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PROSECUTING WAR CRIMES WITHOUT ICC MEMBERSHIP: A CRITICAL STUDY OF INDIA'S DOMESTIC AND INTERNATIONAL LEGAL APPROACH

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Abstract:
War is never isolated and neither are the crimes that take place as an outcome to those wars. They are considered to be an outcome of the consistent human rights abuses and the failure of state machinery at a national level in a manner that affects the justice system. The prosecution of war crimes lies heavily on the analysis of the court it is being taken up in. The Rome Statute which was introduced in July 1998 after being formulated by the Preparatory Committee, the establishment of an international criminal court was done which came into existence in the year 2002 after being ratified by sixty nation-states. The International Criminal Court has jurisdiction over four matters: crimes against humanity, war crimes, genocide and crimes of aggression. India did not ratify the statute because of reasons which will be critically analysed in this paper. India's non-membership at the ICC and the accountability gap it creates within domestic legislations which are not at par with the international treaties India is a signatory to. There will also be a critical analysis of domestic legislations along with dissecting military laws. This paper will also conduct a comparative analysis with countries that are not members to the ICC. Subsequently, there will also be a brief study about the structure, the kinds of crimes prosecuted; and why it exists as a permanent court and not as an ad-hoc tribunal as was the case in the Military Tribunals which were established in the post world-war II era along with studying what role did India play at these tribunals. The aim of this paper is to conclusively establish the reason behind the lack of accountability which exists and to also recommend necessary policy changes which will enable India to strengthen its position in the international diaspora which converges on the grounds of human rights.

Keywords: war, human rights, rome statute, tribunals, domestic laws.

I. Introduction

In the past one hundred years of existence of international relations and politics which not just affects a country domestically but also how it impacts the greater reality of the world has begun to be recognised through the impact it brings. This recognition has happened by way of building structured international organisations such as the United Nations[1], European Union[2], ASEAN[3]; military and strategic alliances such as NATO[4]. Along with international treaties and conventions such as the Geneva Convention[5] and UNICEF. Due to this development, certain obligations have also been laid down for the member states to follow; however for every right that is granted, a corresponding duty too shall arise.

This obligation is followed in terms of ensuring national peace along with international cooperation. However with the onset of wars from 1914 up until 1945, the need of the hour which arose was to build a forum for accountability with regards to the crimes

[1] U.N. Charter pmbl., June 26, 1945, 59 Stat. 1031, 3 Bevans 1153.
[2] Treaty on European Union (Maastricht Treaty), Feb. 7, 1992, 1992 O.J. (C 191) 1
[3] ASEAN Declaration (Bangkok Declaration), Aug. 8, 1967, 6 I.L.M. 1233 (1967).
[4] North Atlantic Treaty art. 1, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.
[5] Geneva Conventions of Aug. 12, 1949, 6 U.S.T. 3114–4799, 75 U.N.T.S. 31–417.

that have been committed during those specific war years. This accountability did not come into existence prior to the recognition of those acts done with a malafide intention, to specifically harm a group of people belonging to a particular race, ethnicity, colour or religion as was the case in World War II with the persecution of Jews and Polish people by the Nazi regime founded by Adolf Hitler, to name a few.

The efforts to bring about accountability in the nature of prosecution after the recognition of crimes that had happened during war times with regard to setting up and formulating a designated court or tribunal began after World War I finished. However, this attempt turned out to be frugal in the sense that the tribunals could not be set up. Consequently, no international criminal accountability was created. After World War II was over and there was an uproar about the heinous crimes which were committed in Nazi-Germany, the need for bringing justice started to rise. As a result, the International Military Tribunal at Nuremberg [6]was set up which legally speaking was an ad-hoc tribunal meaning that it was a temporary court which would punish the criminals belonging to the Axis powers who were responsible for committing crimes against peace, war crimes and crimes against humanity. This was mentioned in the Charter of the tribunal.

However, this tribunal faced serious criticisms in the sense that it was believed to be "Victor's Justice" as the foundation of this tribunal was thought of by the Allied powers and it was stated that the victors of World War II had a lot of influence on the working of this tribunal. Regardless, this tribunal found twenty-two individuals guilty out of which eleven received the death penalty and the rest were convicted. After this endorsement of justice on an international level, the need for a permanent court which would not only prosecute but also punish the individuals committing acts far beyond the ambitions of human rights arose. But, this need faced a setback due to the Cold War Era. And upon the breakdown of the USSR in 1991 and the civil wars which happened in that region, another tribunal was set up namely the International Military Tribunal at the Former Yugoslavia in 1993[7]. This tribunal indicted one-hundred-and-sixety-one individuals and convicted a staggering ninety individuals for crimes against humanity, war crimes and genocide. A year later, the International Military Tribunal at Rwanda[8] was also set up for the same crimes which convicted sixty-four individuals out of the ninety-six indicted.

After these subsequent tribunals, it was finally accepted by global powers that a permanent court needed to be established. The Preparatory Committee was set up in 1995 and the Committee introduced the Rome Statute in July of 1998. Upon its introduction, the statute was ratified by sixty-states and in the year 2002, the International Criminal Court [9]was set up. This court was not only permanent in nature but it also promised a forum for ensuring prosecution and accountability.

However, this court was deemed to be idyllic as it was not ratified by many countries due to their reasons which were accordingly raised, India happens to be one of them. The same countries which enthusiastically participated in the Prep Com, were the ones which didn't ratify the statute. Literature across many fields of study have pointed to the reasons why states did not accept the authority of the court stating that it created sovereignty and jurisdictional issues along with others which will be analysed in this paper. Further, the research tends to map out the history of the court and reasons many states do not join but what they fail to analyse or rather not inquire is the consequence which occurs domestically for the non-

[6] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 1, Aug. 8, 1945, 82 U.N.T.S. 279 (Charter of the International Military Tribunal).
[7] S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).
[8] S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).
[9] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

state parties who are otherwise at the fore-front of complying with global peace policies.

