STUDENT CONTRIBUTION

Rome Statute and India: An Analysis of India's Attitude towards the International Criminal Court

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The International Criminal Court is the first permanent world judicial institution with nearly universal jurisdiction to try individuals accused of war crimes, crimes against humanity, genocide and possible aggression. Curiously, India voted against the Court's founding instrument, the Rome Statute. The Indian Government has chosen to adopt a 'non-position' on the most important step taken towards establishing genuine accountability for unthinkable atrocities, which reflects a deep seated confusion of thought rather than a principled stance. Even worse, the stated position of the Government has been to find common ground between Indian and American 'apprehensions' of "possible conflict between robust, national judicial processes and international tribunals as also the impact of such tribunals on national sovereignty." Against this background, this paper presents a critical review of the Indian position on the ICC, considering familiar accusations and criticisms directed against it. It also explores policy options available to the government in tackling core international crimes and finally underlines the need for reforms in the national criminal justice system. It is the thesis of this paper that India has seriously misjudged the legal, political and social repercussions of opposing the Rome Statute, and risks a further erosion of credibility if it altogether repudiates the Statute, and with it, its sizable practical advantages for protecting the dual interests of its nationals as individuals serving their country abroad, and of its national security. These points are not based on sentimental devotion to a vague and ill-defined

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internationalism, but on a pragmatic analysis of the interplay between the ICC and customary international law.

Keywords
ICC, Jurisdiction, State Sovereignty, Security Council, International Crimes.

I believe an International Criminal Court is very much to be desired. – Harold Pinter[1]

I. Introduction

In human history, thousand of wars have been fought and millions of lives and limbs have been lost. This inevitably has been punctuated by many egregious instances of "crimes against humanity" for which few or no individuals have been held accountable. At the end of the twentieth century the international community finally summoned its will to establish a permanent international criminal court. In 1998, determined to put an end to impunity for the perpetrators of atrocities and to prevent grave international crimes, a diplomatic conference in Rome adopted the Statute of the International Criminal Court ("ICC").[2] The Rome Statute was approved by an overwhelming majority vote.[3] The ICC Statute has received the sixty ratifications necessary for its entry into force.[4] The new Statute promises to impact universal jurisdiction in particular and the enforcement of international criminal law in general. While it is too soon to assess the ICC's impact on the latter,[5] we could recognize at the outset that the ICC and universal jurisdiction pursue similar goals. Both systems grant jurisdiction, albeit to a different extent, over offenses such as: war crimes, crimes against humanity, and genocide. Further, they attempt to punish crimes that domestic courts would otherwise be unable to prosecute under ordinary heads of jurisdiction. This overlap raises

1 *See* Brainy Quote, *available at* http://www.brainyquote.com/quotes/quotes/h/haroldpint366865.html (last visited on July 4, 2010).

2 U.N. Doc. A/CONF.183/9 (1998), reprinted in 37 I.L.M. 999 (1998) (hereinafter Rome Statute).

3 120 participants in the Rome Conference voted in favor of the Rome Statute and 7 voted against it. 21 states abstained. *See* U.N. Press Release, U.N. Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court, July 17, 1998 (L/ROM/22), *available at* http://www.un.org/icc/pressrel/lrom22.htm (last visited on July 4, 2010).

4 Rome Statute art. 126.1.

5 Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 144-145 (1999).

questions concerning whether the two systems are compatible and whether international justice is best served by having both systems function simultaneously.

Most noticeable is that several States including India and the United States voted against the Rome Statute.[6] Much to the chagrin of most thinking individuals, the Indian Government has chosen to adopt a 'non-position' on the most important step taken towards establishing genuine accountability for unthinkable atrocities, which reflects a deep-seated confusion of thought rather than a principled stance.[7] Even worse, India has actively supported America's brazen campaign to undermine and destabilize the ICC; the stated position of the Government has been to find common ground between Indian and American 'apprehensions' of "possible conflict between robust, national judicial processes and international tribunals as also the impact of such tribunals on national sovereignty."

This study presents a critical review of the Indian position on the ICC, considering familiar accusations and criticisms directed against it. It also explores policy options available to the government in tackling core international crimes and finally underlines the need for reforms in the national criminal justice system. This paper is under the following premises: (1) India has seriously misjudged the legal, political and social repercussions of opposing the Rome Statute; (2) India is in danger of suffering a further erosion of credibility if it altogether repudiates the Statute; and (3) India has a risk of losing practical advantages for protecting the dual interests of its nationals as individuals serving their country abroad, and of its national security.[8]

II. The ICC Jurisdiction and the Triggering Mechanisms

Chapter Two of the Rome Statute[9] dealing with "Jurisdiction, Admissibility and Applicable Law" became the focus of the most profound controversies that attended the meetings in New York and Rome for the establishment of an international criminal court. This applied - admittedly in different degrees - to all four components of the

6 *See* Hearing on the Creation of an International Criminal Court Before the Subcommittee on International Operations of the Committee on Foreign Relations, 105th Congress, at 12-15 (1998) (hereinafter 1998 Hearing) (Statement of Hon. David J. Scheffer, Ambassador-at-Large for War Crimes Issues, explaining the U.S. objections to the Rome Statute), *available at* http://www.iccnow.org/documents/USScheffer_Senate23July98.pdf (last visited on July 4, 2010). Other opponents of the Rome Statute were Bahrain, China, Indonesia, Iraq, Israel, Libya, Qatar and Yemen.

