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# Domesticating International Criminal Law: The Indian State Practice

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**Abstract:** "Domestication of any international law is a very difficult task", the statement becomes even more practical when we talk about the amalgamation of international criminal law into the domestic legal system. Because on one hand, there is no uniformity of State practice in the incorporation process; and on the other, criminal law is primarily emerged out of the concepts like *oikonomos* of Athens and *paterfamilias* of Rome—that give the exclusive authority to sovereign States to administer criminal justice within their territorial boundaries. India follows dualism in incorporating international law into domestic i.e. through a transformation process by adopting domestic legislations. But the Indian judicial system finds itself free to refer any custom, convention or international treaties in absence of domestic legislation on the subject matter. Up to the point, such reference is not inconsistent with the express provisions of law, the sovereignty of the state and the basic structure doctrine. The Indian judiciary has always stood strong as the pillar supporting the human rights values and its ecology, through its direct involvement in the interpretation of law of nations. The paper talks about the Indian mechanism for the domestication of international laws, the role played by the different organs of the state and their overlapping powers. However, it primarily focuses on the susceptibility of the Indian legal system including the legislative as well as the judicial bodies to the principles of international criminal law.

**Keywords:** International Criminal Law, Indian State Practice, Parliamentary Incorporation, Judicial Incorporation

## 1. Introduction

It is through the process of incorporation, that a state is able to implement the international obligations and norms to its domestic or municipal legal system.**"**Domestication of any international law is a very difficult task", the statement becomes even more practical when we talk about the incorporation of international criminal law into the domestic legal system. The reason may be twofold: on the one hand, there is no uniformity of State practice in the incorporation process on account of varied theoretical understandings and ideological differences for absorption of international law principles; and on the other hand, criminal law is closely associated with sovereignty and primarily emerged out of the concepts like *oikonomos* of Athens and *paterfamilias* of Rome—that gave unlimited and exclusive authority to the male family-head to discipline the members of the household. This family system had evolved into a State system whereby the exclusive power to punish and discipline had been succeeded by the heads of sovereign States. On that account, no State is willing to compromise or being counseled by any external sources in the administration of criminal justice within its territory.

Under the Indian legal system, the legislature holds the power to enact, implement or incorporate the international laws into the multiple realms. It is only through the process of rectification that an international instrument can be enforced and not by the mere signing of it. Rectification can be defined as a form of acceptance provided by the state to be confined by the subject provisions. [1] Under the Indian constitution, the power of such rectification vests with the legislation. But at the same time in absence of legal provision or *non- liquet* in the municipal legal system, the judges and

[1] In Indian context ratification occurs either by adoption of municipal legislation domestically and deposit of instrument of ratification internationally; or by exchange of instrument of ratification. Generally, the former is the mode of adoption for law-making treaties and the latter is the mode for adoption of treaty-contracts.

the courts also have the power to refer to any custom, convention or international treaties for the subject matter without taking any prior permission of the legislation. Up to the point, such reference is not inconsistent with the express provisions of law, the sovereignty of the state and the basic structure doctrine. To upload the *principle of separation of power* the Indian constitution provides for three different organs which are Legislation, the Judiciary and the Executive, yet they are not completely separate and may as well overlap at times. High Courts and the Supreme Court of India, for example, perform administrative tasks when they supervise and form regulations for their subordinate courts.[2] This adaptability allows the Indian judiciary to serve as a quasi-legislative authority in incorporating international law into domestic law at times. The judiciary has always taken such active interest in safeguarding human values and promoting environmental norms on several occasions.

In a period of conflicting global challenges such as the environment *vs*. development, development *vs*. human rights, international *vs*. domestic, and so on, the judiciary must take the lead in fostering international cooperation through new approaches and judicial activism. An international treaty framework cannot function properly without the appropriate cooperation and support of domestic legal systems; similarly, local courts cannot achieve justice by relying solely on national laws while disregarding international law norms. As a result, for a better future world, the authoritative nature of municipal law and the dynamic nature of international law must cooperate.

