



India's Tryst with International Criminal Law: Why Delhi Cannot Digest the Roman Pasta?

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Abstract

The Rome Statute of the International Criminal Court of 1998 (the statute) establishing the International Criminal Court (ICC) seeks to provide an international criminal law regime to deal with crimes against humanity. Despite the path breaking structure of this statute, India has refrained from being a signatory to it. This paper deals extensively with India's unhappiness over a universally important and well drafted law like the Rome Statute. This paper debates two major concerns of India with respect to the statute: abuse of referrals by the Security Council and the challenge to its sovereignty. It also features an exhaustive discussion of India's eagerness to include terrorism and 'use of nuclear warfare' as crimes under the statute. Based on an extensive legal research, the author concludes that India must make no further delay in becoming a member nation of the statute.

Keywords: Court, Crime, Humanity, Prosecution, Sovereignty

Introduction

International community has a vital role to play in checking crimes against humanity. The Rome Statute of International Criminal

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Court of 1998 is the first step towards creating a uniform international criminal law regime to deal with cases involving international crimes like crimes against humanity, war crimes, genocide and crimes of aggression.¹

The statute provides for the creation of ICC with the power to try and punish the most serious violations of human rights in cases where the domestic justice systems fail at the task.² On July 17, 1998, 120 states voted to adopt the statute and on April 11, 2002, the 60th ratification necessary to trigger the entry into the force of the statute was deposited by several states in conjunction and the treaty came into force on July 1, 2002 thereby establishing the ICC.³ As many as 121 countries are state parties to the statute as on July 1, 2012.

The ICC sits in the Hague, alongside the International Court of Justice. The Preamble of the statute reflects the statute's objective⁴ to ensure that justice be delivered to the most serious crimes that concern the international community.⁵ The statute by and large constitutes an authoritative expression by a great number of states on international criminal law.⁶

The ICC's jurisdiction at present is limited to three crimes: genocide, war crimes and crimes against humanity.⁷ The court shall also exercise jurisdiction over the crime of aggression once a provision is adopted by defining the crime and setting out the conditions under which the court shall exercise jurisdiction with

¹ The Rome Statute of International Criminal Court art. 5(2), Jul. 17, 1998, A/CONF.183/9; RC/Res.6, ICC *Doc.* No. RC/Res.6.

² WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (Cambridge University Press 4th ed. 2011).

³ Coalition of International Criminal Court, *History of the ICC*, available at <http://www.iccnw.org/?mod=icchistory> (last visited Mar. 19, 2013).

⁴ The Rome Statute of International Criminal Court preamble ¶ 4, Jul. 17, 1998, A/CONF.183/9.

⁵ The Rome Statute of International Criminal Court preamble ¶ 5, Jul. 17, 1998, A/CONF.183/9.

⁶ *Prosecutor v. Furundzija*, IT-95-17/1-T, ¶ 227 (Dec. 10, 1998).

⁷ The Rome Statute of International Criminal Court art. 5(1), Jul. 17, 1998, A/CONF.183/9.

respect to this crime.⁸ The court has the authority to exercise its functions and powers, as provided in this statute on the territory of any state party and, by special agreement, on the territory of any other state.⁹ The court is a permanent institution and is endowed with the power to exercise its jurisdiction over persons, irrespective of them being state or non state actors, for the above mentioned crimes.¹⁰ The ICC exercises its jurisdiction with respect to a crime referred to it by a state party, United Nations Security Council (UNSC) acting under Chapter VII of the Charter of the United Nations or the prosecutor himself.¹¹ Since its establishment in 2002, the ICC has taken cognizance of four countries, namely, the Democratic Republic of Congo, Uganda, Central African Republic, Sudan (Darfur) and is also monitoring situations in a series of other countries: Côte d'Ivoire, Colombia, Afghanistan, Chad, Georgia and Kenya.¹²

India's Concern With the Rome Statute of International Criminal Court, 1998

India actively participated in the proceedings of the Rome Conference and vociferously placed its reservations and recommendations on the structure of the draft statute. India's chief concern with the present form of the statute is the unrestrained powers vested in the hands of the Security Council of the United Nations which may be used by it to bind non-state actors, which may ultimately lead to the violation of Article 34 of the Vienna Convention on the Law of Treaties. India is also repugnant to the

⁸ The Rome Statute of International Criminal Court art. 5(2), Jul. 17, 1998, A/CONF.183/9; *supra* note 1.