7 N. Koshy, *International Criminal Court and India*, 44 ECONOMIC & POLITICAL WEEKLY 1456-1458 (2004).

8 M. Leigh, *The United States and the Statute of Rome*, 95 AM. J. INT'L L. 124-131 (2001).

9 *Supra* note 2.

concept of jurisdiction: subject-matter jurisdiction, temporal jurisdiction, personal jurisdiction, and territorial jurisdiction. It might be noted that jurisdiction *ratione materiae* of the ICC has been confined to genocide, crimes against humanity and war crimes,[10] with the possible inclusion at a later date of the crime of aggression.[11] There is also the promise of further consideration of extending the court's jurisdiction to acts of terrorism and drug-related crimes.[12] As far as jurisdiction of the ICC *ratione temporis* is concerned, the Rome Statute will not apply retroactively,[13] and crimes within the jurisdiction of the court will not be subject to any statute of limitations.[14]

Any aspect of the ICC jurisdiction would be incomplete without reference to the "principle of complementarity." According to this principle, as defined in Article 17 of the Statute, States have the primary jurisdiction to prosecute crimes within the jurisdiction of the ICC. The ICC's jurisdiction will only arise if the State with custody of a suspect is unable or unwilling to prosecute that person. Complementarity and several special safeguards against frivolous prosecutions, should put to rest Washington's concerns about its ability to shield American citizens from prosecution in the ICC. Complementarity also raises intriguing questions about State sovereignty. For example, the power of the ICC to determine 'unwillingness' to prosecute, implies a value judgment as to the criminal justice system of a state. Application of the principle *ne bis in idem* as defined in the ICC Statute[15] also gives rise to the question under what conditions truth commissions and amnesty, as strategies for national reconciliation in new democracies, will most likely preclude prosecutions of officials of a prior regime in the ICC.

According to Article 12 of the Rome Statute, the ICC's power to exercise criminal jurisdiction must be accepted by State parties. This means that the ICC's jurisdiction is essentially consensual. However, in contrast to earlier proposals providing for different 'opt-in' and 'opt-out' regimes,[16] the ICC will operate under the regime of 'inherent' or automatic jurisdiction. When a State ratifies the Rome Statute it thereby accepts the

10 *Id.* art. 5(1)(a)-(c).

11 *Id.* art. 5(1)(d), 5(2).

12 *See* Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Resolution E, U.N. Doc. A/CONF.183/C.1/L.76/Add.14 (July 16, 1998).

13 Rome Statute art. 11.

14 *Id.* art. 29.

15 *Id.* art. 20. The principle of *ne bis in idem* in the ICC Statute differs from the American principle of double jeopardy. Under the statute, a person cannot be tried twice for the same act. In the American system, a person cannot be tried twice for the same crime, but a single act may constitute more than one crime.

16 Different 'opt-in' and 'opt-out' options were proposed by the International Law Commission in its 1994 Draft Statute for an International Criminal Court. *See* Report of the International Law Commission on the Work of its 46th Sess., Y.B. INT'L L. COMM'N. at 26, 41-43 [1994-2], U.N. Doc. A/CN.4/SER.A/Add.1 (part 2). The 1994 Draft Statute enabled the state party to 'opt out' of one or more categories of crimes when ratifying the Statute.

ICC's jurisdiction over all crimes within its scope.[17] No additional declarations of acceptance by State parties are required. An exception to automatic jurisdiction is the transitional provision which allows State parties to 'opt-out' of the ICC's jurisdiction over war crimes committed on their territory or by their nationals for a nonrenewable seven year period by filing a special declaration to that effect.[18]

Article 12 of the Rome Statute defines actual preconditions to the exercise of jurisdiction. Pursuant to Article 12, the Statute can exercise its jurisdiction only if the State of the territory where the crime was committed or the State of nationality of the accused are parties to the Rome Statute or have accepted the ad hoc jurisdiction of the ICC with respect to the crime in question. It is important to note that under Article 12 of the Statute the consent of any of the above States is enough. There is no mandatory consent of the State of nationality of the accused. This means that persons accused of committing the relevant crimes may be subject to prosecution even if the State of their nationality is not a party to the Rome Statute. In addition, Article 12 provides that no consent of the territorial State or the accused's State of nationality is required in all cases when a situation in which a crime appears to have been committed is referred to the ICC by the Security Council acting under Chapter VII of the UN Charter. Under this provision, the ICC will have jurisdiction even if a crime is committed in territories of non-member States by nationals of non-member States. That is the so-called 'Triggering Mechanisms' of the ICC.

The triggering mechanisms exemplify the various means by which cases can be brought before the Court. The first means is a by a State party to the Statute. The State party refers the situation to the ICC Prosecutor for investigation where one or more crimes under the jurisdiction of the ICC have been committed.[19] If the Prosecutor determines that there is sufficient cause to commence an investigation he or she must notify all States parties and any other State that would normally be able to assert jurisdiction over the crime.[20] The second mechanism is where the Prosecutor initiates the prosecution *proprio motu*.[21] If the prosecutor becomes aware of possible crimes within the jurisdiction of the Court, he or she may commence self-initiated investigations. The Prosecutor may request information from States, non-governmental organizations or any other reliable source as deemed appropriate.

17 Rome Statute art. 12(1).

18 *Id.* art. 124.

19 *Id.* arts. 13(a) and 14.

20 If a State with conventional jurisdiction notifies the Prosecutor within one month of its intent to investigate the crime, however, the Prosecutor must differ to that State. This is as a result of the fact that the Court is established to compliment domestic jurisdiction or to supplement it. Certainly, it is not to supplant national courts.