## 2. Domestication of International Law

According to Article 38 of the International Court of Justice's Statute [17], the Court's role is to resolve disputes that are brought to it consistent with international law. The article also specifies where international law principles can be obtained, including international conventions, international customs, basic principles of law, and judicial decisions and juristic opinions.[3] While bringing international law domestic States do not or rarely adopt municipal legislations to incorporate the principles of international customs, general principles, or judicial decisions and juristic opinions. Whereas, incorporating international treaties and conventions require different procedural formalities like, signature, accession, ratification or adoption of domestic legislation. Since obligations under treaties are more precise that should earnestly be carried out to avoid any issues of non-compliance, States prefer to be more cautious while expressing their consent to be bound.[4]

Treaties and conventions may be classified into two types, namely, law-making treaties and treaty contracts. Law-making treaties are those that attract the participation of numerous States establishing rules regulating international conduct of their own and of others as well. United Nations Charter, the Vienna Convention on the Law of Treaties, and the Hague Conventions are good examples of law-making treaties [21]. Whereas, treaty-contracts are those that regulate the relation only between the parties with regard to specific or exclusive issues among them. Bilateral investment treaties, double taxation avoidance agreements, and extradition treaties are good examples of treaty contracts. Such treaties do not directly become the sources of international law but may assist the formation of international customs. However, in both cases signing and ratifying of treaties are essential to bringing them domestically.

State practice in implementing international treaties is diverse among different States and there is no uniform procedure to incorporate them into domestic legal system. The theoretical difference between monism and dualism continues to be a relevant factor for centuries in understanding and transforming international law into the domestic sphere. Monists argue that international law is the superior legal system that automatically forms part of every domestic legal system; but to the contrary, dualists maintain that rules of international law do not automatically apply in the municipal sphere unless incorporated through municipal legislation. Law, either domestic or international, is made for human welfare and hence, the Vienna Convention on Law of Treaties (VCLT), 1969 attempts to harmonize the conflicting approaches to meet the common interests of the international community. Article 11 of the Convention upholds that '[t]he consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.[5] The provision encompasses all forms of transformation process to bring international law into domestic. This is a compromise between the theoretical

[2] The Supreme Court is empowered under Article 145 of the Indian Constitution to set rules that govern the court's practise and procedure. Likewise, Article 229 empowers the High Courts to establish regulations governing officials and staff, as well as the High Courts' costs. In addition, Article 227 gives High Courts supervisory authority over lower courts.

[3] Article 38 of the Statute of the ICJ provides that '[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

International customs, as evidence of general practice accepted as law;

The general principles of law recognized by civilized nations;

Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

[4] Article 2 of the Vienna Convention on Law of Treaties (VCLT), 1969 [22] defines that 'treaty' means 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. Different designation of 'treaty' includes treaties, conventions, protocols, or agreements.

[5] Usage of different words in the provision indicates the varied process in which States express their consent to be bound by a treaty. However, the significance of every such process in expressing consent is equally valid. Article 2(1)(b) of the VCLT declares that '"ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty'. The procedural mechanism for expressing consents by each of these ways is detailed in Article 12 to 16 of the Convention.

differences and ideological conflicts between States following monism and dualism.

In accordance with the provision there are three modes for expressing consent to be bound by a treaty namely, (i) signature; (ii) exchange of instrument constituting treaty; and (iii) ratification, acceptance, approval, or accession. While signing a treaty the signature may be a definitive-signature or a simple-signature. Definitive-signature implies the full power of the representative signing the treaty and it is an expression of State's consent to be bound by the treaty without any further requirement of ratification, acceptance or approval by domestic parliament. Article 46 and 47 of the VCLT make it clear that once a definitive-signature is put on a treaty then the State shall not be allowed to claim the defence that the consent is expressed in violation of its internal laws; or against specific restrictions on the authority to express consent.[6] To the contrary, simple-signatures are those that are subject to approval by State either through exchange of instrument of ratification, adoption of domestic legislation, or through ratification, approval or acceptance. In either case once, Article 27 makes it clear that, once the State becomes a party to a treaty it 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