⁹ The Rome Statute of International Criminal Court art. 4(2), Jul. 17, 1998, A/CONF.183/9.

¹⁰ The Rome Statute of International Criminal Court art. 1, Jul. 17, 1998, A/CONF.183/9.

¹¹ The Rome Statute of International Criminal Court art. 13, Jul. 17, 1998, A/CONF.183/9.

¹² Laura Barnett, *The International Criminal Court: History and Role*, Legal and Legislative Affairs Division, Library of Parliament Research Publications, available at <http://www.parl.gc.ca/content/LOP/ResearchPublications/prb0211-e.htm#congo> (last visited Dec. 1, 2013).

idea of politics creeping into the UN Security Council Referrals.¹³ Apprehensions about the loss of sovereignty owing to the ICC's interference with issues such as naxalism, insurgent situations in Jammu & Kashmir insurgency, North-Eastern India etc. also dampens the national spirit. There is considerable amount of dissatisfaction due to the the blurring distinction between normative customary law and treaty obligations.¹⁴ Furthermore, India's recommendation towards creating provisions to allow countries to opt out of the treaty to safeguard their interests was blatantly rejected in the final draft.¹⁵ Wide powers vested with the Prosecutor was another cause of concern. Lastly, India's attempt to designate the 'use of nuclear weapons' as a war crime and characterizing international terrorism as a crime under the ICC's jurisdiction were given a similar treatment.¹⁶ Interestingly, the ICC and the state parties have failed so far to convince even the most powerful states such as the US, China and Russia to be a part of the statute.¹⁷ When India realized that its reservations were falling on deaf ears, it eventually abstained from voting on the statute, and since then has not taken any steps to sign the same. India's stand on the ICC Review Conferences and Conferences of Parties since the establishment of ICC has been largely that of a 'silent observer'.¹⁸

Security Council: Meddling With Affairs of ICC?

Security Council is a body in charge of measures for preservation or reservation of international peace and security. Under Article 24 of the Charter of the United Nations, the United Nations Security Council has the primary responsibility for maintaining

¹³ Dilip Lahiri, *Should India Continue to Stay Out of ICC*, Observer Research Foundation, (Nov. 24, 2010) available at <http://www.orfonline.org/cms/sites/orfonline/modules/analysis/AnalysisDetail.html?cmaid=20612&macmaid=20613>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Florian Jessberger, *From Rome To Reality: Introductory Observations*, 22(1)*Crim. L.Forum* 171 (2011).

¹⁸ *Supra* note 13.

international peace and stability.¹⁹ Even though it is not a judicial body, it has been assigned certain judicial functions under Articles 13 and 16 of the statute.²⁰ Concerns arise when the UNSC refers matters under Article 13(b) of the statute which allows the ICC to assume an intrusive character; as the duty to cooperate is not based on state's consent but is based on Chapter VII and Articles 25 and 103 of the UN Charter.²¹

India is apprehensive about the conferment of crucial powers to the court by the UNSC such as the power of judicial trigger, power to defer the prosecution in cases before the court and the possibility of political heavy weights overshadowing the entire process.²² A blatant example of the abuse of UNSC's power of referral provided in Article 13(b) of the statute²³ was the referral of the situation prevailing in Darfur since July 1, 2002 to the Prosecutor of the ICC in 2005.²⁴ Security Council referred the matter but added a stipulation²⁵ that this referral did not authorize the ICC to prosecute any persons from states that are not parties to the statute.²⁶ The UNSC Resolution in this case tied the power of referral with its power to defer investigation or prosecution under Article 16.²⁷ This is contrary to the law under Article 16 which does not provide grounds for application of such collective and preventive deferrals. This is a stark instance of the UNSC stretching

¹⁹ Charter of United Nations, art. 24 ¶1.