21 Rome Statute arts. 13(c) and 15.

Thus, the legal impediments to accepting the Rome Statute are easily allayed, and in fact, seem to build a case for India signing the Statute. It is the underlying political apprehensions that must be detected and confronted. First, with respect to the inclusion of jurisdiction over war crimes in internal conflicts, a cause of anxiety would be clearly given to the unrest in Kashmir, the North-East, Gujarat, etc. Yet, because India has been already a party to the 1949 Geneva Conventions, this is not a novel question. Second, absolute State sovereignty is obsolete under contemporary international law; sovereignty cannot be asserted to cover up crimes against the peace and security of mankind.[22] Whenever a nation enters into a treaty regarding trade, disarmament or anything else, it strategically cedes some of its rights, for a greater good. Furthermore, the ICC jurisdiction over a country's nationals is not an infringement of sovereignty or of democracy. In fact, it may uphold sovereignty[23] by helping countries defend themselves against foreign perpetrated atrocities on their territory, while States that enlist the ICC for this purpose fulfill a democratic obligation to the security of their inhabitants. Third, it bears repeating that the Rome Statute is premised on the principle of complementarity; the primary responsibility for investigation and trial rests with the State, and the ICC steps in only in the face of a genuine inability or unwillingness to prosecute. The Indian position has been that the ICC's inherent power to decide whether a State has acted, and acted in a manner consistent with justice, impinges on State sovereignty, and it may be used even by India's adversaries to embarrass it. Accordingly, there has been a deliberate downplaying of the high thresholds that have been built into the Statutes for investigating a crime and launching a prosecution. Legal definitions of crimes are peppered with clauses like 'widespread' and 'systematic.' Also, it is difficult to reconcile India's general confidence in its human rights record, and strong, democratic and judicial set up, with this diffidence *vis-à-vis*, the ICC.[24] In fact, rejection of cases by the ICC would be an added feather in India's cap.[25]

The third and the most controversial question of these trigger mechanisms is the referral by the United Nations Security Council. This is in the light of India and the United States opposition to the Court. Article 13(b) of the Rome Statute states that the ICC may exercise jurisdiction "in a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council

22 J. Mayerfeld, *The Democratic Legacy of the International Criminal Court*, 28 THE FLETCHER FORUM OF WORLD AFFAIRS, 147-156 (2004).

23 *Id.*

24 *Supra* note 7, at 1457.

25 U. Ramanathan, *India and the ICC*, 18 FRONTLINE 24 (2001). The problem with not signing the Statute is that it reduces the potential for making a difference to the development of law around the ICC Statute. There would be no Indian presentation among the judges, the Prosecutor's office, in the Registry and the Assembly of State Parties.

acting under Chapter VII of the Charter of the United Nations." It is believed that where the ICC obtains jurisdiction over a case by virtue of such a Security Council referral, its jurisdiction is considered stronger and truly universal which renders irrelevant the consent of the State where the crimes occurred.[26] The first in which the Court's jurisdiction is premised on a Security Council referral is the situation in Darfur, Western Sudan through the Security Council Resolution 1593.[27]

The main issue here is whether a Security Council's referral to the Court overrides any requirement of the consent of a relevant State as a precondition for the Court's exercise of jurisdiction, and this is clearly repugnant to the proponents of State sovereignty. However, such authority is 'inherent' in the Council's constitutional authority under Chapter VII of the Charter. India cannot feasibly do away with such power of the Security Council completely. Moreover, India fails to recognize that Article 17(precondition of complementarity) of the Rome Statute will be applicable even in the case of the Security Council's referral; it understands that this safeguard is available only to those States which are parties to the Rome Statute. If India is concerned about being politically targeted by the Security Council, ironically, the only realistic approach is to ratify the Rome Statute and to prove the willingness to prosecute the crimes following Article 17.

III. State Sovereignty: Is the ICC Superseding State Autonomy?

Campaigning for the U.S. president, Pat Buchanan cited the Rome Statute as a key battleground in "the millennial struggle...of patriots of every nation against a world government where all nations yield up their sovereignty and fade away."[28] Others have sounded similar warnings about infringements on sovereignty.[29] India has objected that

[26] Corrina Heyder, *The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in the light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status,* 24 BERKELEY J. INT'L L. 651(2006).

[27] S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005), *available at* http://www.unhcr.org/refworld/doc*id*/42bc16434.html?(last visited on Sept. 28, 2011)

[28] Patrick J. Buchanan, The Millennium Conflict: America First or World Government, Speech Delivered to Boston World Affairs Council 9 (Jan. 6, 2000) *available at* http://www.tysknews.com/Depts/New_World_Order/millennium_conflict.htm (last visited on July 4, 2010).

[29] *See* Jesse Helms(Senetor), Toward a Compassionate Foreign Policy, Address before the American Enterprise Institute 9 (Jan. 11, 2001). He said: "This brazen assault on the sovereignty of the American people is without precedent in the annals of international treaty law," available at http://www.aei.org/past_event/conf010111.htm;

the ICC will "directly infringe on the judicial sovereignty of States."[30]

'Sovereignty' cannot be easily defined.[31] It is recognized in the broad sense as individual States' self-determination to act without interference from a higher power.[32] The practical implication of the concept of sovereignty is that nation States exercised full control over its own affairs including issues of human rights, which were in principle not regulated by international law. This traditional concept of sovereignty, however, has been employed as a veritable shield by some States to unleash terror and pains on their subjects. If it is assumed that issues of human rights were part of the reserved domain of States, they are still limited by rules of international law.[33] The Permanent Court of International Justice recalled in this respect that the jurisdiction of a State is exclusive within the limits fixed by international law.[34] Thus, State sovereignty must be interpreted in view of general principles of international law such as general prohibition of abuses of right.

The Court has the jurisdiction over the serious crimes of concern which amount to gross violations of international humanitarian and human rights law.[35] These crimes are often committed in international or internal armed conflict. India argues that the jurisdiction of the ICC on crimes will impinge on its sovereignty. The United States, along with neither signing nor ratifying the treaty, has also engaged in acts that could undermine the effectiveness of the Court. Their objection reflects the archaic view of absolute State sovereignty. This is in contradistinction with the modern and preferred view that sovereignty is the residuum of power, which a State possesses within the confines laid down by international law.[36]

Hearing before the Senate Subcommittee on International Operations of the Committee on Foreign Relations, Is a U.N. International Criminal Court in the U.S. National Interest?, 105th Cong., 2nd Sess. 10 (July 23, 1998) (Statement of Sen. John Ashcroft). He argued: "By ceding the authority to define and punish crimes, many nations took an irrevocable step to the loss of national sovereignty and the reality of global government," *available at* http://www.iccnow.org/ documents/1stSesPrepComSenatecfr.pdf (last visited on July 4, 2010).