The main core of this paper is to analyse the gap which occurs between ratifying international treaties that instil human rights values and not enacting laws that favour those particular values. For India, there are constitutional provisions which allow prescriptive jurisdiction to take over and enact those laws but they are not applicable. And even if such laws, they are not enforced effectively due to social and economic systems, which again points to a gap. Researchers across various fields of study have tried to state the reasons why this non-membership occurs however in these studies, there is always a lack of an acknowledgement for an accountability gap. That even though India is party to international conventions such as CEDAW, CRC, ICCPR to name a few, there are not enough legislations to back this obligation. Some statutes do find existence but they do not find enforceability and hence the standard of obligation is not met. These statutes have been set up because the government of India has the constitutional obligation to make these legislations as per Article 51(c) and Article 253.

Further, there are certain laws that will be evaluated which find intense enforceability but the result of this comes in the form of human rights abuses which is contrary to the obligations India is required to fulfil. Simultaneously there will also be a critical analysis of the Codified laws in defining "War crimes" and "genocide" along with dissecting military laws. This paper will also conduct a comparative analysis with countries that are not members to the ICC in order to compare the reasons for these states' non-membership. The aim of this paper is to conclusively establish the reason behind the lack of accountability which exists and to also recommend necessary policy changes which will enable India to strengthen its position in the international diaspora which converges on the grounds of human rights.

II. Theoretical Framework: ICC and an analysis of India's domestic legal framework

The Rome Statute was adopted on the fifteenth day of July, 1998 and it became a law which enacted the International Criminal Court which was adopted in the year 2002 on the first day of July. The statute has thirteen parts with one-hundred-and-thirty-eight articles. The Court has international legal personality and it is an organ of any other international organisation ensuring that it functions independently. Presently, the ICC seat is at Hague, the Netherlands. It has three branches namely, Judicial, Investigatorial and Prosecutorial and Registry. Matters at this court can be brought forth in three ways- by a Party State, United Nations Security Council or the Prosecutor.

The Rome Statute has jurisdiction over four types of crimes namely, genocide, crimes against humanity, war crimes and crimes of agression as shown in Table 1. Genocide is defined under Article 6 of the statute as the intent to destroy whole or in part a national, racial, ethical or religious group. Article 7 of the statute establishes that crimes against humanity are specific acts committed as part of systematic attacks that are directed towards any civilian population with knowledge.[10] War Crimes are defined under Article 8 of the statute as grave breaches of the Geneva Convention of 1949 along with it being defined as violations of established protections of the laws of war. Crimes of aggression are an addition to Article 8 as Article 8 *bis* that states it as a person who is in a place of position indicting the military to commit acts that are violent in nature.

[10] Ray Murphy, *International Criminal Accountability and the International Criminal Court*, Irish Ctr. for Hum. Rts., Sch. of Law, Nat'l Univ. of Ireland, Galway, https://ciaotest.cc.columbia.edu/casestudy/mur01/mur01.pdf

Crime	Definition (General)	Key Elements
Genocide	Acts committed with intent to destroy a protected group	Killing, causing serious harm, preventing births
Crimes Against Humanity	Widespread or systematic attacks against civilians	Murder, torture, enslavement, persecution
War Crimes	Serious violations of international humanitarian law during armed conflict	Attacks on civilians, torture, unlawful detention
Crime of Aggression	Use of armed force against another state violating UN Charter	Planning or executing aggressive war

Table 1

As of 2025, 125 countries have ratified the Rome Statute which have been granted complete membership. There are many countries which stay out of the court such as USA, China and Pakistan; their reasons for non-membership will be studied in the future course of this paper. But most importantly, India has not yet ratified the statute and has yet to become a permanent member of the court. Although India was a very prominent member of the Prep Comm however when it came to ratifying the statute, India abstained from voting stating that there are sovereignty issues along with the lack of defining certain crimes that India regularly faces that is terrorism within the ambit of 'crimes of aggression'[11].

The main jurisprudential basis of the Rome Statute follows the concepts of universal jurisdiction and balance of state sovereignty. Universal Jurisdiction refers to the instances wherein the court can take up matters from a party state in which the domestic legal machinery has collapsed and ceases to impart justice to those who seek it. This notion does not entirely go against state sovereignty since it only occurs when there is a domestic breakdown hence the balance. Upon a deeper research, it can be found that scholars have argued incessantly on the fact that the reason behind India's non-membership is far greater than originally stated by the delegation. Primarily, India has sovereignty issues with the court's formulation. In essence, the country does not seek resolution of its domestic cases on an international level.

India has a long history of awaiting a chance to become a permanent member at the United Nations Security Council which is one of the bodies that can directly refer a matter to the ICC.[12] This referral style suggests that India wants that permanence in order to ensure that the five permanent members do not overmine their superiority and use their powers to influence major decisions. Further, India also believes that the seat secured by permanent members does not reflect the realities of the current world.

Another reason why India chooses to stay out is that of jurisdiction. India states that the doctrine of complementarity is an instance where the court will take up jurisdiction only in cases where the national legal machinery has failed and it cannot accurately or effectively impart justice to those who seek it will not work properly because on what basis can the court decide effective and non-effective. It is a promoter of the idea of "Optional Jurisdiction" wherein party-states can hand over jurisdiction if they believe the

[11] Devasheesh Bais, *India and the International Criminal Court*, FICHL Policy Brief Series No. 54 (Torkel Opsahl Acad. EPublisher 2016), https://www.toaep.org/pbs-pdf/54-bais

[12] *supra 11*

matter which is at their hands cannot be resolved by domestic legal systems.

One of the reasons why India stays out of the ICC is because it does not recognise "terrorism" as a crime of aggression and that is a problem India has faced for a very long time. Due to the lack of this recognition, India does not become a party to the statute. Further, India also wants to include nuclear weapons to the list of weapons which can be used to inflict crimes which are defined under the statute. This is also stated to be a strong reason due to which India stays out of the International Criminal Court.

Subsequently, India believes that the prosecutor has been given a lot of powers. As in its eyes, the prosecutor alone can open an investigation against any individual or a governing authority of any of its member states. Along with this objection, India also seeks recognition of terrorism as a part of 'crimes of aggression' which is an issue the country deals with regularly. India believes in the deterrence policy of nuclear weapons and forwards the opinion that the use of nuclear weapons be included in the definition of war crimes.