²⁰ Hans Kochler, *Law and Politics in the Global Order: The Problems and the Pitfalls of Universal Jurisdiction*, in INTERNATIONAL CRIMINAL JURISPRUDENCE: ISSUES AND CHALLENGES (R.K.Dixit, R.K.P. Shankardass, C.Jayaraj & Manoj Kumar Sinha eds., Hope India Publisher 2009).

²¹ JO STIGEN, THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS: THE PRINCIPLES OF COMPLEMENTARITY 471 (Brill, 2008).

²² Usha Ramanathan, *India and the ICC*, 3 J. INT. CRIM. JUST. 633 (2005).

²³ The Rome Statute of International Criminal Court art. 13(b), Jul. 17, 1998, A/CONF.183/9.

²⁴ S.C. Res. 1593, U.N. Doc. SC/8351 (2005).

²⁵ S.C. Res. 1593, ¶ 6, U. N. Doc. S/RES/8351 (2005).

²⁶ Kochler, *supra* note 20, at 44.

²⁷ The Rome Statute of International Criminal Court art. 16, Jul. 17, 1998, A/CONF.183/9.

its authority of referral to suit the convenience of its permanent members.

It would be seen, however, that the powers vested in the hands of UNSC are truly not unbridled in nature. Before the ICC was established in 2002, the UNSC established three judicial *ad hoc* institutions to adjudicate on matters that were a 'threat to peace'. It created an *ad hoc* International Criminal Tribunal for crimes committed in the former Yugoslavia (ICTY)²⁸ in 1993 and International Criminal Tribunals for crimes committed in Rwanda (ICTR)²⁹ in 1994, and later called for the establishment of Extraordinary Chambers in the UN Administration in East Timor.³⁰ UNSC has remained active in creating special *ad hoc* tribunals even after the establishment of the ICC in 2002, *i.e.* the Special Court for Sierra Leone in August 2002³¹ and establishment of the Special Tribunal for Lebanon in 2007³². The success of these tribunals clearly indicate UNSC's experience in carrying out matters which impose 'threat to peace' like war crimes, genocide, crimes against humanity, etc. with sufficient responsibility and foresightedness.

There are numerous provisions in the statute which whittle down powers of the UNSC. A referral by the Security Council can be made only by staying within the limits of Chapter VII of the UN Charter which contains a strict requirement of threat to international peace and security.³³ A referral under Article 13(b) of the Statute must necessarily be a referral of the entire situation to the ICC so as to avoid one sided referrals of crimes committed by one party to a conflict. Security Council can never refer old Indian matters like Punjab militancy of the 1980s to the ICC because it is bound by the mandate of Article 11(1)³⁴ which does not permit the

²⁸ S.C. Res. 827, U.N. Doc. S/RES/827(May 25, 1993).

²⁹ S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

³⁰ S.C. Res. 1272, ¶¶ 1, 16, U.N. Doc. S/RES/1272 (Oct. 25, 1999).

³¹ S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

³² S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007).

³³ Matthias Neuner, *The Security Council and the ICC: Assessing the first ten years of coexistence*, 18 New Eng. J. Int. Comp. L. 289 (2012).

³⁴ The Rome Statute of International Criminal Court art. 11(1), Jul. 17, 1998, A/CONF.183/9.

ICC to adjudge matters retrospectively.³⁵ Moreover, it is not for the UNSC to decide whether to open an investigation because this power lies only in the hands of the prosecutor the Pre Trial Chamber.³⁶

The Security Council repeatedly classified internal conflicts or cases of civil war as a threat to international peace and dealt with them under Chapter VII of the UN Charter.³⁷ With respect to the crimes of aggression, the Rome Statute of International Criminal Court being a 'master of its own decisions', especially in such crimes³⁸ is not bound by the Security Council's determination that an act of aggression has occurred. The same is further asserted by a plain reading of Article 15(4). India's prime concern of politicization of Security Council leading to deferrals of prosecution and investigation under Article 16 of the Statute is unfounded, because if the UNSC seeks to pass a resolution compatible with the wordings of this article, it must ensure that at least nine affirmative votes are casted in its favour. It is also to be ensured that none of the five permanent states in the UNSC *veto* this decision.³⁹ India must appreciate this strict threshold requirement which acts as an 'adequate guarantee' that Article 16 will not be misused by the UNSC.⁴⁰

³⁵ Luigi Condorelli & Santiago Villalpando, *Referral and Deferral by the Security Council* as contained in *The Rome Statute of the International Criminal Court: A Commentary*, 636 (Cassese et al. ed. 2002); Neuner, *supra* note 33, at 291.

