *Ibid.*, p. 122; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998. Official Records. Vol. 3, Reports and Other Documents, p. 248, 250, A/CONF.183/13 (Vol. III) ('Rome Conference Vol. III') (<https://www.legal-tools.org/doc/e03967/>).

<sup>5</sup> Prep Com, 1<sup>st</sup> Session, 17<sup>th</sup> Meeting, L/2777 (<https://www.legal-tools.org/doc/720225/>).

<sup>6</sup> Rome Conference Vol. II, *supra* note 1, pp. 86, 187.

<sup>7</sup> *Ibid.*, p. 122.

created to try the crimes of gravest magnitude and perpetrators of these crimes could escape justice if the UNSC decided to defer.<sup>8</sup>

India claimed that the powers and responsibilities of the UNSC are already provided for in the UN Charter, and the Statute cannot add to or subtract from its powers; thus, in the interest of the independence of the Court, the Statute should not give special powers to the UNSC or explicitly recognize such powers.<sup>9</sup> Additionally, India believed that the power of referral would give the UNSC authority to bind non-parties to the Statute in violation of the law of treaties.<sup>10</sup> Similarly, India wanted no role for the UNSC in deciding whether an act of aggression has taken place for the purposes of the international crime of aggression.

India has had a long-standing demand to be a permanent member of the UNSC. As the second most populous country in the world and an emerging power, she feels that the current composition of the UNSC is not representative of the realities of the world. Thus, India does not want to increase the ambit of the powers of the UNSC, given its current composition. However, India fails to recognize that the powers of the UNSC in the Statute is only a recognition of the powers which the Council already possesses under the UN Charter, as exercised when it created the two *ad hoc* tribunals. In theory, the UNSC can refer any situation within India to the ICC under the UN Charter, despite India not being an ICC State Party. Abstaining on this ground does therefore not change anything in law for India.

However, if the abstention on this ground is a form of protest to the powers given to the UNSC in the Statute, India might change this stance in the future as its prospects of getting a permanent seat on the UNSC become more positive. If such an inconsistency of position were to be exposed, we may wish to reflect on what that would do to the credibility of the legal narrative in India's foreign policy in this area.

#### 4. Nuclear Weapons

India favoured the inclusion of use of nuclear weapons in the list of war crimes owing to their indiscriminate nature and the fact that the International Court of Justice in its advisory opinion had stated that their use was contrary to international humanitarian law.<sup>11</sup> India tabled a proposal to make the employment of nuclear weapons a war crime.<sup>12</sup>

While India had nuclear weapons at the time of the Rome Conference, she hoped and still hopes to never use

them. Towards that end, India has built a novel nuclear doctrine which states that "India will not be the first to initiate a nuclear strike, but will respond with punitive retaliation should deterrence fail".<sup>13</sup> Consistent with India's goal of global nuclear disarmament, this was a first major step, to recognize that the use of nuclear weapons constitutes a crime. However, this issue does not seem to be so relevant to India as can be seen from the parliamentary debates mentioned in the next section.

#### 5. Jurisdictional Issues

While India appreciated the need for an international criminal court, it could not contemplate a situation where Indian courts would be unable to provide justice in the unlikely event of commission of such grave crimes within its jurisdiction. It was, nevertheless, afraid that the ICC might misuse its jurisdiction to investigate the conduct of Indian authorities in areas of India where it is combatting insurgency and militancy. These conflicts are considered internal matters which should not be discussed on international platforms. This should not be understood to mean that it supports immunity for its officials, as it was opposed to immunity *ratione materiae* and *ratione personae*.<sup>14</sup>

##### 5.1. Pre-Conditions to the Exercise of Jurisdiction

India wanted the Court to not have inherent or compulsory jurisdiction. She favoured the optional jurisdiction model of the draft statute of the Court prepared by the International Law Commission whereby the Court would exercise jurisdiction based upon the consent of States.<sup>15</sup> India believed that the consent of territorial and custodial States should be necessary for the Court to have jurisdiction,<sup>16</sup> although India agreed to inherent jurisdiction in cases of genocide.<sup>17</sup>

The opt-in jurisdiction has been retained in Article 12(3) of the Statute and India may give jurisdiction to the ICC whenever she feels the need to do so.