However, problems and conflicts occur only when States sign the treaty but fail to ratify the same. Such States are mere signatories but not parties to the treaty. Article 2(1)(g) holds that '"party" means a State which has consented to be bound by the treaty and for which the treaty is in force'. Further, Article 34 makes it clear that '[a] treaty does not create either obligations or rights for a third States without its consent'. Consent is a prerequisite for binding a State with legal commitments of the treaty; mere signatories are not bound to carry out obligations under the treaty. However, there are few exceptions to this general rule, namely, (i) *jus cogens* or peremptory norm of general international law; and (ii) object and purpose rule. A State could be required to be bound by a treaty despite being a non-party or even non-signatory if the treaty codifies the principles of customary law or comprises the principle of peremptory of norm of general international law.[7] Similarly, Article 18 of the VCLT provides that a State could legally be compelled to refrain from defeating the object and purpose of a treaty despite being a signatory without ratification if 'it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty'.

With regard to Indian position, international law binds the State only when it is transformed into domestic legal system either through parliamentary incorporation or through judicial incorporation. Otherwise, the principles of international law are not directly enforceable in the country. In *Jolly George Verghese and Another* v. *The Bank of Cochin*, *AIR 1980 SC 470,* Supreme Court of India made it clear that 'Article 51(c) [1] of the Constitution obligates the State to 'foster respect for international law and treaty obligations in the dealings of organised peoples with one another.' Even so, until the municipal law is changed to accommodate [international law] what binds the court is the former, not the latter'. However, even if the country signs and ratifies a treaty internationally, it cannot be implemented domestically unless adopted through a municipal legislation. In such case, the country may be held accountable internationally for non-compliance; nevertheless, organs of the State or its apparatus cannot be compelled to implement the principles of the treaty so signed or ratified.

## 3. Parliamentary Incorporation

Implementing international treaties, conventions or agreements is a two-phase process under Indian Constitutional framework: firstly, signing and ratifying treaty internationally (i.e. treaty-making power); and secondly, enacting legislation domestically (i.e. law-making power). There is a distinction between the formulation and the fulfillment of international treaty commitments. The former is in charge of the executive branch, while the latter is in charge of the legislature. The executive authority of the Union of India lies with the President under Article 53 read with Article 73, and it extends to all issues over which the Parliament has the ability to pass laws.[8] Article 253 on the other hand, lays out the procedure for incorporation, stating that "Parliament has authority to make any law for the whole or any part of India's territory for implementing any treaty, agreement, or convention with any other country or countries, or any decision taken at any international conference, association, or other body" (emphasis added). However, presidential power extends only to those matters with respect to which Parliament can make laws. On that account, whether parliamentary legislation a prerequisite for exercising presidential power? In *Union of India v. Manmul Jain and Others*, *AIR 1954 Cal. 615*, the High Court of

[6] Article 46 of the VCLT provides that '[a] State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance'.
Similarly, Article 47 declares that '[i]f the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent'.

[7] Article 53 of the VCLT defines that 'a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

[8] Article 53 provides that '[t]he executive power of the union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with [Indian] Constitution'. Further, Article 73 provides that 'the executive power of the Union shall extend: (a) to the matters with respect to which Parliament has power to make laws; and (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the government of India by virtue of any treaty on agreement'.

Calcutta answers the question in negative and makes clear the difference between the two phases of incorporation as follows:

> 9. Making a treaty is an executive act and not a legislative act. Legislation may be and is often required to give effect to the terms of a treaty. Thus if a treaty, say, provides for payment of a sum of money to a foreign power, legislation may be necessary before the money can be spent; but the treaty is complete without the legislation … The President makes a treaty in exercise of his executive power and no court of law in India can question its validity.
>
> 10. [W] hen the president, in whom Article 53 of the Constitution vests all the executive power of the Union, has entered into a treaty, the municipal courts cannot question the validity of the treaty.

Similarly, in *Maganbhai Ishwarbhai Patel v. Union of India and Another*, *AIR 1969 SC 783*, the Supreme Court of India Observed that:

> The executive is qua the State competent to represent the State in all matters international and may by agreement, convention or treaties incur obligations which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List I of the Seventh Schedule.

