Compliance for Convenience: Inconsistencies in the Implementation Patterns of Human Rights Treaties in India

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Abstract

The Republic of India is signatory to numerous human rights treaties, and is mandated by its constitution to implement any such international treaty. However, while some treaties are enthusiastically enforced, others are ratified but not implemented. This is evident in the compliance patterns of the Fourth Geneva Convention and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). While the latter is utilized in many legislations, the former has been all but forgotten. Supreme Court judgments reflect the level of compliance to a treaty. Greater litigation around a ratified treaty proves it is more active as law. A landmark case involving CEDAW was *Vishaka and Others vs. State of Rajasthan and Others*; the Supreme Court declared citizens can claim even unratified rights guaranteed under a treaty. Yet in *Naga People's Movement of Human Rights vs. Union of India*, it did not even mention the Fourth Geneva Convention. This paper aims to address why some human rights treaties are better implemented than others in India. It analyzes the reasons behind such discrepancies in implementation patterns, including political will, socio-religious nationalist traditions, judicial conviction, and media attention.

Introduction

In 1997, two judgments were pronounced by the Supreme Court of India within three months of each other. Both were of monumental significance to human rights. In August, while deciding *Vishaka and Others vs. State of Rajasthan and Others*, the Supreme Court drew heavily upon the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to lay down guidelines protecting women from sexual harassment at the workplace.[1] However, in November, while discussing the human rights violations by the army in the case *Naga People's Movement of Human Rights vs. Union of India,* the Supreme Court never referred to the Fourth Geneva Convention. It held that as long as internal disciplinary mechanisms are in place, civilians need no further protection from armed forces.[2] The contrasting responses of the Court in these two judgments can be attributed to many causes – including, perhaps, the composition of the bench and the personal beliefs of the judges – but the divergent approaches to international treaties in each of these judgments is an interesting dimension to analyze.

India signed the Geneva Convention relative to the Protection of Civilian Persons in a Time of War ("Fourth Geneva Convention") on December 16, 1949 and ratified it on November 9, 1950.[3] In 1960, in exercise of its power under Article 253 of the Constitution of India, the Indian Parliament enacted the Geneva Conventions Act to give effect to all four Geneva Conventions, including the Fourth Geneva Convention.[4] However, the scope of the remedial procedure to access protection in case of human rights violations relevant to the Geneva Conventions was severely curtailed by the Act.[5] Very few cases have come up in courts that refer to the Geneva Convention Act, and the judiciary has been similarly unwilling to perform a protective role in those cases.[6]

CEDAW was signed on July 30, 1980 and ratified on July 9, 1993, with a reservation that many critics felt undermined the main purpose of the Convention.[7] The reservation, "*The Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent,*"[8] would have permitted the Government of India to ignore a large number of discriminatory practices against women. That is because many of these, including dowry harassment and domestic violence, have traditionally been viewed as family matters and governed by the personal laws of each religious community.[9] Yet, the government has taken a commendable number of legislative steps towards curbing these violent and discriminatory practices, both in 1997, when the *Vishaka* case was heard, and subsequently.[10]

The first section of this paper explores the attitude of the Supreme Court towards international treaties and standards, particularly in the context of the Vishaka and Naga People's Movement cases. In the second section, it delves into the inherent features of the treaties and

[1] *Vishaka & Others vs. Rajasthan*, 1997.
[2] *Naga People's Movement*, 1997.
[3] Geneva Convention (IV).
[4] Geneva Convention Act.
[5] Ibid., Section 17.
[6] See Rev. Mons. *Sebastian Francisco vs. Goa*, 1970.
[7] CEDAW.
[8] Ibid.; "Declarations and Reservations: India."
[9] National Portal of India, "Personal Laws."
[10] "Addendum: Replies of India," 2014.

how far they compel the state parties to take action, utilizing Kal Raustiala's framework of legality, substance, and structure. Finally, it analyzes the political and social factors that may influence the willingness of the government and judiciary to implement international treaties. In this regard it relies on Beth Simmons' criteria for what circumstances compel a state party to comply with the international standards they sign on to.