³⁶ Neuner, *supra* note 33, at 292.

³⁷ See Generally *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR-72, ICTY Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 30 (Oct. 2, 1995).

³⁸ Roger S. Clark, *Amendments to the Rome Statute of International Criminal Court*, 2 GOETT. J. INT. L.703 (2010).

³⁹ The Charter of the United Nations, art. 27(3).

⁴⁰ William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 Eurp. J. Int. L., 701, 716 (2004).

India's Issues With State Sovereignty

The concept of 'sovereignty' forms the bedrock of international relations and public international law.⁴¹ United Nations is itself based on the principle of 'sovereign equality' among states as laid down in its Charter.⁴² The renowned author, Ian Brownlie, identified three broad components of state sovereignty, namely -

- 1) "a jurisdiction, prima facie exclusive, over a territory and the permanent population living there;
- 2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and
- 3) the dependence of obligations arising from customary international law and treaties⁴³.

Therefore, a sovereign state like India has the right to exercise exclusive jurisdiction over its own territory and its people. It is due to this fear of losing its exclusive power of prosecution to the ICC that India has refrained from signing the statute.⁴⁴ India may consider such unavoidable participation as a burden on its national lawmaking, one that diminishes the notion of state sovereignty.⁴⁵ To quell such doubts on sovereignty, the following issues must be considered:

Primacy of National Jurisdiction over the ICC

The mechanism of the ICC hinges itself on the idea that the national system plays primary role in adjudicating international crimes, and that the ICC assumes jurisdiction only when national systems waive their own jurisdiction, whether out of their own will or out

⁴¹ Daniel G. Partan & Predrag Rogic, *Sovereignty and International Criminal Justice*, Rev. Col. D. Der. Int., 73 available at http://www.javeriana.edu.co/juridicas/pub_rev/international_law/revista_1/cap.%203.pdf (last visited Feb. 13, 2013).

⁴² U.N. Charter, art. 2(1).

⁴³ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 289 (Oxford University Press 7th ed. 2008).

⁴⁴ Ramanathan, *supra* note 22, at 627.

⁴⁵ *Id.*

of their inability to prosecute.⁴⁶ Article 17 of the statute lays down four issues of admissibility of cases on the touchstone of 'complementarity'. The language of Article 17 suggests that state parties maintain the primary jurisdiction while the ICC's jurisdiction is the exception.

In case a state does not initiate any investigation or prosecution, only then can the ICC exercise its jurisdiction⁴⁷, that being very farfetched because of the active and independent character of India's judiciary. Furthermore, it is very difficult to prove 'unwillingness to investigate or prosecute' on behalf of a state because Rule 51 of the Rules of Procedure and Evidence of the ICC⁴⁸ permits the state which is invoking the principle of complementarity to show that 'its courts meet internationally recognized norms and standards for the independent and impartial prosecution of a similar conduct'.⁴⁹ Inability to carry out 'investigation or prosecution' of a case which is within the state's jurisdiction has to be proved by firstly, confirming that the judiciary is 'unavailable' or has 'collapsed' and, secondly, that the state is unable to obtain the requisite evidence and testimony.⁵⁰ Lastly, the ICC will hear only the most serious crimes of an international nature.⁵¹ The notion of 'gravity' is pivotal in the function of the ICC, as it cannot look into all cases related to committing war crimes, crimes against humanity and genocide in the world.⁵²

⁴⁶ Summer A. Smith, Book Review: *From Nuremberg to the Hague: The Future of International Criminal Justice*, HARV. INT. L. J 563 (2004).

⁴⁷ NIDAL NABIL JURDI, *THE INTERNATIONAL CRIMINAL COURT AND NATIONAL COURTS: A CONTENTIOUS RELATIONSHIP* 37 (Ashgate 2011).