However, in the absence of a domestic legislation international law cannot be considered as part of the municipal legal system and its principles will not be implemented in the territory of India. This implementing process is an exclusive authority of Parliament excluding the role of State legislatures. Under Seventh Schedule of the Constitution '[p]articipation in international conferences, associations and other bodies and *implementing of decisions* made thereat' (emphasis added) as well as '[e]ntering into treaties and agreements with foreign countries and *implementing of treaties, agreements and conventions* with foreign countries' (emphasis added) exclusively fall under entry 13 and 14 of the Union List and no similar entries could be found under State List or Concurrent List. [9] The consequences of entries found under different lists are well established under Article 246 that:

> *Parliament has exclusive power* to make laws with respect to any of the matters enumerated in List I [i.e. Union List] in the Seventh Schedule…. Parliament [and State Legislatures] have power to make laws with respect to any matters enumerated in List III [i.e. Concurrent List] in the Seventh Schedule…[and] the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II [i.e. State List] in the Seventh Schedule (emphasis added).

With this exclusive power Indian Parliament has enacted thousands of domestic legislations to incorporate international treaties, conventions and agreements addressing issues of economics, trade, environmental, human rights, humanitarian, labour standards, and so on. However, India's response towards treaties addressing issues of criminal law is very much selective and multiplex. Such treaties may be classified into the following categories for a proper analysis of Indian State practice, namely: (i) treaty conferring authority; (ii) treaty imposing responsibility; and (iv) treaty of complementarity. The first type of treaties is those that bequeath jurisdictional authority on domestic courts and tribunals over newer crimes or expanding authority over existing crimes. Generally, India become parties to such treaties and conventions and do not show any reluctance in signing or ratifying the same. For instance, India is party to Hijacking Convention, [10] Sabotage Convention, [11] Hostage Convention,[12] Nuclear Terrorism Convention,[13] etc. Most of these multilateral treaties specialise and expand the authority of domestic courts over certain crimes that originally could only be dealt under domestic criminal law (i.e. Indian Penal Code, 1860) like any other normal crimes.

The second type of treaties is those that hold States and State apparatus accountable for their repressive activities against individuals. Generally, India avoids ratifying such kinds of treaties and reluctant to take any legal commitments that interferes in their sovereign freedom either directly or indirectly. For instance, India signed the Convention against Torture, 1984 on 14 October 1997 but it is yet to ratify the convention even after two decades. [14] The Convention principally tries to limit sovereign ability to use torture as a

[9] Other issues relating to international law and international relations like, '[f]oreign affairs; all matters which bring the Union into relation with any foreign country' (entry 10); '[d]iplomatic, consular and trade representation' (entry 11); 'United Nations Organisations' (entry 12); '[w]ar and peace' (entry 15); '[f]oreign jurisdiction' (entry 16); and '[e]xtradition' (entry 18) are also exclusively fall under the Union List in the Seventh Schedule.

[10] Convention for the Suppression of Unlawful Seizure of Aircraft, 1970 [5] is a multilateral treaty to prohibit and punish hijacking of civilian aircraft. India signed the treaty on 14 July 1971 and enacted a domestic legislation 'The Anti-Hijacking Act, 1982' [19] and deposited the instrument of ratification on 12 September 1982.

[11] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971 [3] is a multilateral treaty to prohibit and punish behaviour which may threaten the safety of civil aviation. India signed the treaty on 11 December 1972 and enacted a domestic legislation 'The Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982' [20] and deposited the instrument of ratification on 12 November 1982. Similarly, India is also a party to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 [4].

[12] International Convention against the taking of Hostages, 1979 [8] is a multilateral treaty to prohibit and punish taking of hostage based on the principle of *aut dedere aut judicare* i.e. extradite or prosecute the perpetrators. India's accession and ratification to the treaty came on 07 September 1994.

[13] International Convention for the Suppression of Acts of Nuclear Terrorism, 2005 [10] is a UN treated made to criminalise the acts of nuclear terrorism and to promote police and judicial cooperation in prevention, investigation and punishment of those acts. India signed the treaty on 24 July 2006 and ratified on 01 December 2006. In addition to this India is already a party to the other twelve international terrorism conventions and protocols.

