

Justice has another address

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Pakistan is not cooperating with India” was CBI chief Vijay Shankar’s response this week to why Dawood Ibrahim has not yet been brought to trial before Indian courts. According to Shankar, the CBI knows exactly where Dawood is, but because he is unfortunately lurking in Pakistan, a country that has a “record of not co-operating with India when it comes to terrorism”, India has to resort to diplomatic channels in its efforts to bring him to justice. The Dawood saga and India’s continuing attempts to extradite individuals suspected of having committed terrorist offences on Indian soil point to a significant lacuna in India’s terrorism policy — the absence of an international forum that could either try individuals accused of acts of terrorism, or at the very least, pressure non-cooperating states into prosecuting or extraditing the accused.

This is where the importance of the Second National Consultation on the International Criminal Court and India in Delhi (on April 25 and 26) lies. Although the focus of the consultation has been on the moral reasons for joining the ICC, we will highlight an additional strategic reason for doing so.

India’s abstention on the vote bringing the Rome Statute for the International Criminal Court (ICC) into effect in July 1998 signalled its tortured relationship with the ICC. India’s concerns with the ICC are a curious mix of national pride and frustrated ambitions. India was and remains deeply hostile towards the ICC prosecutor’s ability to undertake investigations and prosecutions on an independent basis, or upon a referral by the Security Council, without the consent of the state whose nationals are being prosecuted. At the same time, India was peeved at the failure of its efforts to shape the definition of crimes included in the statute, particularly terrorism.

The first of these concerns has been addressed by several international scholars who posit that given the structure of the ICC, national concerns about sovereignty are misplaced. In brief, the argument is that the ICC’s jurisdiction is complementary to that of member states. It is only if the state which has jurisdiction over the crimes is either unable or unwilling to prosecute these crimes that the ICC’s jurisdiction can be invoked. India has a largely stable, independent judicial system and the Rome Statute ensures that the ICC will rarely go beyond encouraging domestic trials for such countries. But its position vis-à-vis terrorism makes best the enemy of better. India’s refusal to join the ICC because it does not expressly criminalise terrorism reads the statute too narrowly, and is also a strategic mistake.

Consider the crime Dawood is accused of — plotting a series of bomb blasts in Mumbai on March 12 1993, which killed hundreds of people and injured several more. The coordinated attacks took place in 13 locations. While the Rome Statute of the ICC does not contain the crime of terrorism, these events would clearly have constituted a ‘crime against humanity’ under the statute, if the statute were in operation at that time. Technically, a crime against humanity is committed when crimes like murder, rape, serious bodily harm etc are committed as part of a widespread and systematic attack on a civilian population pursuant to the policy of a state or an organisation. Given this strict definition, not all acts of terrorism will qualify as a crime against humanity. But the Mumbai bomb blasts were certainly systematic, widespread, and arguably pursuant to the policy of terrorist organisations. In the words of Judge Philippe Kirsch of the ICC (in conversation with Indian parliamentarians in December 2005), “it is therefore highly likely that certain acts of terrorism could in fact come before the ICC not as crimes of terrorism, as your eye would see them, but as crimes against humanity.”

Now, like in Dawood’s case, it is possible that the suspected perpetrators of the attack are within the jurisdiction of a foreign country, which refuses to prosecute them in its own courts and also refuses to extradite them to face trial in India. As the statement of the CBI chief makes clear, under present laws, there is nothing India can do legally to make sure that these suspects are tried for their alleged crimes.

The ICC has jurisdiction over a case if either the suspects are nationals of a member state or if the crimes are committed on the territory of a member state. In a case like this one, because the crimes were committed on Indian soil, India could have referred the case to the ICC if it was its member at the time when the crimes are committed. It does not matter whether the foreign state whose nationals or residents are alleged to have committed the crimes is a member or not. The ICC can assume jurisdiction and require all member states to co-operate with the prosecution irrespective of the consent of the state whose nationals are being prosecuted. For instance, if the suspects were to seek refuge in a foreign state which is party to the statute, that state would be obliged to surrender the suspects to the ICC and assist in its investigative efforts. If the foreign state is not a member of the ICC, it will not have any obligation to co-operate with the ICC. But the international attention that an ICC trial will inevitably bring to the case may shame it into prosecuting or extraditing the suspects.

A review conference of the Rome Statute is due in 2009, where the question of criminalising terrorism is bound to emerge. If India goes to the conference as a voting member state, its words will carry more weight than if it goes there as an outside observer. All moral and strategic considerations indicate that India should ratify the statute and do so urgently.

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