The reasons behind India's non-membership of the ICC have been critiqued by many scholars and political analysts.[13] They put forth the argument India stays out due to sovereignty and jurisdictional issues. However, these issues, according to the researchers, are meagre issues which can be resolved upon the study of the Rome Statute in itself and further ensuring that the ICC will not override its authority to prosecute any individual belonging to any member-party at its beck and call. India also stays out due to the powers granted to the prosecutor which are not based on the Statute as the Prosecutor has to comply with the rules and inform the government of that particular country that they will be opening an investigation against one of their countrymen. Similar is the issue of UNSC bringing matters to the ICC, in reality, that power of referral is not granted by the Rome Statute specifically, however, the UN Charter grants this power which again proves to be a reason for India to abstain itself from joining the ICC.

But the real contrast can be seen when noticing that India has had many international disputes that have occurred over the course of many years. These issues have mainly been border disputes, water disputes and terrorism; and the resolution of these issues has been found by way of arbitration at the Permanent Court of Arbitration. [14] This promotes the idea that the country not only focuses on resolution of disputes on a rule-based framework as seen in the Indus Water Treaty Dispute but also in a manner that will protect the countrymen as was seen in the Kulbhushan Jadhav Case[15] wherein even though courts in Pakistan had passed a death penalty, India seeked a stay of that order on grounds of human rights at the Court's seat at Hague.

After a few years of attaining independence, India adopted the Constitution[16] in the year 1950. Under the ambit of constitutional law, this book is considered to be grund norm. Essentially, the constitution will grant fundamental rights in Part III, to all its citizens and it also laid down the Directive Principles of State Policy in Part IV, which are not enforceable in nature but are to be followed as established principles in order to build a socially and politically sensible society. India is also signatory to many international conventions and treaties which follow the agendas of protection against violation of human rights, protection of women and children to name a few. Subsequently, these laws create multiple obligations for India to fulfil in the sense that in order to ensure global peace

[13] Sanjay Gupta, *India and the International Criminal Court*, Dep't of Pol. Sci., Univ. of Lucknow, https://www.lkouniv.ac.in/site/writereaddata/siteContent/20200325132442966 8sanjay_gupta_criminal_court.pdf

[14] Convention for the Pacific Settlement of International Disputes arts. 20–29, July 29, 1899, 32 Stat. 1779.

[15] Jadhav (India v. Pakistan), Judgment, 2019 I.C.J. Rep. 418 (July 17).

[16] India Const.

and cooperation, the country will domesticate laws that fulfil these obligations. This argument is furthered by Article 51(c) of the Indian Constitution which states that the country has to have respect for all the obligations which arise out of India being a signatory to the international conventions and treaties. Under article 253 it is mandated that the Parliament of the country has to enact laws and ensure effective implementation with regards to the obligations.

As a result of these constitutional obligations, India has enacted certain laws to fulfil the role of those treaties. The Protection of Women Against Domestic Violence Act, 2005 was established to protect women as India is signatory to Convention on the Elimination of all forms of Discrimination Against Women, 1979[17]; further, India is signatory to the Child Rights Convention[18] as a result of which the Juvenile Justice Act, 2015 was enacted. And CEDAW was cited during the passing of the judgement in the Vishakha vs State of Rajasthan[19]. But even though India has enacted these laws they somehow face enforceability issues. And although India is fulfilling the global cooperation, these laws still result in cases wherein adequate protection is not granted. For instance, even though India is committed to ending all forms of violence against women cases such as Mukesh & Anr. Vs State of Delhi (NCT)[20] and children are exposed to child trafficking and bonded labor which again brings the researchers attention to an accountability gap which these domestic legislations create.

Further, in codified criminal laws such Bhartiya Nyay Sanhita, 2023[21] (Indian Penal Code, 1860) there is no adequate definition to be found for crimes that international standards demand India to incorporate in its legislations such as ‘war crimes’, ‘crimes against humanity’, ‘genocide’ and ‘crimes of aggression’. The only provisions which find sustenance are mentioned in Chapter VII which deals with offenses against the state (IPC Chapter VI), Chapter VIII which deals with offences relating to army, navy and air force (IPC Chapter VI) and Chapter XI which deals with offences against public tranquility. Further, sedition laws that were deeply ingrained in the legal framework of Indian Penal Code have been successfully removed and replaced by offenses that would harm the integrity, sovereignty and the fraternity of the nation. These provisions are not enough to substantiate these international obligations.[22]

However, to what length does India go to protect the people in places and positions of authority? The main root-cause of India’s non-membership is the protection it wants to grant to the military and army officials. In order to make sure that these important figures do not face prosecution for the alleged crimes they commit domestically. A propelling argument that this author puts forth is the consistent human rights abuses that have taken place domestically in India at the hands of its military officials. In the 1950s there was an uproar in the Naga region of North-Eastern India as a result of which there were increased isolated incidents of insurgency. This created a threat to the new-found national integrity of the country. In the year 1958 the Armed Forces (Special Powers) Act[23] was passed which granted the army or more specifically the Assam Rifles Regiment intense powers. These powers primarily came by distinguishing that region as a "disturbed area” which was defined under section three of the Act. It also

[17] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.
[18] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.
[19] *Vishaka v. State of Rajasthan,* (1997) 6 S.C.C. 241 (India).
[20] *Mukesh & Anr v. State (NCT of Delhi)*, (2017) 6 S.C.C. 1 (India).
[21] Bharatiya Nyaya Sanhita, No. 45 of 2023, India Code (2023)
[22] *Offences Against the State*, 8 Int’l J. L. Mgmt. & Hum. 19–26 (2025), https://www.ijlmh.com/wp-content/uploads/Offences-against-the-State.pdf
[23] Armed Forces (Special Powers) Act, No. 28 of 1958, India Code (1958).

allowed military officials to open investigations against anyone they deemed to be an insurgent.

Further, the 1970s saw a hike in militant activities in the Jammu & Kashmir region of Northern India. As a result, as per the definition given under section 3 of Armed Forces Act, 1958[24]. The region was now a "disturbed area" and the army was given a lot of powers to curb the issues which they believed arose as an outcome of militancy. However, there were discrepancies in the definition of "disturbed areas" as a region could be deemed so according to the government and in later amendments it was enforced that there would be a six-month review to consider the status of disturbances in the region.