Vishaka vs. State of Rajasthan

In 1992, a social worker in rural Rajasthan, India, tried to prevent the child marriage of a one-year old girl and was gang raped by the child's father, grandfather, uncle, and other relatives. The trial court judgement in the criminal case found that while the semen of five different men had indeed been found in the vaginal swab collected, none of the samples matched the accused.[11] The social fallout of this judgment was that the villagers started viewing the victim as a liar and a prostitute and ostracized her family. Social workers in the community also began facing tremendous resistance from upper-caste families.[12]

The other consequence of the judgment was the coalition of a number of women's groups that petitioned the Supreme Court with a writ petition to consider the violation of human rights faced by working women. A writ petition, filed under Article 32 of the Constitution of India, seeks redressal for human rights violations before the Supreme Court. The petitioners in this case argued that the rights of working women under Article 14 (right to equality), Article 19 (1) (g) (freedom to practice any profession, or to carry on any occupation, trade or business) and Article 21 (right to life and liberty) were violated by sexual harassment at the workplace.[13]

Recognizing the Rajasthan incident as "the depravity to which sexual harassment can degenerate"[14] the Supreme Court said that in the absence of legislative measures, there was an urgent need to find an alternative mechanism to address the issue. The alternative mechanism it proposed was a set of "guidelines" that were to be followed as law until Parliament legislated on the issue.[15] The Supreme Court laid heavy emphasis on the importance of enforcing CEDAW across its judgement. It referred to Article 253 of the Constitution, which empowers Parliament to make laws for implementing any treaty that India is a party to, and the power of the Union government to enter into and implement treaties with foreign countries.[16] Noting that Article 51 directs the government to foster respect for international law and treaty obligations,[17] the court held that in the absence of legislation, international treaties on human rights (to which India is a party) can be read into the Articles of the Constitution that guarantee fundamental rights, to the

[11] Since the medical exam occurred 52 hours after the incident. See: Datta and Rajagopal, "Bhanwari Devi – Betrayed," 4-28.
[12] Jungthapa, "A Shocking Acquittal," December 15, 1995.
[13] *Vishaka & Others vs. Rajasthan,* 1997.
[14] Ibid., para 2.
[15] The Supreme Court of India is a court of record vide Article 129 of the Constitution of India, and vide Article 141 the law declared by the Supreme Court is binding on all courts in India.
[16] List I of the Seventh Schedule to the Constitution of India lists the subjects on the Union government has exclusive power to legislate. Entry 14 of this list provides for, "Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries."
[17] Article 51 is part of the Chapter on Directive Principles of State Policy. Though not legally enforceable, these provisions are to be considered guiding principles of governance.

extent that there is no inconsistency.[18]

By reading international treaties that have not been legislated upon into fundamental rights, the Supreme Court gave itself the power, under Article 32, to protect all human rights that were the subject matter of these treaties.[19] Furthermore, it referred to the Beijing Statement of Principles of the Independence of the Judiciary to confirm its obligation to promote the observance and attainment of human rights.[20]

On the strength of such constitutional interpretations of its powers, it went forward and gave effect to Article 11 of CEDAW[21] and paragraphs 17 and 18 of General Recommendation No. 19, 1992, with reference to paragraph 24 (j).[22] These provisions provide for the elimination of violence in employment with the aim of creating equality between men and women.[23] The Court laid down guidelines that were implemented by workplaces across the country, until the time that Parliament passed the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, when the guidelines lapsed and were replaced with legislative measures.