##### 5.2. Exercise of Jurisdiction

India was not supportive of the ICC Prosecutor's *proprio motu* powers as she thought that they could be misused for political purposes.<sup>18</sup>

India did not support the initiation of investigations by the Prosecutor on a *proprio motu* basis, as it was believed that such a decision rests within the competence

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*, p. 207.

<sup>10</sup> *Ibid.*, pp. 122, 322.

<sup>11</sup> *Ibid.*, pp. 122, 168, 279, 322.

<sup>12</sup> Rome Conference Vol. III, *supra* note 4, p. 248.

<sup>13</sup> See Indian Ministry of External Affairs, "Indian Nuclear Doctrine", available at <http://mea.gov.in/in-focus-article.htm?18916/Draft+Report+of+National+Security+Advisory+Board+on+India+n+Nuclear+Doctrine> (last accessed on 25 March 2016).

<sup>14</sup> Prep Com, L/2769 (<https://www.legal-tools.org/doc/8f3e43/>).

<sup>15</sup> Rome Conference Vol. II, *supra* note 1, pp. 86, 187, 279.

<sup>16</sup> *Ibid.*, pp. 187, 279.

<sup>17</sup> *Ibid.*, p. 322.

<sup>18</sup> Prep Com, L/2795 (<https://www.legal-tools.org/doc/bad092/>).

and authority of States and not in the professional role of a prosecutor.<sup>19</sup> Additionally, India believed that the nature of crimes under the Statute is such that the reputation of Governments would come under scrutiny if the Prosecutor were to act on its own motion for political purposes.<sup>20</sup>

India stated that the jurisdiction of the Court should only be initiated with the consent of the territorial and the custodial States.<sup>21</sup>

### 5.3. Admissibility

India wanted a stricter complementarity regime whereby the Court would complement national jurisdiction only in exceptional situations when the judicial system in a State was non-existent or unable to deal with crimes within the Court's jurisdiction.<sup>22</sup> As an example, India mentioned the situations which led to the creation of the ICTR and ICTY as conditions under which the Court should exercise its jurisdiction. India was sceptical about the criteria for the determination of unwillingness on the part of a State and supported a Chinese proposal that only a national decision taken in violation of national law should qualify.<sup>23</sup> There was concern that the Indian courts would have to constantly prove their viability failing which they would be overridden by the ICC.<sup>24</sup>

This concern stems from the fact that Courts in India have not been able to render justice without undue delay and that by itself could be enough for the ICC to deem Indian cases admissible. However, this fear should currently not exist as the ICC itself is riddled with exceptional delay despite its very generous resources.

### 5.4. Subject-Matter Jurisdiction

India opposed the jurisdiction of the ICC over internal conflicts,<sup>25</sup> and wanted war crimes to not include acts committed in the context of an armed conflict not of an international character.<sup>26</sup>

On the specific crimes, India wanted a much higher threshold for crimes against humanity, preferring that only widespread *and* systematic attacks can constitute

crimes against humanity, contrary to the present formulation of widespread *or* systematic.<sup>27</sup> Likewise, India favoured the requirement of armed conflict for crimes against humanity.<sup>28</sup> According to India, if the threshold for crimes against humanity is set too low, individual acts such as a murder could fall within the jurisdiction of the Court.

India also did not favour the inclusion of "enforced disappearance of persons" as an act that can constitute a crime against humanity.<sup>29</sup>

The jurisdictional concerns do not merely stem from the fact that the ICC could misuse its jurisdiction for political purposes, but also that India wants to retain the primacy of national courts at all cost. India feels that the exercise of jurisdiction by the ICC over Indian nationals and territory would be a major embarrassment as it would portray India as unwilling and unable to deal with such grave crimes.