[14] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 [2] is a United Nations treaty for prevention of torture and other cruel, inhuman or degrading treatment or punishment against individuals by States or their officials in order to extract any information or while imposing any punishments. India is a signed the treaty on 14 October 1997 but to ratify.

means of extracting information or punishing persons for wrongdoing. Torture is defined as "any act by which extreme pain or suffering, whether physical or mental, is intentionally inflicted on a person...by or at the instigation of or with the approval or acquiescence of a public official or other person acting in an official capacity" under Article 1 of the Convention (emphasis added). According to Article 4 of the Convention, States Parties must guarantee that all acts of torture are classified as crimes under their respective criminal laws. In addition, Article 13 and 14 confer rights on the victims of torture to complain and receive compensation for their sufferings. However, unless and until the present condition of the police and prison system in the country, both before and after conviction, undergoes a vital transformation India cannot afford to ratify the treaty.[15] It is not that torture is the common phenomenon of criminal legal system and States reluctant to ratify the treaty; rather it is the belief that States have fundamental freedom and authority to engage in torture for criminal administration and hence States reluctant to become party to the treaty.[16]

Similarly, India signed the Convention on Enforced Disappearance on 06 February 2007 but even after a decade the country is yet to ratify the treaty.[17] Primary object of the Convention is to regulate the State practice of detaining individuals outside the protection of law and makes the State answerable for such activities. Article 2 defines that 'enforced disappearance' means 'arrest, detention, abduction or any other form of deprivation of liberty *by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State*… which place such a person outside the protection of law' (emphasis added). The provision directly targets the State from engaging in any kind of illegal arrest or detention. Further, Article 4 requires the State parties to ensure that all acts of enforced disappearance shall be made as offences under their domestic criminal law. In addition, Article 24(4) requires that '[e]ach State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation'. However, considering the prevailing situation in Jammu and Kashmir, Assam, Nagaland, Manipur as well as the menace of Naxalism in different parts of the country, along with the practice of fake encounters and extra-judicial killings, it is very much unlikely that the county could soon ratify the convention.[18]

The third type of treaties is those that share the authority of domestic courts towards international courts and tribunals over certain crimes. India is always reluctant to sign or ratify such treaties that take away or share domestic authority towards international. For instance, India has neither signed nor ratified the Rome Statute of the International Criminal Court, 1998.[19] Article 1 and Article 5 of the Statute makes it clear that the Court's jurisdiction is only complimentary to national criminal courts and only with regard to most serious crimes of international concern such as, genocide, crimes against humanity, war crimes and crime of aggression.[20] Despite that India has not even signed the treaty so far. However, parliamentary incorporation of international criminal law in India is possible only with regard to those treaties that confer authority on State's criminal administration. With regard to the treaties imposing responsibility, in most cases, India has signed the treaty but very much reluctant to ratify or adopt a domestic legislation to incorporate into municipal legal system. However, mere signing of the treaty serves two different purposes: on the one hand, as a largest democracy India would like to project itself as country that supports the promotion of human rights and fundamental freedoms; and on the other, yet the country will not be legally bound to implement the same domestically. This is a kind of complicity in the garb of convenience.[21] With regard to treaties of complementarity India is not even ready to sign.

## 4. Judicial Incorporation

Indian judiciary is known for judicial activism and judicial creativity that has never been restricted within the confines of black-letter laws. Whenever there is a scope for, courts and

[15] A 2015 Tamil-language docudrama 'Visaranai' (means 'Interrogation') is a good starting point to understand the police brutality, corruption and loss of innocence in the face of injustice in India. The film won the Amnesty International Italia Award in the 72nd Venice Film Festival and it is also an official Indian nomination for the Best Foreign Language Film Category at the 89th Academy Awards.

[16] Minister for Home Affairs introduced the Prevention of Torture Bill, 2010 [13] to enable India to ratify the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. But it is yet to become an Act of the Parliament.

[17] International Convention for the Protection of All Persons from Enforced Disappearance, 2006 [9] is a multilateral treaty to prevent forced disappearance of individuals at the hands of States. India signed the treaty on 06 February 2007 but yet not ratified.