Naga People's Movement of Human Rights

Three months after the *Vishaka* judgment, the Supreme Court passed its judgment in the *Naga People's Movement of Human Rights* case. This case was triggered by over three decades of severe human rights violations by the armed forces deployed in the states of northeast India.[24]
The Armed Forces (Special Powers) Act (AFSPA) of 1948 was enacted to allow army officers of all ranks, commissioned and non-commissioned, deployed in places notified as "disturbed areas," to use any amount of force considered necessary by the officer to enforce law and order.[25] The subjectivity of the phrase, "is of the opinion that it is necessary," has resulted in severe human

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[18] *Vishaka & Others vs. Rajasthan,* 1997.
[19] Ibid.
[20] Ibid.
[21] Article 11 of CEDAW states "1. 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.
3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary."
[22] General Recommendations on Article 11 of the CEDAW (1992), 17. Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.
18. Sexual harassment includes such unwelcome, sexually-determined behavior as physical contact and advances, sexually colored remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection may disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.
24. (j) States parties should include in their reports information on sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the workplace.
[23] *Vishaka & Others vs. Rajasthan,* 1997.
[24] Northeast India comprises eight states – Manipur, Mizoram, Nagaland, Arunachal Pradesh, Meghalaya, Sikkim, Assam and Tripura. AFSPA was enforced in all states except Sikkim. In 2015, Tripura was denotified as a disturbed area and AFSPA is presently not in force there. See: Ramachandran, "India's Controversial Armed Forces," July 2, 2015.
[25] Armed Forces (Special Powers) Act, Section 4 (1958).

rights violations over the years, including disappearances, torture, murder and rape of civilians. Several human rights and civil society organizations have protested against the AFSPA since its enforcement. In 1995, the Government of Nagaland appointed the Justice D.N. Sen Commission of Enquiry to look into several incidents of murder, arson and rape committed by the armed forces from December 1994 to March 1995. The Commission found the reports to be true and carried out by various units of the army. This constituted part of the evidence placed before the Supreme Court.[26]

The Court held that Parliament had absolute legislative competence to enact a law that dealt with the deployment of armed forces, and was well within its powers to do so. With respect to human rights violations, it held that the army had sufficient internal mechanisms to control excesses, if any, committed by its officers.[27] It did not discuss the subjectivity in the phrase "is of the opinion that it is necessary."[28] Rather, the Supreme Court felt certain that since even the junior-most non-commissioned officers have had at least fifteen years of service experience, they would be responsible in forming such an opinion. The Supreme Court relied upon the list of "do's and don'ts" provided to officers during deployment, and held that these provided sufficient checks and balances to the unfettered powers provided by the Act.[29] The ground realities were given a blind eye. There was no mention of the Fourth Geneva Convention or of the Geneva Convention Act anywhere in the judgement. In fact, there was no mention of any national or international standard of human rights at all. The phrase, "human rights" itself was only used once to summarize the contention of the petitioners. The constitutional term "fundamental rights" was not used at all. The Supreme Court restricted itself to a very narrow analysis of both the legislative competence and technical availability of the checks and balances of power.

Human rights violations by the armed forces continue in these areas to date. Activists such as Irom Chanu Sharmila have been on a hunger strike for nearly sixteen years in protest against the AFSPA.[30] Following the rape and murder of Ms. Thangjam Manorama in 2004, a group of approximately 30 Manipuri women marched naked to the Army Headquarters, chanting "Indian Army, rape us too."[31] There have been repeated petitions to the Supreme Court to reconsider its position on the act, and several recommendations have been sent to the Parliament to repeal the act.[32] None have been met with any success.

Does the Treaty Compel Compliance?

The difference in attitudes towards the two international treaties can be analyzed with respect to several standards of international treaty behavior. The first level of analysis is regarding the form and content of the treaty itself, and how far it compels a state party to take action. In his seminal article, "Form and Substance in International Agreements," Kal Raustiala states that the obligations imposed upon a State party are heavily impacted by the form, structure and

[26] People's Union for Democratic Rights, "An Illusion of Justice."
[27] *Naga People's Movement,* 1997.
[28] Armed Forces (Special Powers) Act, Section 4 (1958).
[29] *Naga People's Movement,* 1997.
[30] Samom, "Irom Sharmila released," February 29, 2016.
[31] Srivastava, "Manipur's Simmering Outrage," September 2, 2006.
[32] Human Rights Watch, "These Fellows Must be Eliminated."

substance of an agreement. The interactions between these three features play an important role in the operation of agreements.[33]