## 6. Terrorism

India believed that if the ICC is to judge crimes of international concern then terrorism must be included in the list of crimes.<sup>30</sup> It submitted two proposals for the inclusion of terrorism. The first proposal sought to make acts of terrorism a crime against humanity and was complete with a definition of the act of terrorism.<sup>31</sup> The second proposal wanted to include crimes of terrorism in the list of core crimes in the Statute. The proposal left the definitions of these crimes to be defined by the Preparatory Commission.<sup>32</sup>

India has long suffered terrorist activities and she has spearheaded the movement to get a Comprehensive Convention on International Terrorism adopted at the United Nations General Assembly. It is notable that India sponsored a draft text for the proposed convention in 1996.<sup>33</sup> This issue was in other words of critical importance to India. Rejection of the proposals was taken as a defeat. It was a major factor in the Indian decision to abstain from the vote to adopt the Rome Statute. In many ways, the rise of terrorist acts around the world since the adoption of the Statute confirms that India has addressed a real threat and problem in many countries. The issue may, therefore, have to be revisited also in the context of the ICC. It is, however, arguable whether the ICC could

<sup>19</sup> Rome Conference Vol. II, *supra* note 1, pp. 86, 187.

<sup>20</sup> *Ibid.*, p. 200. Note the sharp criticism of the ICC's use of prosecutorial discretion in preliminary examination by CHAN James, "Judicial Oversight over Article 12(3) of the ICC Statute", FICHL Policy Brief Series No. 11 (2013), Torkel Opsahl Academic EPublisher, Oslo, 2013, and ZHANG Xin and XIAO Jingren, "A Realist Perspective on China and the International Criminal Court", FICHL Policy Brief Series No. 13 (2013), Torkel Opsahl Academic EPublisher, Beijing, 2013.

<sup>21</sup> Prep Com, L/2795, *supra* note 14.

<sup>22</sup> Rome Conference Vol. II, *supra* note 1, pp. 86, 187.

<sup>23</sup> *Ibid.*, p. 218.

<sup>24</sup> *Ibid.*, p. 86.

<sup>25</sup> Prep Com, L/2764 (<https://www.legal-tools.org/doc/771d36/>).

<sup>26</sup> Rome Conference Vol. II, *supra* note 1, p. 168.

<sup>27</sup> *Ibid.*, p. 148.

<sup>28</sup> *Ibid.*, p. 279.

<sup>29</sup> *Ibid.*, p. 148.

<sup>30</sup> Prep Com, L/2761 (<https://www.legal-tools.org/doc/768688/>); Prep Com, L/2766 (<https://www.legal-tools.org/doc/694ec4/>); Rome Conference Vol. II, *supra* note 1, pp. 178, 322.

<sup>31</sup> Rome Conference Vol. III, *supra* note 4, p. 242.

<sup>32</sup> *Ibid.*, p. 248.

<sup>33</sup> Sixth Committee, 51<sup>st</sup> Annual Session of the General Assembly, Measures to Eliminate International Terrorism, 11 November 1996, A/C.6/51/6.

already have jurisdiction over acts of terrorism should an appropriately framed situation come before the Court.<sup>34</sup>

## 7. Developments Since the Rome Conference

India's stance towards the ICC since its establishment has not been supportive. This can be seen from the fact that it was in favour of UNSC resolution 1422 which, pursuant to the power of deferral which India vehemently opposed during the Rome Conference, requested the ICC to not commence any investigation or prosecution against peacekeepers from States not party to the Statute.<sup>35</sup> India stated in the UNSC that it cannot accept an outside authority – the ICC – to sit in judgement over the actions of its troops who remain answerable solely to the Indian courts.<sup>36</sup> In 2011, when the UNSC unanimously decided to refer the situation in Libya to the ICC, India agreed, albeit reluctantly, to go along with the consensus.<sup>37</sup> India preferred a more calibrated and gradual approach, but she nevertheless voted for the resolution as other members believed that the referral would restore calm and stability in Libya.<sup>38</sup> More recently, in 2015, India hosted Sudan's President Omar Hassan Al Bashir disregarding ICC's request for his arrest and surrender to the Court.<sup>39</sup>