[18] India's stand on Armed Forces (Special Powers) Act (AFSPA), 1958 is highly criticised by many States and civil society organisations internationally. The Act grants special powers to security forces to search without warrant, arrest persons, and use deadly force in disturbed area. But still section 6 of the Act provides that '[n]o prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act'. Many criticise that the Act indirectly authorises and encourages enforced disappearance of individuals in the so called disturbed areas.

[19] Rome Statute of the International Criminal Court, 1998 [16] is a multilateral treaty to establish permanent international criminal court to deal with certain serious crimes of international concern

[20] Article 1 of the Statute provides that '[a]n International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this statute, and shall be *complementary to national criminal jurisdiction*' (emphasis added).
Article 5 of the Statute provides that 'jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The Crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression'.

[21] Section 17 of the Indian Contract Act, 1872 [7] declares that 'a promise made without any intention of performing it' amounts to 'fraud'. Applying the same principle internationally would make activities of the State as fraudulent when it signs a treaty without any intention of ratifying it.

tribunals in the country has made extensive reference to philosophical, ideological, mythological, moral, social, and cultural principles to expand the meaning and ambit of constitutional as well as other legal principles. Often they also make reference to judgments of foreign courts from Australia, Canada, South Africa, United Kingdom, and United Sates as and when required. With regard to the implementation of international law into municipal legal system the Supreme Court and the High Courts do not wait for the Parliament to makes laws; rather, they directly make reference to the principles of international law. Common law doctrine of precedent and *stare decisis* are very much applicable in the Indian context. For instance, Article 141 of the Constitution provides that '[t]he law declared by Supreme Court shall be binding on all courts within the territory of India'. However, there is no similar provision that confers binding authority on the decisions of the High Courts, but it could be inferred from Article 215 read with Article 227 of the Constitution. [22] In *East India Commercial Co. Ltd. Calcutta and Another* v. *The Collector of Customs Calcutta*, *AIR 1962 SC 1893*, the Supreme Court observed that:

> It would be anomalous to suggest that a tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of it … [Though] there is no specific provision, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate courts … [it] is implicit in the power of supervision conferred on a superior tribunal that all the tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working: otherwise there would be confusion in the administration of law and respect for law would irretrievably suffer.

With this freedom and authority on many occasions the judiciary has performed a quasi-legislative function to bring international law into domestic. Direct reference to the principles of international law is made, in most cases, either to protect human values or to preserve the ecology when there is a legal vacuum in municipal laws. For instance, most of the international environmental law principles like sustainable development, precautionary principle, polluter pays principle, and public trust doctrine has been brought to domestic only through landmark judgments of the Supreme Court and not by parliamentary legislation. [23] In *Vellore Citizens Welfare Forum* v. *Union of India and Others*, the Supreme Court held that:

> It is almost accepted proposition of law that the rule of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law … [and] we have no hesitation in holding that 'Sustainable Development' as a balancing concept between ecology and development has been accepted as a part of the Customary International Law.
>
> Some of the salient principles of "Sustainable Development", as culled out from Brundtland Report and other international documents, are inter-Generational Equity, Use and Conservation of Natural Resources, Environmental Protection, the Precautionary Principle, Polluter Pays principle, Obligation to assist and cooperate, Eradication of Poverty and Financial Assistance to the developing countries. We are, however, of the view that "The Precautionary Principle" and "The Polluter Pays" principle are essential features of "Sustainable Development".

In addition, the court also directed the Central Government to establish an authority under Section 3(3) of the Environmental (Protection) Act, 1986 to protect the degrading environment in the country. Similarly, in *MC Mehta* v. *Kamal Nath and Others*, *(1997) 1 SCC 388*, the Supreme Court made its observation on public trust doctrine that:

> Our legal system - based on English Common Law - includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.

With regard to the protection of human rights and fundamental freedoms Indian judiciary on many occasions have made direct references to the principles of international human rights law. For instance, in *Nilabati Behera* v. *State of Orissa*, *AIR 1993 SC 1960*, the Supreme Court referred Article 9(5) of the International Covenant on Civil and Political Rights (ICCPR), 1966 [11] to provide compensation for unlawful arrest and detention as a public law remedy under Article 32 of the Constitution.[24] Similarly, in *Vishaka and Others* v. *State of Rajasthan and Others*, *AIR 1997 SC 3011*, the Supreme Court made a reference to Article 11 and 24 [6] of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979 to prevent sexual harassment at the workplace.[25] On that account, the

[22] Article 215 provides that '[e]very High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself'. Similarly, Article 227 provides that '[e]very High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction'.