Legality: Obligations Imposed by the Treaty

Raustiala argues that treaties (or "contracts", as he calls them) impose legally binding obligations upon state parties, and are therefore often considered inflexible and rigid.[34] Since both agreements under consideration in this paper are conventions, they are assumed to be in the nature of contracts. If so, there ought to be some implications for the breach of the contract. The legal obligations for all state parties in the Fourth Geneva Convention include: a) disseminating the text of the convention in civil society, and including it in military training (Article 144); b) making penal legislation to deal with any person who commits a breach of the Convention (Article 146 para I); and c) to search for and produce before the Court, persons who commit the breach (Article 146 para II).[35]

The Geneva Convention was implemented in India through the Geneva Convention Act of 1960 and provided very stringent punishments, including the death penalty, for grave breaches of any of the Geneva Conventions. This includes the Fourth Convention.[36] In one way, this may seem to fulfil the obligation cast upon the Government of India vide Article 146 paragraph I. However, it is to be noted that the term used in the convention is "effective" penal sanctions. The Geneva Convention Act mentions in Section 17 of its Miscellaneous Chapter that, "No court shall take cognizance of any offence under this Act except on complaint by the Government."[37] This, in effect, clips the wings of all the penal provisions provided for in Section 3 under, "Punishment for Grave Breaches of Convention."

The Government of India has very rarely, if ever, abided by the obligation in Article 146 paragraph II. Though inquiry commissions such as the Justice D.N. Sen Commission have been set up in some instances of human rights violations, action has almost never been taken to find the guilty persons and punish them.[38] The AFSPA itself provides immunity to all persons in respect to anything done or purported to have been done under the provisions of that act, unless prior sanction has been received for prosecution from the central government.[39] Furthermore, the Geneva Convention Act accords priority to court-martials over criminal prosecution as far as members of the armed forces are concerned.[40] Reports by human rights organizations, such as the People's Union of Democratic Rights (PUDR) and People's Union of Civil Liberties, observe that the government routinely refuses to grant sanction for the prosecution of army officers, and the army gives "clean chits" to all those accused.[41]

The training material provided to the military is highly confidential. However, if an assumption is to be made on the basis of the list of do's and don'ts provided to the armed forces, as quoted in the *Naga People's Movement* judgment,[42] they seem to be merely norm-creating, rather

[33] Raustiala, "Form and Substance," 2005.
[34] Ibid., 586.
[35] Geneva Convention (IV).
[36] "Geneva Convention Act," Section 3 (1960).
[37] Ibid., Section 17 (1960).
[38] People's Union for Democratic Rights, "An Illusion of Justice."
[39] Armed Forces (Special Powers) Act, Section 7 (1958).
[40] Geneva Convention Act, Section 7 (1960).
[41] People's Union for Democratic Rights, "An Illusion of Justice"; People's Union of Civil Liberties, "An Analysis of Armed Forces."
[42] *Naga People's Movement,* 1997.

than imposing any legal obligation. Yet there is no repercussion for the Government of India for failing to meet their obligations, apart from the reports of NGOs. These too are based on general standards of human rights, rather than the provisions of the Geneva Convention. To date, the attitude of the government and the judiciary remain largely the same. In the case of *State vs. Surinder Pal Singh and Others*, the question was about the role of the army in the massacre of all able-bodied, young Muslim men in Hashimpura, a small neighborhood in Uttar Pradesh, in northern India. The Prosecution wrote to the Defense Ministry in 2010, and again in 2013, for records of army officers on duty in that area during the relevant period of time. The Defense Ministry sent back a vague reply that the incident was too old and that they would not be able to search for the records. The judge conducting the trial refused to send out summons. In the judgment, it was recorded that no member of the army was examined by the prosecution – hence they could not be held guilty.[43]