Over the course of the decades the Armed Forces Act, 1958 (FT) has found enforcement in the "disturbed regions" there have been a number of reports that have come forth claiming that the army officials have misused their powers and violated the military codes of conduct[25]. These reports claim that there have been heinous crimes which were committed that crossed all boundaries of human rights. For example, the Manipur Extrajudicial Killings[26] wherein a large number of custodial deaths have occured by way of torture that was inflicted upon innocent civilians at the hands of military officials. Another example is that of the Pathribal Killings wherein five innocent villagers were killed in a fake encounter because the army officials believed, without any proper investigations, that they were responsible for the killing of two- army officials the day prior to the killings. However, the system has still yet to impart justice as the Armed Forces Act, 1958 grants protection to such military acts that were committed and are still being committed yet they remain under reported or buried in between files.

Moreover, along with the Armed Forces Act, 1958; Unlawful Acts Prevention Act, 1967[27] has also found enforceability to counter terrorism in the country. However, the reality of the implications of this act are similar to the Armed Forces Act as UAPA too gives the central government a lot of arbitrary powers to prosecute any civilian they have suspicion over. According to section 35 (2) of this Act, the central government can deem any civilian to be a terrorist and they can be added into the list of terrorists that are active in the country. Further they can be arrested at the will of officials without the remedy of judicial appeal for over two years at length. Even if the alleged accused is granted eventual acquittal this act ensures that the procedural standards punish them extensively. As a result, this act too seems to be extremely harsh and tends to blur the lines between moral right and social right. There were concerns raised about the legality of this Act, as a result of which two other laws were introduced, Terrorist and Disruptive Activities (Prevention) Act and Prevention of Terrorism Act, 2002 which turned out to be harsher than the original legislation. As a result of which, the two acts were repealed. However, by way of amendments in the Unlawful Acts Prevention Act, 1967 the core aspects of the two repealed acts were adopted.

When it comes to the procedural standards, the primary question raised is in sections 35 (2)[28] as described above and section 51[29] which allows the government or the investigative agency to control the funds of the alleged accused that can ultimately destroy the lives of the individual as well as the family

[24] Armed Forces (Special Powers) Act, No. 28 of 1958, § 3, India Code (1958).
[25] Amnesty International, *India: Briefing on the Armed Forces (Special Powers) Act, 1958*, AI Index: ASA 20/025/2005 (2005), https://www.amnesty.org/ar/wp-content/uploads/2021/08/asa200252005en.pdf
[26] *Extra Judicial Execution Victim Families Ass'n (EEVFAM) v. Union of India,* (2016) 14 S.C.C. 536 (India).
[27] Unlawful Activities (Prevention) Act, No. 37 of 1967, India Code (1967).
[28] Unlawful Activities (Prevention) Act, No. 37 of 1967, § 35(2), India Code (1967).
[29] Unlawful Activities (Prevention) Act, No. 37 of 1967, § 51, India Code (1967).

on mere suspicion. The standards of arrest as laid down in the landmark judgement by the Hon'ble Supreme Court in the case of D.K. Basu Vs State of West Bengal[30], are not followed as one of the major guidelines is that the accused has to be presented before the magistrate within twenty-four hours of arrest to either grant bail or to increase the time of judicial custody which is normally 90 days; however through this act, the judicial custody begins at 180 days. Similarly, judicial precedents have not been given importance while drafting this legislation as the concept of "presumption of innocence" which was given in the case of Babu Vs State of Kerala[31] has been reversed. India is a signatory to the International Convention on Civil and Political Rights under which article 9 of the convention states that protection is to be granted against arbitrary arrest, however through enforceability of this act it is seen that this obligation is not followed. And hence it stands undermined which then creates an accountability gap. Further in this act, no adequate compensation is granted after acquittal (if it happens) and the civilian who has faced prosecution cannot open an investigation against any member of the government or any army official.

Leading the argument back to the non-membership, India has not yet ratified the ICC's Rome Statute, however, after a thorough analysis of domestic and theoretical frameworks it can be concluded that it has done so to grant protection to the officials who are violating international human rights standards. Although, army, navy and air-force acts do exist and the concept of court martials is there; however statutory protection enables no investigation to be opened and even if it is opened, as per the laws of the military, the central government has to give ascent for that case to be taken up which hardly happens and that procedure is tedious and outside the scope of this research. The domestic legal frameworks in India do not adequately define what war crimes are. The concept of genocide is often minimised by defining it in terms of 'mass-killings'. Crimes against humanity are considered to be important but no domestic legislation exists to enforce it. The current framework does not ensure that these crimes are not only being not committed but also they are not being committed in places which are not actively in war.

India has long been at the forefront of ensuring global peace and cooperation. The country has taken part in peacekeeping missions which were commissioned by the United Nations and a former Secretary-General of the United Nations has stated that India is very eloquent in its furtherance of its global peacekeeping mission. However, when the country abstained from ratifying the Rome Statute by stating its reasons, a number of delegations raised the question that "What will we tell the people of Burundi? That a court could not be established because India was too fixated on nuclear weapons?"[32]. This non-membership creates a system which favours the military officials and establishes the picture of India as fulfilling international obligations while the domestic realities are something else entirely.

III. India's International Obligations

India is bound by foundational treaties that deal with international humanitarian law. This is to show that India has successfully signed a number of treaties and ratified a number of conventions which focus on aiding the promotion of human rights, ensuring that access to justice is granted to all those who seek it; further placing the signatory country, in this case India, in a forum of accountability that can be taken. These treaties ensure that the international obligations which arise as an outcome are being fulfilled and there is subsequent respect for those conventions. Some of

[30] *D.K. Basu v. State of West Bengal,* (1997) 1 S.C.C. 416 (India).
[31] *Babu v. State of Kerala,* (2010) 9 S.C.C. 189 (India).
[32] Sanjay Gupta, *India and the International Criminal Court*, Dep't of Pol. Sci., Univ. of Lucknow, https://www.lkouniv.ac.in/site/writereaddata/siteContent/20200325132442966 8sanjay_gupta_criminal_court.pdf

the treaties which are discussed in this paper are mentioned in Table 2.