⁴⁸ Jack T. Dempsey, *Reasonable Doubt: The Case Against the Proposed International Criminal Court*, 6 Cato Policy Analysis (1998); I.C.C. R. P. Evid. Rule 51 ICC-ASP/1/3 and Corr.1, part II.A, First session, New York (3rd-10th Sept. 2002).

⁴⁹ I.C.C.R. P. Evid. Rule 51 ICC-ASP/1/3 and Corr.1, part II.A, First Session, New York (Sept. 3-10, 2002).

⁵⁰ The Rome Statute of International Criminal Court art. 17(3), Jul. 17, 1998, A/CONF.183/9.

⁵¹ Nidal, *supra* note 51, at 55.

⁵² *Id.*

There are multiple safeguards available within the statute to prevent the ICC from taking up jurisdiction in the domestic matters if such a complaint has been made under Article 13 of the Statute. When a situation is referred to the court under Article 13(a) of the Statute and the Prosecutor asserts his approval for conduct of investigation, or when the prosecutor makes a referral under Article 13(c), a state may inform the court in receipt of such information. It can also inform that it is investigating or has investigated its nationals or others within its jurisdiction with respect to the said criminal acts which may constitute crimes referred to in Article 5 of the statute.⁵³ The prosecutor is bound to defer the investigation of those persons at the request of that state, unless the Pre Trial Chamber, on the application of the prosecutor, decides to authorize the investigation.⁵⁴ A state is also allowed to appeal to the Appeals Chamber against a ruling of the Pre Trial Chamber, in accordance with Article 82.⁵⁵ Additionally, a state which has challenged a ruling of the Pre Trial Chamber under Article 18 may challenge the admissibility of a case under Article 19 on the grounds of additional significant facts or significant changes in the circumstances.⁵⁶

A state which has jurisdiction over a case may further challenge the admissibility of a case on the grounds referred to in Article 17 or challenge the jurisdiction of the Court on the ground that it is investigating or prosecuting the case.⁵⁷ It is pertinent to note here that if a challenge is made by a state referred to in paragraph 2(b) or 2(c), the prosecutor is bound to suspend the investigation until such time as the court makes a determination in accordance with

⁵³ The Rome Statute of International Criminal Court art. 18(1), Jul. 17, 1998, A/CONF.183/9.

⁵⁴ The Rome Statute of International Criminal Court art. 18(2), Jul. 17, 1998, A/CONF.183/9.

⁵⁵ The Rome Statute of International Criminal Court art. 18(4), Jul. 17, 1998, A/CONF.183/9.

⁵⁶ The Rome Statute of International Criminal Court art. 18 (7), Jul. 17, 1998, A/CONF.183/9.

⁵⁷ The Rome Statute of International Criminal Court art. 19(2)(b), Jul. 17, 1998, A/CONF.183/9.

Article 17.⁵⁸ The above mentioned safeguards make it difficult to argue that sovereignty is not adequately protected by the statute.⁵⁹

The principle of 'positive complementarity' speaks about the possibility of a prosecutor entering into a dialogue and cooperation with the state concerned in order to encourage it to take action domestically and possibly even assist it in that aspect.⁶⁰ It is observed that the most important role of the ICC is to encourage all nations to improve their judicial systems and guarantees that countries must exercise jurisdiction over perpetrators of serious crimes according to their domestic judicial systems.⁶¹ Furthermore, it is interesting to note that the ICC may further hamper its interference possibilities, and this limited capacity might be a reason as to why some states have joined the ICC. A brief perusal of this and the abovementioned arguments dispel the notion that state sovereignty is severely affected by the statute. *In fact*, the ICC finds itself bound by Part 2 of the statute and it is the state which has the priority of jurisdiction over crimes done within the confines of its territory.

⁵⁸ The Rome Statute of International Criminal Court art. 19(7), Jul. 17, 1998, A/CONF.183/9.

⁵⁹ Jo Stigen, *supra* note 21, at 472.

⁶⁰ International Criminal Court, *Paper on Some Policy Issues before the Office of the Prosecutor*, Office of the Prosecutor, available at http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf; See also International Criminal Court, *Statement of the Prosecutor Luis Moreno Ocampo Diplomatic Corps*, (Feb. 12, 2004) available at http://icc-cpi.int/iccdocs/asp_docs/library/organs/otp/LOM_20040212_En.pdf.