30 *See* Views and Comments by Governments, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE STATUTE; ISSUES, NEGOTIATIONS, RESULTS 573, 582 (Roy S. Lee ed., 1999).

31 MICHAEL FOWLER & JULIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY 6 (1995). It reads: "The meaning of sovereignty varies according to the issue that is being addressed or the question that is being asked." *See also* STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 3 (1999).

32 JACK DONNELLY, STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION: THE CASE OF HUMAN RIGHTS, *in* BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION 115, 116 (Gene M. Lyons & Michael Mastanduno eds.,1995).

33 Allan Pellet, *State Sovereignty and the Protection of Fundamental Human Rights: An International Law Perspective, available at* http://www.pugwash.org/reports/rc/pellet.htm (last visited on July 4, 2010).

34 Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco, 1923 P.C.I.J. (Ser. B) No. 4 at 24(Feb. 7).

35 Rome Statute art. 5.

36 I.A. SHEARER, STARKE' S INTERNATIONAL LAW 90-91 (11th ed. 1994).

When the draft statute for an International Criminal Court was voted on in Rome in July 1998, India abstained. The Indian delegation believed that the overwhelming support for the Statute moved through improbability, and possibility, to fact.[37] It continues to be difficult for the Indian establishment to reorient reality to account for an international community that willingly hands over a mandate for enforcing justice to an institution beyond the individual State's territory, amending ability and influence.[38]

In Rome, India endorsed the Non-Aligned Movement("NAM")'s view that "the ICC, should be based on the principles of complementarity, State sovereignty and non-intervention in domestic affairs." It wanted the ICC to exercise only optional, rather than inherent or compulsory, jurisdiction. India, also flagging the danger of an individual prosecutor with *proprio motu* powers as contrary to State sovereignty, stated that: "The ICC must not become captive to political interference, and therefore the Security Council should not exercise any role in the ICC's operation, including the referral of situations to the ICC or on any other manner, on the grounds that this accords pre-eminent authority to the Council's permanent members and detracts from the principles of State sovereignty and equality."[39] India has further opposed the inclusion of criminal responsibility for war crimes committed during situations of non-international armed conflict, and objected to the non-inclusion of the use of nuclear weapons as a crime within the ICC's competence.[40]

The question is, in the end, the extent to which the Rome Statute prospectively takes from individual States the ability to act as they wish in any given circumstance. The ICC is viewed by its proponents as an important step in building a truly global rule of law, where no individual perpetrator can escape accountability for crimes and no victim can be denied justice merely because of the legal fiction of sovereignty.[41] Ironically, this has also proven to be the ICC's most insurmountable barrier to gaining universal acceptance, as most States are generally reluctant to expose their citizens to potential criminal prosecutions for conduct undertaken in its name. In addition, criminal law is

37 L.S. Sunga, *The Attitude of Asian Countries towards the ICC*, 2 ISIL Y. B. Int'l Humanitarian & Refugee L. 18-60 (2002).

38 U. Ramanathan, *India and the ICC*, 3 J. Int'l Just. 627-634 (2005).

39 Mr. Dilip Lahiri, head of the Indian Delegation, put it: "Any pre-eminent role for the UNSC in triggering ICC jurisdiction constitutes a violation of sovereign equality as well as equality before law, because it contains an assumption that the five veto-wielding States do not by definition commit the crimes covered by the ICC Statute, or in case they do commit, that they are above the law and thus possess *de jure* impunity form prosecution, while individuals in all other States are presumed to be prone to committing such crimes." *Id.*

40 Not surprisingly, Pakistan has taken a similar line, strongly supporting the principle that the ICC's jurisdiction should be complementarity to that of national legal systems in order to guard the principle of State consent. It *also* feels that a UNSC role in the ICC would undermine the ICC's impartiality and independence and would represented unwarranted political interference in a judicial body. *See Supra* note 38.

41 *Id.* at 32.

seen to be closely associated with State sovereignty and the ultimate application of the State's penal power over persons within its territory or jurisdiction. While national courts apply foreign private law or civil law, the criminal law is seen as a matter of local public policy, a matter of *lex fori*.[42]

For some liberal-legalists, the global rule of law means the creation of defective international, or stronger, supranational legal competence and authority.[43] The Westphalian models thus ought to be obvious. The rule of law is not only about non-instrumental rules of co-existence among legal subjects, but is also about domesticating the political sphere (principally, State Power) through legalism or impartially applied rules. This postmodern model is not restricted to supporting coexistence among sovereign States, but more radically, is generated towards the project of transforming States so that they behave in a rational or 'civilized' fashion with respect to individuals.[44] In a different sense, States are to be treated as 'instruments' of their citizens, and not the other way around; juridical sovereignty ought not to shield States from domestication and transformation.[45]

Liberal legalism[46] would regard sovereignty as a functional property in a normative sense.[47] Sovereignty is contingent upon responsibilities to individuals. When any State fails dramatically to live up to these responsibilities, other sovereign States - that is the properly functioning ones - are willing to exercise an international authority to protect and uphold individual rights. In principle, equality before the law and legal protection ought not to depend upon the relative weaknesses of some sovereign States. Individuals ought to have access to justice, regardless of the arbitrary geographic or judicial political unit they inhabit.[48]

Thus, the correct construction of State sovereignty is 'functional,' and non-instrumentality in the rule of law ought to apply primarily to individuals, not States. The ICC embodies this very strand of thinking, i.e. when States violate or fail to uphold the rule of law, then there is a responsibility upon international and, conceivably, supranational political authorities to exercise a form of 'secondary sovereignty.'[49] Once the domestic rule of law is restored, outside authorities can withdraw and continue their oversight powers. It is clear then, that the establishment of the ICC to ensure the

42 Y.S.R. Murthy, *A Giant Step Forward or Delusion: An Evaluation of the Rome Statute of the International Criminal Court*, 40 INDIAN J. INT'L L. 505-534 (2000).