Treaty	Year of Ratification	Key Focus
International Covenant on Civil and Political Rights	1979	Protection of civil and political rights
Convention on the Elimination of All Forms of Discrimination Against Women	1993	Gender equality and protection of women
Convention on the Rights of the Child	1992	Protection of children's rights
Geneva Conventions	1950	Rules governing armed conflict

Table 2

India is a signatory to the Geneva Conventions of 1949. The historical background of these conventions lie in the idea that when an open armed conflict occurs in any places the rules of war which would be established by these conventions shall not be broken and if they are broken, accountability will be taken for the grave breaches of these laws. *Jus ad bellum* refers to the right to war, however as established by many scholars of political research that with every right comes a corresponding duty; with this right to war comes *Jus in Bello* which refers to the conduct during war. Going back to the Geneva Conventions which lay down certain rules governing the conduct of armed conflict and protection of civilians, the conduct to be followed when dealing with prisoners of war, and wounded combatants.

In the year 1950, India ratified four Geneva Conventions. These conventions placed an obligation upon the ratifying states to prevent any grave breaches and if the breaches occur, there should be adequate punishment imparted on the perpetrator. These conventions require states to enact a domestic legislative framework which is capable of prosecuting such violations. These obligations tend to exist independent of the ICC membership since the conventions and the Rome Statute are separate entities instilling different obligations with the same goals. Along with the Geneva Conventions, there exist two Additional Protocols of 1977. Additional Protocol I in its scope is applied to international conflicts which include wars for national liberation and its key focus remains on strengthening protections for civilians, sick, wounded and shipwrecked personnel. This protocol was set up to ensure that civilians or civilian objects are not targeted and grants special protections for children, ensures that weapons which cause unnecessary suffering are used restrictively. It is binding on 174 states. Additional Protocol II is applied to armed conflicts between state armed forces and organised armed groups within a state; namely in the face of civil war. This protocol prohibits terrorism, acts of violence to spread terror, slavery, hostage-taking, and the forced movement of civilians. This protocol is binding on 169 states.

However, international criminal responsibility is not limited to the laws that are an outcome of treaty law. International Customary Law plays an important role too in recognising basic crimes which are against those set standards. For instance, genocide, war crimes and crimes against humanity are recognised are part of customary international law which develops from the customs that are existing in a particular country through consistent state practice and they are also accompanied by *opinio juris* meaning legal obligation. This argument is integral to the research in the sense that even though there are certain states that have not ratified the Rome Statute of the International Criminal Court, there is still an expectation and obligation placed upon them to have respect for the basic norms of international criminal law. It is important to note that absence of

membership, for instance that of India, from the International Criminal Court does not explicitly exempt a state from the duty to prevent or prosecute grave violations of humanitarian law which creates an eventual accountability gap as an outcome. These absences do not give countries an open ground to commit more heinous crimes if they happen. The questions about the universal jurisdiction of the court can be understood by way of looking at the judicial machinery of the country of Syria wherein the court system collapsed and the country people looked upon the International Criminal Court to lead the justice system. Although the state of India has consistently maintained that it does not prefer its domestic cases being discussed on an international forum.

However, this is not to say that India is opposed to international criminal accountability in principle. There have been various instances wherein India supported the mechanisms used to further international justice and bring accountability to all those who had wronged their country people. As an aftermath of Rwandan Genocide, an-hoc tribunal was established which was the International Criminal Tribunal for Rwanda in 1994; in this instance, India supported the global efforts to prosecute the individuals who were responsible for committing genocide and also crimes against humanity in this conflict. Similarly, in the year 1993, the international tribunal which was established after the Yugoslav Wars created space for the establishment of the International Criminal Tribunal for the former Yugoslavia which was supported by India by way of sending judges from the country. Prior to these tribunals, the infamous Military Tribunal at Nuremberg was set up to convict the Nazi officials; however, the foundation of that tribunal was critiqued as discussed in the paper earlier. These ad-hoc tribunals are very integral to the international diaspora which has eventually shaped modern criminal justice. These examples are excellent to showcase the facts that India has historically supported international criminal accountability which has been set up to grant justice to those who seek it.

India is also signatory to conventions such as Convention on the Elimination of All forms of Discrimination against Women and Child Rights Conventions along with many others. These treaties and conventions find applicability in the country through various domestic legislations enacted and also by way of mentioning these conventions when setting judicial precedents. However the enforceability of these laws finds a lack of sustenance in the country as there are multiple forms of violence against women which still happens and also the violence against people with disabilities although there is a domestic legislation to protect their rights and interests while also a convention on an international level to which India is a signatory to. Further, India also consistently finds itself engaging UN peacekeeping missions across regions that require assistance and has been appreciated by many delegations.

Along with these international obligations, India also engages with the United Nations Human Rights Council consistently and at various times during the course of the years as they pass by. India regularly takes part in the Universal Periodic Review (UPR) process which is briefly done after four-and-a-half-years to measure the human rights records of the 193 member states. Further, India ensures that the United Nations Human Rights Council is kept reported upon the domestic compliance with the international human rights obligations. India also engages with special rapporteurs at the United Nations and also in human rights monitoring mechanisms. As mentioned India is signatory to many international conventions and treaties which create obligations that intersect with international humanitarian and criminal law principles.

The argument which the researcher would like to bring to the forefront is that despite the active participation of India in international humanitarian and human rights frameworks, the domestic legal system does not fully comply nor codify international crimes such as war crimes and crimes against humanity. These crimes should be part of India's domestic legal frameworks because of the fact that even though India

is not signatory to the court which prosecutes these crimes; it is a party to the conventions and treaties which define these crimes hence creating an obligation. Upon the study of domestic frameworks in the previous section of this paper, it can be concluded that there is also an absence that can be seen when it comes to comprehensive legislations which define war crimes. There is a reliance on general criminal provisions which are the codified criminal laws. Indian lawmakers have maintained on several occasions that there is no need for specific provisions defining these crimes which has raised questions as to whether India maintains this position to protect its military officials. Further, there are also many procedural barriers that are in place in order to prosecute the specific state actors present in conflict regions. There is an overall limited domestication of international criminal law into the statutes of the country.