⁶¹ Ministry of Foreign Affairs of the People's Republic of China, *China and the International Criminal Court*, (Oct. 8, 2003) available at <http://www.fmprc.gov.cn/eng/wjb/zzjg/tyfls/tyfl/2626/2627/t15473.htm> (last visited Nov. 10, 2013); BRUCE BROOMHALL, *THE INTERNATIONAL CRIMINAL COURT: A CHECKLIST FOR NATIONAL IMPLEMENTATION* (Toulouse 1999).

Inclusion of 'Terrorism' and 'Use of Nuclear Weapons as a War Crime' in the Rome Statute: How Genuine are Indian Claims?

India has been highly vocal of including international terrorism as a crime covered by the ICC and declaring the 'use of nuclear weapons' as a war crime under Article 8(2) of the Statute.⁶² Exclusion of these demands made by India has been a primary reason for its hesitation in signing the statute.

Terrorism as a Crime Under the ICC

It is advantageous to allow the ICC to prosecute terrorists because it provides a dominant international platform to resolve the issue of unwillingness on part of some states to prosecute terrorists within their jurisdiction and the deadlock between governments over the surrender of suspected terrorists.⁶³ In spite of terrorism being a matter of universal concern, the ICC's current jurisdiction does not include the same.⁶⁴ The issue of terrorism did come up during the treaty negotiations⁶⁵, however, it was rejected primarily because it was considered as a crime of a different character for which effective systems of international cooperation were already in place, and there was no consensus on the definition of 'terrorism' in order for it to be included in the statute.⁶⁶ However, the final act of the conference⁶⁷, adopted at the same time as the statute, did

⁶² Ramanathan, *supra* note 22, at 631.

⁶³ Angela Hare, *A new forum for the prosecution of terrorists: Exploring the problem of addition of terrorism to The Rome Statute's jurisdiction*, 8 LOY. UNIV. CHI. INT. L. REV., 100 (2010).

⁶⁴ *Id.* at 103.

⁶⁵ Rome Conference for an International Criminal Court, *Proposal Submitted by Algeria, India, Sri Lanka and Turkey on Article 5*, UN Doc. A/CONF.183/C.1/L.27/Corr.1.

⁶⁶ ROY S. K. LEE, *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE THE STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 81 (Kluwer Law International 1999).

⁶⁷ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Final Act of the Conference*, ¶ 8 UN Doc. A/CONF.183/C.1/L.76/Add.14 (1998).

acknowledge the importance of incorporating terrorism within its purview and included a recommendation that a future review conference would consider adding terrorism within the court's jurisdiction.⁶⁸ There is no accepted definition of 'terrorism' even by the United Nations because of a difference of opinion on the concept itself. Some states disagree on whether activities of national armed forces or state's act of self-determination be considered as 'terrorism' while there are other states who are indifferent to the acts of terrorism.⁶⁹

To incorporate 'terrorism' into the statute, Netherlands has proposed an excellent idea of using the same technique that was used to incorporate the crime of aggression in the statute.⁷⁰ This would require 'terrorism' to be included under Article 5 of the Statute on the pre-condition that it would be put to use only when the UN comes out with a definition of 'terrorism'⁷¹, which would not be delayed considering the profound interest of UN in defining it.⁷² This proposal also entails creation of a special working group like a Special Working Group on the Crime of Aggression to assess the amendments that may be required in the statute to include 'terrorism' as a crime. Finally, the renewed interest of state parties on the issue of terrorism at the wake of the incidents during the last decade gives hope to the development of an international definition of terrorism.

⁶⁸ Fiona McKay, *U.S. Unilateralism and International Crimes: The International Criminal Court and Terrorism*, 36 CORN. INT. L. J., 456 (2004).

⁶⁹ Thalif Deen, *Politics: UN Member States Struggle to Define Terrorism*, *Inter Press Service*, INTER PRESS SERVICES NEWS AGENCY, (Jul. 25, 2005) available at <http://www.ipsnews.net/2005/07/politics-un-member-states-struggle-to-define-terrorism/>.