43 G. ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR JUSTICE 134 (1999).

44 R.H. JACKSON, THE GLOBAL COVENANT: HUMAN CONDUCT IN A WORLD OF STATES 6 (2000).

45 *Id.*

46 Regarding the Liberal Legalism, *see* Lester Mazor, The *Crisis of Liberal Legalism*, 81 YALE L. J. (April 1972).

47 K. Annan, *Two Concepts of Sovereignty*, THE ECONOMIST 49-50(Sept. 18, 1999).

48 *Supra* note 48, at 27.

49 *Id.* at 36.

penalization of horrific crimes can no longer be repudiated by apprehensive national governments under the cloak of antiquated notions of absolute sovereignty. It is therefore submitted that the objection of such States like India, the United States, China, etc. against the ratification of the Statute based on the Westphalian concept of sovereignty is no more than a reluctance on their part to be held accountable for gross humanitarian violations and to subject themselves and their nationals to the same standard established for the rest of the world. Sovereignty in the context of the analysis hereinbefore has never been a defense for commission of egregious mass crimes. Today, it is less a defence than ever.

IV. India and the ICC: Indian Response to International Crimes

The refusal of India to become party to the Rome Statute might appear inconsistent with India's tradition over international law since ancient times.[50] Its overall record shows that India has been enhancing the rule of laws in international relations in both the pre-colonial and the post-independent era.[51] Considering its commitment to the multilateralism and the constitutional mandate to respect international law[52] and the current Indian position on the ICC appears strange and paradoxical.

India has a sovereign right to become or not to become[53] party to any international treaty or convention. Decision in this regard is taken by the central executive which alone has power to negotiate and conclude treaties with foreign powers[54] subject to the provisions of the Constitution. India always endorsed the idea of the ICC and accordingly actively participated in the negotiation leading to the adoption of the Rome Statute. However, it finally declined to vote in favor of the Rome Statute in 1998 because in its view the Court envisaged under the Statute was at variance with one envisioned by it. Dilip Lahiri, the leader of the Indian Delegation to the Rome Conference, stated in his opening remarks at that conference:[55]

> India fully endorsed the view...which had stressed that the International Criminal

50 C. Chacko, *India's Contribution to the Field of International Law Concepts*, 93 RECUEIL DES COURS 121-218 (1958).

51 P.S. Rao, *The Indian Position on Some General Principles of International Law*, *in* INDIA AND INTERNATIONAL LAW 33-64 (Bimal N. Patel ed., 2005).

52 The Indian Constitution art. 51(c).

53 *Id.* at arts. 53, 73 & 246, Schedule 7, List I, Item 14.

54 *See Manmull Jain v. Union of India, Maganbhai v. Union of India*, AIR 1969 SC 782.

55 *Supra* note 51, at 59.

> Court should be based on the principles of complementarity, the sovereignty of States and non-intervention in the internal affairs of States, and that its statute should be such as to attract the widest support and acceptance of States, State consent being the cornerstone of the court's jurisdiction.

He also justified India's refusal to accept the Statute on the ground that special role had been given thereunder to the Security Council both to accord compulsory jurisdiction in certain cases and to require the Court to defer consideration of cases. Today, any consideration of India's arguments against the Statute must take into account the fact that the Statute is not a perfect instrument and includes "messy technical solutions, awkward formulations and difficult compromises that fully satisfied none."[56]

The Rome Statute represents a compromise which reflects the interests of States and their respective elites rather than a "universally shared conception of human dignity."[57] Thus, the Statute could not fully satisfy all States. One might argue that to some extent India's concerns about the misuse of the referral power of the Security Council or its power to defer investigation or prosecution by the Court are fully justified because it gives a special privilege to permanent members of the Council, which may not be a party to the Statute, to refer a case involving a non-party State to the Court. In this context it is pertinent to note that no permanent member of the Security Council can veto the prosecution of its nationals and only a resolution adopted under Chapter VII of the Charter can defer the investigation or prosecution of the accused for a period of twelve months. The request for such referral, however, may be renewed by the Council under the same conditions. Supporters of the Security Council's role in the exercise of the jurisdiction of the Court argue that this power already rests with the Council in any event under Chapter VII of the Charter and further the Security Council has already established itself in the field of international criminal law with its creation tribunals for the former Yugoslavia and Rwanda.[58] It should also be recognized that even when a situation is brought before the Court by the Security Council, inadmissibility of the case can still prevent the exercise of the Court's jurisdiction.

Arsanjani notes that: "Article 17 on admissibility and Article 90 on the obligation of third State regarding complying requests by the Court and by another State do not

[56] For the negotiation history of the Statute, *see* Keith-Hall, *The First and Second Sessions of the U.N. Preparatory Committee on the Establishment of an International Criminal Court*, 91 AM. J. INT'L L. 177-187 (1997). *See also* Keith-Hall, *The Third and Fourth Sessions of the U.N. Preparatory Committee on the Establishment of an International Criminal Court*, 92 AM. J. INT'L L. 124-133 (1998).

[57] Elias Davidsson, *Economic oppression as an International Wrong or as Crime against Humanity*, 23 NETH. Q. HUM. RTS., 173-207 (2005).