India has maintained that it follows a rule-based method of dispute resolution and wants to regularly comply with the obligations which are created as a result of India's participation in a convention.[33] However, with the absence of its membership, this raises questions regarding the reasons behind which were analysed prior but also how it creates a barrier between bringing accountability to those individuals who have been wronged by the system and want to seek justice. The protection granted to the country's military officials is not only done domestically but rather also done internationally wherein Indian military officials cannot be prosecuted for the acts they commit on foreign soil as part of the outcome it creates due to the non-membership. The method of functioning creates a heavy structural tension between the commitments India has internationally and the capacity of its domestic legal framework to fully implement those obligations. In the next section of this paper, there will be a detailed study of the reasons why countries such as the USA, Pakistan and China have maintained the position of staying out of the International Criminal Court without ratifying the Rome Statute. It will be analysed whether these countries stay out of the court because of similar reasons to India or because of some other reasons or they tend to stay out to protect its military officials. These reasons will be considered and drawn out to compare along with analyzing what all can India adopt from these countries with regards to the methods of prosecuting war crimes in open armed conflict or in peaceful regions too.

IV. A Comparative Study

This chapter of the paper will focus on conducting a comparative analysis of the countries that are not party to the Rome Statute and the International Criminal Court along with one country that has ratified the statute. This analysis will be of the reasons for their non-membership or their membership, the similarities in concerns that India has, along with the lessons India can learn with regard to the domestication of legislations that prosecute the crimes within the country that are also dealt with in the International Criminal Court. The comparative analysis will be of the following countries: USA, Pakistan, China, Bangladesh and Russia.

USA

The United States of America is one of the most powerful countries of the world and is home to a very diverse group of people who come from different heritages and lineages throughout the world. It is deemed to be a developed country and has retained a permanent seat at the United Nations Security Council since its inception in 1945. The United States is considered to be one of the most prominent non-members of the International Criminal Court which was established under the Rome Statute.

[33] Dhruv Jayeshkumar Trivedi & Priyanshi Gupta, *An Analytical Study on the Role of International Courts and Tribunals in Peaceful Resolution of India's Inter-State Disputes*, 8 Int'l J. L. Mgmt. & Hum. 3549 (2025), https://www.ijlmh.com/wp-content/uploads/An-Analytical-Study-on-the-Role-of-International-Courts-and-Tribunals-in-Peaceful-Resolution-of-Indias-Inter-State-Disputes.pdf

The United States of America had initially signed the Rome Statute in 2000 under the Clinton Administration but that signature was later nullified by the Bush Administration. Under the Obama Administration, this signature remained nullified although there were certain speculations that the States was going to enter the Court; however, after many years, the country still remains out of the statute.[34]The reasons for non-membership are very similar to that of India. It is stated that the country wants to protect the national sovereignty it has developed. Further, there is an open fear in the minds of the administrative agencies that if membership is procured, there will be a constant prosecution threat of U.S. military personnel that are stationed abroad.

Similar to India, the United States of America maintains a preference for domestic prosecution mechanisms and states that their national courts should have primary jurisdiction over crimes of an international nature that are committed by or involve its nationals.

Even though the United States of America is a non-member of the Rome Statute and has not joined the International Criminal Court, it has enacted several domestic statutes which criminalize international crimes. This is not surprising since the country is a member-party to major humanitarian conventions that have been accepted in the last few decades. Primarily, there is the War Crimes Act which was passed in the year 1996 (FT) which penalises grave breaches of the Geneva Conventions of 1949. There is the Genocide Convention Implementation Act (Proxmire Act) (FT) which implemented the obligations mandated under the Convention on the Prevention and Punishment of the Crime of Genocide. The Torture Act of 1994 (FT) further criminalizes any acts of torture committed by nationals of the United States anywhere abroad.

This analysis of statutes shows that even if a country has no membership of the International Criminal Court, it can still prosecute international crimes domestically. This is a lesson for India in the sense that if there is adequate definition and understanding of international crimes, then those crimes can be prosecuted nationally without the interference of international organisations. The U.S. model shows the implementation of international treaties through domestic statutory framework.

China

The People's Republic of China stands as one of the most intense global powers of the world and it is home to many inventions of daily life which we don't give it enough credit for due to its East-Asian geography. The country is developed and has achieved exponential growth rates in the past few decades. Regardless, it stood as one of the Victor's of the second world war and as a result, it holds a very strong permanent position at the United Nations Security Council which it has continued to hold since the Council's inception in 1945. China is also one of the prominent nations that has not ratified the Rome Statute of the International Criminal Court.

The country has from the very beginning opposed the establishment of the Court. One of the major reasons why is that the country of China prefers to maintain sovereignty of its machinery and explicitly does not want any kind of interference of international organizations in its domestic conflicts which is a position that is very similar to that of India. The Chinese government is a fortress. Its main goal is to protect the internal matters in order for them to not be discussed on an international forum which is a position similar to that of India[35]. Another important

[34] Leila Nadya Sadat & Mark A. Drumbl, *The United States and the International Criminal Court: A Complicated, Uneasy, Yet at Times Engaging Relationship*, Wash. Univ. in St. Louis Legal Stud. Research Paper Series (2016), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1504&context=wlufac

[35] Amnesty International, *India: "Justice, the Victim" – Criminal Justice and Human Rights Violations in India*, AI Index: ASA 17/023/2007

reason for its non-membership is that China is opposed to the prosecutorial powers which can be extended to non-member states meaning that any non-member state could also be prosecuted if the case of that country is brought forth by the Prosecutor of the International Criminal Court or the UNSC. Further, China has also stated concerns regarding the crimes of aggression provisions that are there in the Rome Statute. The country focuses on an extremely outwardly approach to the prosecution of international crimes, that is to say that without the membership, the country does not fail to prosecute these crimes. The Chinese government has historically preferred that international criminal jurisdiction shall remain state-controlled rather than supranational which is a position similar to India's.

China has incorporated certain international crimes within its domestic criminal law framework which particularly relate to war crimes, protection of civilians in armed conflicts and violations committed by military personnel which are mentioned in the Criminal Law of the People's Republic of China. This statute postulates that the country has to have domestic frameworks which fulfil the international obligations that the country has as it is a signatory to the international conventions. One important lesson for India that can be learnt by analysing the laws and frameworks of China is that international crimes can still be prosecuted if they are codified. This enforcement strengthens accountability without necessarily surrendering jurisdiction to an international court which does not fill the obligations of the countries entirely. Further, this methodology ensures that there is no critique of the position that China holds in the international diaspora. Further enunciating the fact that China is indeed committed to the prosecution of these crimes without attaining membership of the International Criminal Court.