[23] The Precautionary Principle is incorporated from Principle 18 of the Stockholm Conference on Human Environment, 1972 [18] and Rio Declaration, 1992; the Polluter Pay Principle is incorporated from Principle 16 of the Rio Declaration, 1992 [15] and Sustainable Development from the Report of the World Commission on Environment and Development, 1987 [14] (also known as Brundtland Report).

[24] Article 9(5) of the ICCPR provides that '[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'.

[25] Article 11 of the CEDAW provides that 'States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to work as an inalienable right of all human beings; (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction'.

Court laid down number of guidelines and norms to be followed in all workplaces and other institutions until legislation is enacted for the purpose; and emphasised that the guidelines and norms would be treated as the law declared by this Court under Article 141 of the Constitution. With regard to making direct references to international law the Court was opinion that:

> In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein.

However, one major exception to this judicial freedom is that no reference could be made if it contravenes: (i) basic structure of the Constitution; (ii) sovereignty of the State; or (iii) express provision of law enacted by the Parliament. If any reference is made in contravention to any of these principles, such judgements are not valid and shall be considered as *per incurium*. For instance, in *Gramaphone Company of India Ltd.* v. *Birendra Bahadur Pandey and Others*, AIR 1984 SC 667, the Supreme Court observed that:

> The comity of Nations requires that Rules of International law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves.

Further, in the *Narmada Bachao Andolan v. Union of India, AIR 2000 SC 3751*, the Court continued to make the following specific observation with regard to judicial incorporation of international law that:

> Comity of Nations or no, Municipal Law must prevail in case of conflict. National Courts cannot say yes if Parliament has said no to a principle of international law. National Courts will endorse international law but not if it conflicts with national law. National courts being organs of the National State and not organs of international law must perforce apply national law if international law conflicts with it. But the Courts are under an obligation within legitimate limits, to so interpret the Municipal Statute as to avoid conformation with the comity of Nations or the well established principles of International law. But if conflict is inevitable, the latter must yield.[26]

Finally, with regard to interpretation of statutes the Supreme Court, in *Tractor Export, Mascow* v. *Tarapore & Company and Another*, *AIR 1971 SC 1*, comprehended that '[i]f statutory enactments are clear in meaning, they must be construed according to their meaning even though they are contrary to the comity of nations or international law'. Further, in *ADM Jabalpur* v. *Shivakant Shukla*, *AIR 1976 SC 1207*, Justice Khanna in his minority opinion made the following comprehensive observation to resolve the conflict between municipal law and international law that:

> [It is a well-established rule of construction that] if there be a conflict between the municipal law on one side and the international law or the provisions of any treaty obligations on the other, the courts would give effect to municipal law. If, however, two constructions of the municipal law are possible, the court should lean in favour of adopting such construction as would make the provisions of the municipal law to be in harmony with the international law or treaty obligations.

With regards to the domestication of international criminal law Indian judiciary has always been reluctant to make a direct reference to international treaties and conventions. The reason is that criminal administration of a country is always closely associated with the sovereignty of the State. Since independence, Supreme Court of India have dealt with numerous cases involving issues of custodial torture, custodial death, inhuman or degrading treatment or punishment, enforced disappearance, and so on. For instance, the cases include: *Nandini Satpati* v. *P. L Dani,* AIR 1978 SC 1025, *Sunil Batra* v. *Delhi Administration* (1978) 4 SCC 494, *Raghbir Singh* v. *State of Haryana* (1980) 3 SCC 70, *Khatri* v. *State of Bihar,* AIR 1981 SC 928, *State of U. P* v. *Ram Sagar Yadav* (1985) 1 SCC 552, *D. K. Basu* v. *State of West Bengal*, AIR 1997 SC 610, *Joginder Kumar* v. *State of U. P.*, (1994) 4 SCC 260, *Secretary, Hailakandi Bar Association* v. *State of Assam* (1995) Supp. 3 SCC 736, *Nelabati Behara* v. *State of Orissa* (1993) 2 SCC 746, *Extra Judicial Execution Victim Families Association (EEVFAM) and Another* v. *Union of India and Another*, Writ Petition (Criminal) No. 129 of 2012, etc. In most of these cases Supreme Court has categorically condemned the activities of the State but in no occasion it made any attempt to derive criminal law principles from treaties or conventions and thereby punished the perpetrating public officials.