On the other hand, in spite of a highly debilitating reservation, the Government of India has gone ahead and enforced many provisions of CEDAW through legislation, executive schemes, policy and guidelines, etc.[44] In fact, the government has taken measures even in areas that the reservation said it would excuse itself from. Between signing the convention, and prior to formal ratification, the Dowry Prohibition Act was amended in 1986 to include cruelty related to dowry, and death caused in relation to dowry, as penal offences.[45] In 1990, the National Commission for Women was established to review and recommend legal safeguards for women.[46] The Constitution was amended to reserve a third of seats in the grassroots- level local self-government for women.[47] In 2005, the Hindu Succession Act was amended to give Hindu women the right to inherit joint-family property.[48] This step by the government was a move against prevailing religious and cultural norms of the community, and so against the reservation itself.[49] In the same year, the Protection of Women from Domestic Violence Act was passed,[50] and the government adopted gender budgeting as a tool to mainstream gender in its policies and programs.[51] The judiciary has been equally enthusiastic in protecting the rights granted by the state under these legislative measures, as can be seen from the sheer volume of litigation in the court dockets on these issues. The legal obligations imposed by CEDAW upon the state parties are, a) to create a legislation or to incorporate in their constitution the principle of equality between men and women; and, b) to adopt a legislation that prohibits discrimination and protects the rights of women.[52] In essence, therefore, the obligations under both the Fourth Geneva Convention and CEDAW are the same, in terms of the creation of domestic legislation. The ability to create domestic legislation gives state parties greater autonomy in how they wish to execute international legal standards. The question that needs to be asked, then, is why there are

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[43] *Surinder Pal Singh, 2015.*
[44] "Addendum: Replies of India," 2014.
[45] Indian Penal Code, Section 304B and Section 498A.
[46] National Commission for Women Act, Section 3 (1990).
[47] Constitution of India, The Constitution (Seventy Third) Amendment Act, 1992 and Article 243D (2); Constitution of India, The Constitution (Seventy Fourth) Amendment Act, 1992 and Article 243T (2).
[48] Hindu Succession Act, Sections 6, 6A, 6B (1956).
[49] Of course, the Hindu community being the majority community, it is possible that the government may be willing to grant property rights to Hindu women. Muslim women's rights to property and inheritance have not been amended so far.
[50] Protection of Women from Domestic Violence Act (2005).
[51] *Ministry of Women and Child Development,* "Gender Budgeting."
[52] CEDAW, Article 2.

varying standards in the legal and judicial approaches to the two conventions. One reason could be that the specific ask of the Fourth Geneva Convention is to create legislative measures that give effective penal sanctions to members of the armed forces.[53] As pointed out by the PUDR report, neither the army tribunals nor the government wish to lower the morale of the men who are risking their lives for the security of the state.[54] That explains the restrictive provision of Section 17 of the Geneva Convention Act, where the state and courts try their best to cushion army-men who may have to be censured for their actions in the field, thus reducing their willingness to place themselves at risk. CEDAW, on the other hand, allows a lot more room for state discretion by allowing states to legislate in any manner they think best, so long as the goal of the convention is achieved.

Further, each substantive clause in CEDAW begins with: "State parties shall take all appropriate measures to…."[55] With respect to legislation, the obligations are the same as the Fourth Geneva Convention, but the state also has the ability to take other "appropriate measures," which is a loosely-defined term and grants the state parties some flexibility in deciding the best course of action. It is also obvious that legislation alone cannot bring about all the necessary changes, and some amount of norm-changing is required. Raustiala mentions the importance of pledges as norm-changing mechanisms, and acknowledges their effectiveness.[56] Though not a pledge, the comparatively ambiguous phrase, "appropriate measures" allows state parties to undertake other mechanisms, such as awareness campaigns, education initiatives, job training, etc. that, for a willing state, will be much more effective in achieving social, and not just legal, equality for women.

Substance: Depth of the Treaty

The next determining factor for treaty compliance that Raustiala considers is "substance," which is the extent to which a state party will be required to deviate from the status quo in order to execute a treaty.[57] Barsoom et al. refer to this criterion as the "depth" of a treaty.[58] The more the state is required to deviate from its current legal position, the deeper is the treaty, while treaties that do not significantly displace state parties are considered "shallow." Raustiala argues that shallower agreements are more likely to perform well.[59] It is perhaps in this context that the difference in judicial and state attitudes can be best analyzed.