The ICC has been discussed many times in the Indian Parliament, by members who want the Government to ratify the Statute and those who want to refer terrorist attacks in India and the situation in neighbouring States to the ICC.<sup>40</sup> Additionally, questions have been posed in the Parliament regarding the reasons for India's abstention from the Statute to which successive Governments have responded consistently by stating three reasons: 1) the primacy of the national judicial process, 2) the non-inclusion of terrorism as a crime against humanity, and 3)

the powers given to the UNSC.<sup>41</sup> Interestingly, in answer to the most recent question, the Government stated that it is "carefully watching the developments and the functioning of the Court".<sup>42</sup>

Despite the reserved position of successive Indian Governments, the Rome Statute has had some impact in India. A bill was unsuccessfully tabled before Parliament in 2014 which purported to include offenses of organized communal and targeted violence. It drew on some elements of the Rome Statute including the widespread or systematic threshold under crimes against humanity and command responsibility for military and civilian superiors.<sup>43</sup>

## 8. Conclusions

The Indian position towards the Statute is not much different from that of other Asian States who have decided to not ratify based on their concern that it would lead to the dilution of their sovereignty.<sup>44</sup>

India is unlikely to ratify the Statute in the near future owing to its concerns regarding the primacy of national jurisdiction. At the same time, India's current status *vis-à-vis* the ICC is what it always wanted: she preserves the primacy of her national courts, and still has the option to accept the jurisdiction of the ICC for a specific conduct or period. Thus, instead of discussions on the possibility of India ratifying the Statute, the discourse should focus on if and when India may submit an Article 12(3) declaration. Expect it to only come for acts of terrorism.

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<sup>34</sup> Roberta Arnold, *The ICC as a New Instrument for Repressing Terrorism*, Transnational Publishers, 2004.

<sup>35</sup> UNSC resolution 1422 (<https://www.legal-tools.org/doc/1701d5/>).

<sup>36</sup> 4568<sup>th</sup> Meeting of the UNSC, 10 July 2002, S/PV.4568.

<sup>37</sup> UNSC resolution 1970 (<https://www.legal-tools.org/doc/00a45e/>).

<sup>38</sup> 6491<sup>st</sup> Meeting of the UNSC, 26 February 2011, S/PV.6491.

<sup>39</sup> ICC, Situation In Darfur, Sudan, Pre-Trial Chamber, Request for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir to the Republic of India, ICC-02/05-01/09-252, 26 October 2015 (<http://www.legal-tools.org/doc/8e0b91/>).

<sup>40</sup> Lok Sabha Debates, 26 July 2000, Item no. 25; 23 April 2003, Item 25; 16 August 2011, Item no. 24.

<sup>41</sup> Lok Sabha, Unstarred Question 4611, 18 April 2001; Unstarred Question 2918, 18 August 2004; Unstarred Question 2185, 7 December 2005; Unstarred Question 3812, 19 December 2006; Unstarred Question 3313, 16 March 2011.

<sup>42</sup> Lok Sabha, Unstarred Question 3313, 16 March 2011.

<sup>43</sup> The Prevention of Communal Violence (Access to Justice and Reparations) Bill, 2014, Introduced 5 February 2014, Rajya Sabha.

<sup>44</sup> Devasheesh Bais, *The Raison D'Être of Non-Ratification of the Rome Statute by Asian States*, <http://ssrn.com/abstract=2149964>.