[58] Intervention of Security Council in International Criminal Court, LEGAL INDIA *available at* http://www.legalindia.in/intervention-of-security-council-in-international-criminal-court (last visited on Sept. 10, 2010).

accord any priority to the Court if the matter was referred to it by the Council."[59] So if a State is neither unable nor unwilling to try the perpetrators of crimes, it can successfully prevent the Court from the exercise of its jurisdiction. A finding of inability of a State to prosecute depends on the following: (a) a total collapse of the national judicial system; and (b) a substantial collapse of the national judicial system.[60] One or more of these must produce the following conditions: inability of the State to obtain an accused or key evidence and testimony or is otherwise unable to carry out its proceedings.[61]

The law relating to admissibility is thus in the process of evolution. It should also be borne in mind that the admissibility and jurisdiction of a case can be challenged by an interested State not only at the investigation stage, but even before and after the commencement of trial.[62] India's opposition to the Security Council's power of referral of a case to the ICC should also be considered from the standpoint of the effective functioning of the Court. We have seen that the ICC is not an *ex post* but *ex ante* tribunal and as such may be required to undertake investigation and prosecutorial proceedings even in the midst of an ongoing armed conflict or before an international security problems has been resolved or even manifested itself. Consequently, the situation under investigation may fall within the jurisdiction of the UN regional institutions. Judge Hans Peter Kaul notes that "good-working relationship with the United Nations is both necessary and unavoidable, considering how often the United Nations may be present in areas under investigation by the ICC and how often the information acquired through its work there may be of crucial importance."[63] Though the ICC has entered into a relationship agreement with the United Nations which provides the basis for close cooperation and consultation between them on matters of mutual interest,[64] it is neither a specialized agency of the UN, nor otherwise belongs to the 'UN Family.' As it is a permanent court designed to act independently of but in close relationship with the UN it may be in disadvantageous position *vis-à-vis* the *ad hoc* international tribunals, which are the creations of the Security Council, in respect of the assurance of the Council's backing and support.

Turning to the accusation that prosecutors have been vested with uncontrollable

59 M.H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22-28 (1999).

60 M. Arsanjani & W. M. Reisman, *The Law-in-Action of the International Criminal Court*, 99 AM. J. INT'L L. 385-387 (2005).

61 *Id.*

62 Rome Statute art. 19.

63 Hans P. Kaul, *Construction Site for More Justice: The International Criminal Court after Two Years*, 99 AM. J. INT'L L. 370-372 (2005).

64 Agreement between the International Criminal Court and the United Nations (Oct. 4, 2004), entered into force on the same day. For a discussion of a previous draft of the Relationship Agreement, *see* Dayal A. Mundis, *The Assembly of States Parties and the Institutional Framework of the International Criminal Court*, 97 AM. J. INT'L L. 132 (2003).

powers, the fact is otherwise. Under the strict system of the Rome Statute, the Prosecutor cannot start a formal investigation independently. When the Prosecutor wants to initiate an investigation on his/her own motion (*proprio motu*), he/she must first obtain authorization from the Pre-Trial Chamber.[65] It is true that the Prosecutor initiated investigations in the first two cases of Northern Uganda and Congo on the basis of State reference without the direct involvement of the Pre-Trial Chamber. At any time during investigations, however, the Court's jurisdiction could be challenged by a State or arrested person, which, if successful, would end the Prosecutor's investigation.[66] Meanwhile, to allay the apprehensions of States with regard to its proprio motu powers, the Office of the Prosecutor has indicated a clear preference for initiating investigation of alleged core crimes, wherever possible, on the basis of a referral by a State party pursuant to Article 14 or by the Security Council pursuant to Article 13(b) of the Statute.[67] It does not mean that the Prosecutor will never exercise the authority to initiate investigations *proprio motu* but the intention of the Prosecutor is to assure the international community that these powers will not be used unless absolutely necessary, *e.g.*, "where States have failed to refer an objectively serious situation."[68] This development shows that the ICC is evolving its jurisprudence very cautiously keeping in view the concerns of States parties and even non-party States. There is, in fact, a keen desire in the ICC to demonstrate that the familiar criticisms of and accusations against the Court are unfounded.[69] It is indeed a significant step directed towards promoting the universal character of the ICC and encouraging and persuading the non-party States to join the Court.

As for the argument relating to incompatibility of Article 12 of the Statute (the exercise of jurisdiction by the Court over the nationals of a non-party State when the territorial State has given its consent) with Article 34 of the Vienna Convention on the Law of Treaties(General Rule regarding Third Nations), it has been argued that this does not put a non-party State's nationals under any new obligations or greater risk of its national being tried by a foreign jurisdiction and a non-party State is not under any obligation to hand over the accused or provide any piece of evidence.[70] To say is not to deny that the provisions of Article 12 of the Statute contain fairly progressive regarding

65 Rome Statute art. 15(2).

66 *Id.* art. 18.

67 *See* Annex to the Paper on Some Policy Issues Before the Office of the Prosecutor: Referrals and Communications. 5 (April. 23, 2004), *available at* http://www.amicc.org/docs/ICC%20OTP%20Policy%20Paper%20Annex%20210404.pdf (last visited on July 4, 2010).

68 *Supra* note 63, at 374.

69 *Id.* at 380.

70 B.C. Nirmal, *Jurisdiction of the International Criminal Court*, 3 ISIL Y. B. Int'l Humanitarian & Refugee L. 122 (2003).

the relationship with not-parties States to the Statute. The denial of the right to diplomatic protection from the State of the accused under Article 12 illustrates the unusual nature of this provision. Nonetheless, a non-party State has still many means at its disposal to prevent the Court from exercising its jurisdiction over its nationals. In view of several preconditions for the exercise of jurisdiction, the principle of complementarity, rules of admissibility and other provisions for challenge to the admissibility/jurisdiction of the Courts, criticisms and accusations directed against the court by the States not joining the Court seem to be highly exaggerated and misplaced.