The Constitution of India mandates equality between men and women in multiple articles, and even in its preamble. In the chapter on fundamental rights, women are specifically guaranteed protections through Article 14 (equality before law); Article 15 (prohibition of discrimination on the grounds of sex); Article 16 (equality of opportunity in matters of public employment); and Article 23 (prohibition of traffic in human beings).[60] The Directive Principles of State Policy require the government to provide just and humane conditions of work and maternity relief.[61] The Constitution also makes it the fundamental duty of all citizens to "renounce

[53] Geneva Convention (IV), Article 146.
[54] People's Union for Democratic Rights, "An Illusion of Justice."
[55] CEDAW, Articles 5, 6, 7, 8, 10, 11, 12, 13, 16.
[56] Raustiala, "Form and Substance," 586.
[57] Ibid., 584.
[58] Barsoom et al., "Is the Good News," 383.
[59] Raustiala, "Form and Substance," 601.
[60] Constitution of India, Part III.
[61] Constitution of India, Article 42.

practices derogatory to the dignity of women" [Article 51A (e)].[62] Thus, for the Government of India, enforcing CEDAW provisions was only an extension of legislating upon their constitutional mandate. Even with respect to norm-changing, the constitution had already provided the grand norm, and the requirements of CEDAW were only an additional external impetus to make the necessary legal provisions. For the judiciary, the task was even easier. The Supreme Court has been tasked with protecting all fundamental rights granted by the constitution,[63] and even though the Vishaka judgment has been criticized for judicial over-reach, it can easily be argued that the court was merely fulfilling its mandate. CEDAW was signed in 1980 and ratified in 1993, so in 1997, it is possible to argue, the status of the provisions of CEDAW was similar to the constitutional provisions that had not yet been legislated upon.

On the other hand, the Constitution provides for an abrogation of fundamental rights in case of preventive detention, declaration of emergency, and other exceptional situations. Article 34, which is also within the chapter of Fundamental Rights, states that:

> Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.[64]

When the fundamental rights of citizens are contrasted with the rights of the armed forces, this constitutional provision relegates human rights to the background. It greatly weakens the legislative will to enforce the Fourth Geneva Convention stringently. In addition, the Convention was signed one year after the creation of AFSPA , and the Geneva Convention Act has no overriding clause for a previously-enacted law. The Fourth Geneva Convention therefore carries a high level of depth for the Government of India. The judiciary is similarly prevented from objecting to military excesses by Article 34 of the Constitution, the legislative competence of the Parliament to enact AFSPA and Section 17 of the Geneva Convention Act.

Structure: Monitoring Treaty Compliance

The last feature of a treaty that Raustiala discusses is structure, which refers to a system for monitoring the enforcement of the treaty by state parties. The Fourth Geneva Convention has no supervising or regulatory body. In case of any dispute, the Protecting Powers are expected to mediate and settle the disagreement.[65] There is, therefore, no authority that can monitor the implementation of the Fourth Geneva Convention. On the other hand, the CEDAW requires state parties to submit a report once every four years to the Secretary-General of the United Nations for consideration by the CEDAW, detailing the legislative, judicial, administrative or other measures which they have adopted, and the progress they have made in giving effect to CEDAW's provisions.[66]

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[62] Constitution of India, Part IVA.
[63] Constitution of India, Article 32.
[64] Ibid., Article 34.
[65] Geneva Convention (IV), Article 12.
[66] CEDAW, Article 18.

It is interesting to note from the reports India has submitted that all enforcing mechanisms were brought into force in the year prior to when the report was due. In 2005, for instance, the Domestic Violence Act, the Hindu Succession (Amendment) Act and the Gender Budgeting scheme were all brought into force, in time for the 2006 report. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act was brought into force in 2013, just ahead of the 2014 report.[67] As Raustiala puts it, prodding governments to report on implementation keeps international commitments in the constant attention of bureaucrats.[68]

Political Will to Comply

The second level of analysis is with respect to the motivations of the government and the judiciary itself in implementing treaties. Beth Simmons, in *Mobilizing for Human Rights*,[69] lays down a number of theories of compliance, including a treaty's national agenda-setting influence and the leverage a ratified treaty provides to human rights litigation.