# 5. Conclusion

The Indian Constitutional provides a framework such that the dominance over the incorporation of international law into the municipal legal system has been equally distributed among all three branches of the government, executive, legislature and

Article 24 of the Convention provides that 'States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention'.

[26] Hersch Lauterpacht [12] also gave a similar opinion as follows:

While it is clear that international law may and does act directly within the State, it is equally clear that as a rule that direct operation of international law is within the State subject to the overriding authority of municipal law. Courts must apply statutes even if they conflict with international law. The supremacy of international law lasts, *pro foro interno*, only so long as the State does not expressly and unequivocally derogate from it. When it thus prescribes a departure from international law, conventional or customary, judges are confronted with a conflict of international law and municipal law and, being organs appointed by the State, they are compelled to apply the latter (Lauterpacht 1970, p. 227).

judiciary. 'Treaty-making power' to sign and ratify treaties or agreements is exercised by the President as an executive head of the State; 'Law-making power' to adopt domestic legislation to implement treaties or conventions is handled by the Parliament as a legislative body; and 'adjudicatory-power' to interpret laws or to make direct references to international law is enjoyed by the Supreme Court and High Courts as judicial establishments. However, their respective powers and functions are not exclusive or absolute; rather, interrelated and interconnected that keeping each of them within their legitimate limits. For instance, President cannot sign a treaty unless authorised by the Council of Ministers;[27] similarly, a law enacted by Parliament may be declared void or unconstitutional by Supreme Court or High Courts;[28] and judgments of the courts may be overruled by Parliament by adopting a Constitutional amendment or conflicting legislation. Such three-dimensional checks and balances make it difficult for any easy incorporation of international law into the Indian legal system.

Despite the fact that Article 51(c) [1] of the Constitution mandates that "[t]he State shall strive to cultivate regard for international law in the interactions of organised peoples with one another," the provision is found in Part-IV of the Constitution, which deals with non-enforceable Directive Principles of State Policy.[29] Nonetheless, Justice SM Sikri, sitting for the Supreme Court in *Kesavananda Bharati v. State of Kerala,* stated:

> [I]t seems to me that, in view of Article 51 of the directive principles, this Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India.

It is easy for the Supreme Court to declare that the *Constitution is after all a municipal law* and should be *understood in the light of the UN Charter* or other principles of international law, as long as it is not an intervention in the administration of criminal justice system. However, the opinion would not be same if it abridges or takes away the sovereign authority over prevention or punishment of crime or if it attempts to hold the Sate criminally responsible for any act or omission. Indian judiciary has come across numerous opportunities—like, custodial death, custodial torture, enforced disappearance, fake encounters, abolishing death penalty, and so on—to incorporate the principles of international criminal law into domestic, the courts have made not even an attempt.

Though scholars may argue that it is an era of globalization and man-made boundaries are no longer a barrier for global governance with principles of universal international law, like, UN Charter, Universal Declaration of Human Rights (UDHR), international trade and investment regime, new-found concept of global administrative law, and so on, States are yet to give-up their sovereignty over criminal administration within their respective territorial boundaries.

## Compliance with Ethical Standards

### *Conflict of Interest*

The Author declares that he has no conflict of interest.

### *Ethical Approval*

This article does not contain any studies with human participants or animals performed by any of the authors.

### *Informed Consent*

Not Applicable.

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[28] Article 13(2) of the Constitution provides that '[t]he State shall not make any law which takes away or abridges the [fundamental] rights conferred by this [Part-III] and any law made in contravention of this clause shall, to the extent of the contravention, be void'.

[29] Article 37 of the Constitution provides that '[t]he State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void'.

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