Even though the ICC poses minor risks for the sovereignty of the States, they are "minor to inaction in the face of genocide and crimes against humanity." Governments which are still skeptical about the ICC should therefore reconsider the issue of accepting the Rome Statute. While their support will ensure the effective functioning of the Court, they are also to be benefited from their participation in the ICC. As Arsanjani noted, "the International Criminal Court represents a major step towards the better promotion and protection of human rights, good governance and the rule of law through multilateral cooperation and support."[71] He viewed that: "Rather than a threat to any national interests, the extension of a universal system of international criminal justice could benefit the peoples in all countries and regions including Asia."[72] India should recognize that the actual implementation of international human rights law and international humanitarian law in the jurisdictions leaves much to be desired. Their decision to accept the Rome Statute will not only signify their official commitment to the Court, but also their willingness to abide by international standards of fair trial, human rights and the rule of law. To the contrary, their otherwise lukewarm approach towards the Court is likely to give some credence to the belief that their opposition is guided less by lofty considerations of principle and more by the desire to save the government officials from the criminal responsibility for gross human rights violations occurring in their countries.

India also needs to reconsider objectively its attitude towards the Rome Statute and the ICC in view of its past record on the issues of international law and human rights.[73] India is neither a super power, nor a permanent member of the Security Council whose strategic and military considerations and foreign policy compulsions come in the way of joining the Court. It does not have military bases across the globe and further its forces are deployed outside the country only as part of the UN Peace keeping operations; there are hardly any considerations of immunity of soldiers in the case of India as is the case

71 *Supra* note 59, at 56.

72 *Id.*

73 B.C. Nirmal, *The Legal Status of Refugees in India, in* INDIA AND INT'L L.175-188 (Bimal N. Patel ed., 2005).

with the United States.[74]

V. Why Should India Sign the Rome Statute?

India should sign the Rome Statute mainly because its national criminal justice system for the investigation and prosecution of genocide, war crimes and crimes against humanity is not that strong and effective. Moreover, India is a party to the Genocide Convention of 1948 and, as such, is under an obligation to enact the necessary legislation to give effect to the provisions of the Convention. The Union Government of India has a fundamental duty under Article 51(c) of the Constitution to respect international law and treaty obligations. Following Article 253 of the Constitution, the Parliament has the power to make a law on the subject. It is also to be recognized that the *jus cogens* obligations outlawing genocide and the customary international law on the subject are not only binding on India, but may also be deemed to be incorporated into the domestic law.[75] Despite that more than 56 years have passed since the date of ratification of the Convention, regrettably, no legislation has been enacted to give effect to the provisions of the Convention.

There is no specific legislation on crimes against humanity in India, although most of the conducts which have come to be recognized as war crimes under international law such as murder, torture,[76] rape[77] and sexual harassment,[78] extermination and enforced disappearance, persecution of a group are by and large covered under the existing law. Besides, many of these crimes are considered to be grave violations of the right to life and personal liberty guaranteed under Article 21 of the Indian Constitution and the victim's right to compensation[79] has been recognized by the Supreme Court and the High Courts in a number of cases.[80]

However, the crimes against humanity do not mean isolated instances of these crimes, but occur when any of the acts like murder, extermination are committed as part of a widespread or systematic attack directed against any civilian population with

74 *See generally* Hans-Peter Kaul and Claus Kress, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises*, 2 Y.B. Int'l Humanitarian L. (1999).

75 Vellore Citizens Welfare Forum Case (1996) 5 SCC 746.

76 Of Police torture as a violation of the right to life and personal liberty, *see* Raghubir Singh *v.* State of Haryana, AIR 1980 SC 1087.

77 Bodhisattava Gautam *v.* Subhra Chakraborty, AIR 1996 SC 922.

78 Vishaka *v.* State of Rajasthan, AIR 1997 SC 301.

79 Khatri *v.* State of Bihar, AIR 1981 SC 928.

80 *Supra* note 75.

knowledge of the attack. In consequence, the existing legislations are inadequate to deal with such crimes. An example is the crime of enforced disappearance which is not explicitly recognized as a crime under any of the existing legislations.[81] It is therefore argued that either a new legislation on the Prevention and Punishment of Genocide and Crimes against Humanity be enacted at the earliest available opportunity or that India should sign and ratify the Rome Statute. Two specific reasons may be given in support of this proposal. First are the virtual failures of the State machinery in dealing with what happened in Gujarat and elsewhere, earlier, (including Delhi 1857 or Bombay 1992-93). The Statement of objects and reasons of the Prevention and Punishment of Genocide and Crimes against Humanity (Draft), Bill, 2004 by Members of Citizen's Consultation notes this distressing fact: "What happened in Gujarat and in similar carnage elsewhere, earlier, were not merely a matter of law and order, each of these were all organized crimes against targeted groups, the State Governments either actively conniving with the majority group, or remaining as bystanders, resulting in a total collapse of the rule of law and the justice, system altogether." In a severe indictment of the police, public prosecutor, the trial court, the high court and the State Government in one of the carnage cases the Apex Court acknowledged that the "justice delivery system was being taken for a ride and utterly allowed to be abused, misused and mutilated by subterfuge" and warned against the hijacking of the judicial criminal administration system at the requirement of the Government.[82] The Apex Court further observed:

> Criminal trials should not be reduced to mock trials or shadow or fixed trials - Judicial Criminal Administration System must be kept clean, and beyond the reach of whimsical political will or agendas and properly insulated from discriminatory standards or yardsticks of the prohibited by the mandate of the Constitution.