⁷⁰ ICC Report of the Working Group on the Review Conference, art. 42, ICC Res 8/20, app. III, ICC ASP/8/20 (Nov. 2009).

⁷¹ *Id.*

⁷² IBRAHIM A. GAMBARI, *A MULTILATERAL RESPONSE TO TERRORISM: COMMONWEALTH MINISTERS REFERENCE BOOK* (Henley Media Group 2006).

'Use of Nuclear Weapons' as a War Crime in the Statute

The treaty on the Non-Proliferation of Nuclear Weapons' [NPT], 1968 is merely preventive in nature, and there is a grave requirement of a punitive provision in international law which may act as a deterrent on states from the usage of nuclear weapons. India vehemently argued for the inclusion of the use of nuclear weapons in the ICC statute as a war crime.⁷³ India's commitment to this stand was further justified by Mr. Dilip Lahiri, head of the Indian delegation at the Rome Conference, who said that such an inclusion would accelerate the elimination of nuclear weapons.⁷⁴ As a state capable of using nuclear weapons, India further tabled a draft amendment to list nuclear weapons whose use is banned for the purposes of the statute, which was further rejected.⁷⁵ However, India's stand lost sheen at the conference as soon as it was introduced, due to the lack of support.⁷⁶

India's concern for use and abuse of nuclear weapons was voiced by Mexico at the Report on the Working Group on Amendments held at New York in December 2011.⁷⁷ Mexico proposed to add the term 'employing nuclear weapons' as a war crime in Article 8(2)(b).⁷⁸ Support may also be found in the advisory opinion of the International Court of Justice which has held that nuclear weapons

⁷³ Ramesh Jaura, *India Thumbs Nose at 'European' Court*, Terr., Int. Pr. Ser. (1998) available at <http://www.ips.org/icc/tv170704.htm> (last visited Feb. 15, 2013).

⁷⁴ *Id.*

⁷⁵ United Nations, *Explanation of vote on the adoption of the Statute of the International Criminal Court, Statement by Mr. Dilip Lahiri, Additional Secretary (UN)*, available at <http://www.un.int/india/ind272.htm> (last visited Mar. 3, 2013).

⁷⁶ *Id.*

⁷⁷ International Criminal Court, *Report on the Working Group on Amendments, Tenth session, International Criminal Court: Assembly of State Parties*, ICC-ASP/10/32, New York, (Dec. 12-21, 2011) available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-32-ENG.pdf (last visited Feb. 15, 2013).

⁷⁸ *Id.* at 3; *Id.* at Annex – II.

are generally prohibited by international law.⁷⁹ Irrespective of the afore mentioned reasons, India's stand continues to stay weak⁸⁰ owing to the tough position taken by nuclear heavyweights like the U.S, China, Russia etc.

Conclusion

The ICC is emerging as a symbolic protector of human rights and India must not stay away for long from this remarkable institution. As has been discussed earlier in this paper, India's apprehension of danger over its sovereignty is unfounded because of the application of the 'principle of complementarity' and the presence of an independent judicial system. Furthermore, India's concern of abuse of power by the UNSC is tenuous primarily because of the multiple checks and balances provided in the statute itself which are binding on it, thereby deterring it from any abuse of referrals. India's argument of including terrorism within the cover of the ICC is likely to find support in the International arena, especially after the world witnessed the havoc of terrorism post1998 which, unfortunately, continues till date. Lastly, the argument of including 'use of nuclear weapons' in the list of war crimes seems to be a farfetched idea for the recent future. However, this must not deter India from joining hands with the ICC, because the advantages which it may reap from the court is immense, the major advantage being trial of wanted terrorists. It is against the established principles of international law to obstruct the prosecution of jus cogens crimes and India must realize the same. The world is scrupulously observing India's stand on the ICC. Developing a partnership with the ICC will further enhance India's say in international diplomatic galleries. Hence, the government must take a positive step by signing and ratifying the Rome Statute.

⁷⁹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. (1996).

⁸⁰ Christopher Stephen, *International Criminal Law: Wielding the Sword of Universal Criminal Justice?*, 61(1) INT'L & COMP. L. Q. 55, 59 (2012).