Pakistan

The Islamic Republic of Pakistan is a country that is home to people who have a lot of ambition but are repeatedly failed by their governments. The country is known for its diverse culture and also the hospitable nature of its citizens. But what it is also known for is the failed system of governance, with a leader that died too early after achieving independent statehood. Pakistan now finds itself standing at a crossroad of two futures- one which will take it on a road of development and one which will completely dismantle the current systems that are governing the different sectors of the state machinery.

Pakistan is also not a member of the International Criminal Court. The reasons behind its non-membership are extremely similar to that of India. They are jurisdictional issues, sovereignty issues, the express powers given to the Prosecutor of the court along with the external influence and interference in conflicts that occur in the country domestically. However, another interesting reason stated by Pakistan for its non-membership is that of the lack of "Head of State impunity" which states that the head of state should have protection granted on an international level and that any state-party cannot open investigation against the head of the state[36]. This reason was further solidified after the international condemnation of Sudan's President Omar-al-Bashir who was arrested after facing suspicion for committing crimes against humanity, war crimes and genocide in his country. Pakistan vehemently opposed this arrest which further stopped the country from taking membership of the court.

Like India, Pakistan does not have any comprehensive legislation or a domestic framework which recognises or defines the international crimes although it is a

(2007), https://www.amnesty.org/ar/wp-content/uploads/2021/07/asa170232007en.pdf

[36] Naveed-ur-Rehman, Amir Mahmood Chaudhry & Farooq Umair Niazi, *Pakistan's Reservations on the Rome Statute: A Critical Analysis from Legal and Political Perspectives*, 6 Res. J. for Societal Issues 592 (2024), https://www.researchgate.net/publication/382568064_Pakistan%27s_Reservations_on_The_Rome_Statute_A_Critical_Analysis_from_Legal_and_Political_Perspectives

signatory to the Geneva Convention. This goes to show that the obligations of the country are not being fulfilled. The country of Pakistan has expressed on multiple occasions that it opposes the idea of universal jurisdiction. However, the country generally relies on military courts and domestic criminal legislations to prosecute offenses related to only armed conflict and terrorism. The country lacks statutes which define war crimes and genocide along with crimes against humanity but have provisions related to crimes of aggression. India too has provisions related to that crime but terrorism as a crime of aggression has not been recognised internationally in the statute which punishes these crimes.

Bangladesh & Russia

The country of Bangladesh has had a very interesting history and present. Earlier the country was deemed to be the Eastern counterpart of Pakistan after 1947 and later gained statehood independent of Pakistan in 1971. Now, the country is being run by leaders who want the best for their country men. Bangladesh is one of the nineteen countries in the Asian-Pacific that are part of the International Criminal Court. The country ratified the statute on the 23rd day of March, 2010.

Bangladesh provides an interesting example because it established a domestic tribunal to prosecute international crimes committed during the country's war of liberation in the year 1971. This resulted in the creation of the International Criminal Tribunal at Bangladesh which was established in the year 2010 right around the time the country ratified the Rome Statute. This tribunal prosecuted international crimes. Further, the ICC practises Universal Jurisdiction over the country's legal machinery as it has taken up the matter of the persecution of Rohingya Muslims in the year 2019 and opened an investigation.

The Russian Federation, once the center of power in the former USSR, signed but never ratified the Rome Statute but later withdrew its signature in 2016. Russia has expressed concerns regarding the non-membership in the ICC stating that it may be politically influenced, and the court could interfere with national sovereignty which is a stance similar to that of India and it may exercise its jurisdiction over the actions taken by its armed forces in foreign countries.

Even without the membership, the Russian Federation ensures that its domestic laws punish the international crimes of genocide and war crimes as provided under the Criminal Code of the Russian Federation. Genocide is criminalised under Article 357 and war crimes are criminalised under Article 356 of the Criminal Code. Crimes against humanity are not explicitly defined or named in any chapter however its ambit is covered under Article 356. However, Russia has taken an extreme position wherein the country since 2023 has criminalised any entity or individual which may aid in the implementation of any decision passed by the International Court and this act is punishable by upto five years in prisons. The country also does not recognise the jurisdiction of the court over the atrocities committed in Ukraine.

The Bangladeshi Model can inspire India to establish specialised domestic courts and accompanying statutory frameworks in the country in order to prosecute these crimes. Further the Russian example again puts forth the argument that domestic incorporation of defining and prosecuting international crimes is possible without the membership of the ICC.

This detailed comparative analysis has shown that even if there is no membership towards the Court, it can still lead to the drafting and implementing of certain legislations that criminalise the perpetrators who are committing said crimes and how these countries have a strong military justice machinery. Further, this analysis aligns with the idea India has been setting forward of "optional jurisdiction" wherein states give preference to national courts and the jurisdiction they exercise over international courts. Although, like India, Pakistan does not have any established domestic frameworks which prosecutes or defines these crimes, the analysis showed that the reasons for the country's non-membership are similar

to that of India. Hence, a comparative analysis has shown that the gaps which occur in India due to lack of accountability can be resolved if strong legislations and oversight reforms are enforced in order to ensure that justice is being brought to the victims of these crimes.

V. Challenges and Recommendations

In this section, the researcher will delve deeper into the challenges that this non-membership brings for India and possible policy recommendations to strengthen the barrier between international obligations and domestic legal frameworks.

Challenges

1) Political Sensitivities in Regions of Conflicts: One of the primary challenges that India faces in incorporating international human rights obligations into domestic legal frameworks is the instability which arises in the North-Eastern Region and Jammu & Kashmir which have historically faced incidents of insurgency and militancy. This has led the country to prioritize national security and territorial integrity instead of instating expansive machineries that fulfil the role of accountability. In this context, the government often puts forth the argument that the operational effectiveness of the security forces can be compromised if international criminal law standards were rigidly imposed. This tension has influenced India's cautious approach to ratifying the Rome Statute significantly. Politics of the country also have an impact on the considerations relating to balancing international obligations and enforcing domestic legal frameworks which match those standards.