To prevent the recurrence of such things in the future it is necessary that legislation on genocide and crimes against humanity is enacted by Parliament.[83]

Another reason for becoming a Party to the Rome Statute is the increasing incidence of the torture and death in custody which in turn is affecting the credibility of the rule of law and the administration of criminal justice. This is happening in disregard of the law and fundamental rights of the arrested persons and despite the grave concern expressed by the Supreme Court in respect of questionable conduct of members of the police who are supposed to be the protectors of the citizens but commit violence under the shield of

81 For the evolving jurisprudence on enforced disappearance *see* Malkait Singh v. State of U.P., AIR 1999 SC 1522.

82 Zahira Habibullah Sheikh *v.* State of Gujarat, 2004 CRIM. L. J. 2050 at 2062 (SC).

83 *Id.*

uniform and authority in the four walls of a Police Station or lock up.[84]

VI. Conclusion

From the perspective of human rights, the last decade of the twentieth century may be regarded as a turbulent period characterized by positive as well as negative developments. On the latter, the world has witnessed commission of heinous crimes without accountability. The establishment of the ICC is thus a major step in the evolution of the post-Cold War global system to bring justice to the victims of grave human rights abuses. The ICC can be regarded as changing perceptions of how the rule of law relates to larger problems of global inequality. The individual criminal responsibility in international stratum is strongly required in the neo-liberal world order in which inequalities are becoming more pervasive.[85] The Court further represents the transformation of the traditional concept of sovereignty from the Westphalia regime to that of a residuum of power, which a State possesses within the confines, laid down by international law.[86] The denial of this reality is due to an illusion of political, economic, and military hegemony of which the United States and India clearly stands accused. However, the enthusiasm of the former UN Secretary-General Mr. Kofi Annan proclaimed the ICC as a gift to future generations. It was a meaningful step towards universal human rights and the rule of law.[87]

The international community has overcome seemingly insuperable obstacles to secure a consensus on a text establishing the ICC. The tensions between sovereignty and universality that form an inevitable part of international multilateral negotiations have produced the Statute reflecting the sad reality of political compromise. The restrictive regime of State consent required to activate the Court's prosecutorial jurisdiction in most cases must be viewed against the significant progress in the course of developing the definitions of crimes. The provisions governing the Court's complementary role with domestic justice systems may also yield unforeseen benefits. By linking the Court's jurisdiction to circumstances where States are unwilling or unable to act, the Statute provides a fresh impetus for States to review the adequacy of their existing domestic

84 D.K. Basu *v.* State of West Bengal, (1997) 1 SCC 416.

85 A.C. Cutler, *Law in the Global Polity, in* Towards a Global Polity 69 (M. Ougarrd et al. eds., 2002).

86 I.A. Shearer, Starke's International Law 90-91 (11th ed. 1994).

87 Frank I. Asogwah, *An Overview of the Statute of the International Criminal Court, in* Essays in Honour of Professor C.O. Okonkwo 39 (E.S. Nwanche & F.I. Asogwah eds., 2000).

criminal enforcement mechanisms.[88] With the accomplishment of the international criminal justice by the Statute, the effectiveness of the Court in fulfilling its mandate lies largely in the international community itself. The absence of an international enforcement mechanism means that the ICC is dependent on the cooperation of States to ensure compliance with its orders.[89]

India has presented itself to the rest of the world as opposing the International Criminal Court simply because it does not want to be restrained by any external limitations on its actions.[90] The Indian objection to the ICC amounts to an utterly untenable and contemptible plea for absolutely sovereignty and for refusal of any extra-national jurisdiction even in support of genocide. But genocide and crimes against humanity are everybody's concerns encompassing the fundamental question of humanity beyond the narrow 'domestic' concerns. [91]

Core international crimes like genocide, war crimes and crimes against humanity threaten the peace, security, and well being of the world. To put an end to impunity for the perpetrators of these grave crimes and thus to contribute to the prevention of such crimes measures must be taken at the appropriate legal and administrative level. For it, international cooperation should be also enhanced. States should discharge their overriding obligations to prosecute the perpetrators of these crimes to the best of their ability by reforming and strengthening their national criminal justice systems so that there remains very little need for trial by an international tribunal whether *ad hoc* or permanent. This is indeed the very philosophy of the Rome Statue. As familiar accusations against and criticisms of the ICC are exaggerated and without any firm foundation, India needs to reconsider its position on the ICC. While it is for the Indian Government to take appropriate decision on the ratification accessories of the ICC Statute, it should be based on sound policy considerations and in conformity with India's past honorable record as a respect of international rule of law, multilateralism and its contribution to the codification and progressive development of international law.

There is an ethnocentricity, and a cynicism, that is in evidence in the response of the Indian establishment. This encourages the perception that the ICC is no more than a mere tool in the political game playing or nations. This ethnocentricity prevents the Indian establishment from acknowledging that the problem of impunity has indeed

88 T.L.II. McCormack et al, *Jurisdictional Aspects of the Rome Statute for the New International Criminal Court*, 23 MELBOURNE U. L. REV. 635-656 (1999).

89 *Id.* at 647.

90 *Id.* at 647-8.

91 P. Bidwai, *Bringing Barbarians to Book*, 19(8) FRONTLINE 26 (2002).

acquired great proportions,[92] and that the judicial process is less likely to politicize justice than victor's justice, or *post facto* criminal statutes and remedies, or the rule of might. It is, in fact, the existence of a relatively stable and strong democratic and judicial system in India that can make India's intervention in fighting impunity effective, or even possible.[93] To realize this potential, and to contribute to the establishment of peace and the reduction of the abuse of power, it is necessary to adopt a universal idiom, where it is recognized and acted upon that peace anywhere requires justice everywhere. After all, the specter of the Bosnian Genocide, Abu Ghrib and the Killings in Gujarat, continues to haunt international criminal law.

92 *Id.*

93 *Id.* at 27.