2) AFSPA and the Question of Command Responsibility: A major source of controversy in the legal system of India is the application of the Armed Forces (Special Powers) Act, 1958 which gives an intense form of powers to the army and military officials. This act was enacted to curb the growing situation of militancy and insurgency in the "disturbed regions" of the country. However, this was only theoretical as the implications of this act were far worse. The act gave army officials to arrest, detain, and conduct searches in a manner that would incorporate the use of lethal force. Under this act, the military officials are granted protection from prosecution as the complainant would have to gather sanctions which is essentially permission from the central government in order to take action against the officers who violated the code of conduct. Further, the lack of implementation of the doctrine of Command Responsibility wherein the superior officer has to take responsibility for the actions done by their subordinates also promotes the idea of a lack of accountability. This gap contributes to the broader debate on whether the domestic frameworks of India do sufficiently align with the ever evolving standards of international humanitarian law.

3) Absence of dedicated War Crimes legislations: Another challenge lies in the absence of dedicated legislations that not only define the said crimes but also criminalize them. While there are certain provisions which do exist within the IPC which is not replaced by BNS,2023 to prosecute offences which are against the state, against public tranquility or related to military officials, there is a consistent lack for penalising crimes against humanity, genocide, war crimes and crimes of aggression. This absence makes it particularly difficult to prosecute violations that arise in the context of armed conflicts or widespread attacks against the civilian populations. As a result, the crimes which may actually be international crimes and are to be prosecuted as such are prosecuted under general criminal provisions. This lack also creates an accountability gap within the system.

4) Diplomatic Concerns Regarding ICC Jurisdiction: Finally, the diplomatic considerations of India's very cautious stance

towards not joining the ICC could also affect the system. Even though India is not a party, that does not mean that there is everlasting protection which shall be granted to the military officials. Since India has an outward policy in the global arena for peacekeeping, this could become a problem as the ICC could exercise its universal jurisdiction if there are allegations that Indian military officials have committed said crimes which would then lead to prosecution of those individuals. Such jurisdictional discrepancies contribute towards India's reservations to joining the ICC.

These are some of the challenges that are discussed intensely by scholars and policymakers who consistently suggest that without robust domestic legal safeguards and clear boundaries of jurisdiction, membership of the ICC could create legal and diplomatic complications for the country.

Recommendations

1) Enact a domestic War Crimes Act: This recommendation goes as far to suggest that in India there needs to be specific legislations that counter war crimes that may be occurring within the conflict zones and against civilians at the hands of military personnels. This is not to suggest that the country's interest in national sovereignty needs to be undermined but rather implemented in a manner that does not violate the humanitarian code of conduct established as an outcome of India being signatory to these conventions.

2) Increase military justice: When certain acts committed by the military as was seen in the case of Manipur's Extrajudicial Killings or in the Pathribal killings, it was brought to the researcher's notice that they undermined the basic human rights which are granted to every citizen by way of the Constitution as well as the conventions India is signatory to. As a result, these acts should be punished by ensuring an increment in imparting military justice. There are specific military laws but their procedural standards grant protection which should be amended in order to increase accountability and bridge the gap.

3) Limited Jurisdiction: When such crimes are committed, India should ensure by way of granting limited jurisdiction to help prosecute these crimes in order to ensure that accountability and justice is brought to the victims. There should also be an improvement in the training procedures for the army officials in order to make sure that their code of conduct remains intact.

4) Increasing cooperation with ICC/UN bodies without formal membership: This recommendation is given so that the governing authorities can increase their cooperation with international organizations so that the reasons why India stays out of these organisations can be understood on a deeper, core international level. India, like the United States of America, can become an observer state and only delegate upon joining when those concerns have been resolved.

These are some of the recommendations which can help enhance the domestic and international framework of India's participation in the fulfilment of global peacekeeping and humanitarian standards. Some of the recommendations have been set up in a tabular format for the benefit of the reader in Table 3.

Model	Description	Example States
ICC Membership Model	States prosecute international crimes through ICC jurisdiction	Many EU states
Domestic Substitution Model	States incorporate international crimes in domestic law	United States
Hybrid Tribunal Model	Special tribunals prosecute international crimes domestically	Bangladesh
Limited Accountability Model	No ICC membership and weak domestic codification	India

Table 3

India has never been against the position of ensuring peace on an international level. However, with the concerns the country has raised on multiple grounds need to find resolution. There are some conflicting regions of the country which showcase the re-institution of the faith of the civilians in the democratic policies of the government which goes so far as to show that if these challenges are overcome and the recommendations are implemented in the policy-making structure a lot of internal concerns can be resolved which can then lead to India maintaining a positive stance on the International Criminal Court.

VI. Conclusion

In order to conclude this study, the researcher has to go back to the main aspect of this study which was to figure out how India reconciles its domestic legal framework with the international humanitarian obligations more. During the course of this research, it was found that various scholars and policy-makers indeed laid down the treaties and conventions which raise an obligation for India to follow and in the same lines, they also laid down criticisms that critique the current legislative framework. This lack of acknowledgement of real problems that burden India's diplomatic stance create an accountability gap which was the core of this study. The researcher analyses this gap in the sense that India wants to protect its military individuals along with the individuals who are in places of power; as a result to ensure they escape prosecution, India has not become a member of the ICC. Further, due to this non-membership, there are a number of internal problems which have been created that were discussed in this paper.

Through this research, the aim has been to figure out a way through which this so-called gap can be fulfilled. And after critiquing and analysing the position of India, it is safe to say that the primary goal of India should be to make sure that the reasons why it abstains from ratifying the Rome Statute are resolved internally with strong domestic mechanisms and also by amending the current laws which do not adequately define or prosecute international crimes. There is future scope of this study and it can be picked up from further analysing methods that the current government can take in order to make sure that domestic legal frameworks do actually fulfil international humanitarian obligations. The researcher has given certain recommendations such as enacting a domestic War Crimes Act, increasing military justice, allowing limited jurisdiction along with increasing cooperation with UN bodies without formal membership. However, India is a developing country where the aspirations of its civilian population, the governance and the machineries that are in place continue to change with each passing day. It is upon the combined effort that is to be made in order to make sure that there is an increase in the accountability while balancing India's domestic legal frameworks along with its international humanitarian obligations.

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