Empowering Rights Groups

A compliance theory of critical political importance is that a treaty can mobilize groups that are demanding rights. Simmons explains that treaties introduce a new set of rights and a new understanding of rights claimants into the local political setting.[70] Where the understanding or the rights are not new, they can definitely reinforce the existing legal standards, and provide an exogenous impetus to human rights movements.

The women's rights movement has always been strong in India. In the 1980's, the mobilization groups were making quick gains, with the amendment to the Dowry Prohibition Act recognizing dowry deaths and cruelty on the grounds of dowry as specific offenses. The first half of the 1980's saw the political regime of India's first (and, so far, only) female Prime Minister.[71] Between the signing and ratification of CEDAW, the National Commission for Women was established, so at the time that CEDAW was ratified, there was already a body that could monitor its implementation.

A major *sati* (widow burning) scandal had shaken the conscience of the country in 1987.[72] The acquittal of two policemen in a case of custodial rape had set in motion a strong advocacy movement that was demanding amendments to current rape laws.[73] Moreover, the influence of the 1970's feminist movement in the west had trickled into Indian society in the 1980's. The signing and ratification of CEDAW in this political climate only served to reinforce the leverage that rights groups had in litigation. Simmons mentions that litigation based on international law has been a tactic used by lawyers since the early nineteenth century.[74] The Supreme Court in Vishaka referred to the *High Court of Australia in Minister for Immigration and Ethnic Affairs vs. Tech* (128 ALR 535) wherein the Australian High Court recognized the concept of the legitimate

[67] "Addendum: Replies of India," 2014.
[68] Raustiala, "Form and Substance," 607.
[69] Simmons, *Mobilizing for Human Rights.*
[70] Ibid., 135.
[71] *PM India*, "Former Prime Ministers."
[72] Badhwar, "Roop Kanwar's Sati," October 15, 1987.
[73] See: *Sakshi vs. India, 2004*.
[74] Simmons, *Mobilizing for Human Rights,* 130.

expectation of the observance of international conventions in the absence of contrary legislative provisions.[75] The Fourth Geneva Convention, on the other hand, was signed at a time when India was burning in the violence of its partition in 1947. The focus was on gaining civil and political rights for all citizens of the newly-created democracy, on writing an effective constitution, and on the economics of "nation-building." AFSPA was in force only in northeast India at that time,[76] a section of the country that to date receives little attention from either the government or rights groups in the rest of the country. There was no space for mobilizing or demanding the enforcement of the rights guaranteed in the Fourth Geneva Convention. The Indian Army had just "won"[77] the First Indo-Pakistan War and was the hero of the moment. In 1960, when the Geneva Convention Act was drafted, the country had seen a decade of peace, finished the process of post-Partition land transfers and enjoyed the fruit of their own economic activity for the first time in two centuries. Little, if any, attention was paid to human rights violations in the north-east. Particularly in light of "nation-building" activities, and integration of the Princely States (autonomous provinces that were not under British dominion) into the state of India, the military operations in the northeast to subdue secessionist tendencies were viewed as legitimate actions.[78] Thus, there was no demand for the enforcement of rights under the Geneva Convention.

Political Importance of the Protected

Simmons emphasizes the importance of the political atmosphere surrounding the subject-matter of the convention. She draws a distinction between the "protection of the innocents" and the human rights issues that may interfere with State security.[79] Governments are bound to create toothless domestic legislations, and enact false positives of compliance where the issue is such that their own interests are likely to be hurt. India, for instance, is not a party to the Convention Against Torture, which was being signed around the same time as the Government of India was victimizing a Sikh religious minority group,[80] and when militancy in Kashmir had just started escalating.[81] In that political climate, it was not to be expected of the government to sign a convention that would interfere with its ability to crack down on other violent forces. CEDAW, on the other hand, was of interest to the government for image-building, particularly under the watch of a female Prime Minister until 1984, and as the Indian feminist movement peaked in the 1990's. Thus, implementing CEDAW was politically convenient.

Role of the Media in Informing Human Rights Advocacy

Another major event that influenced mobilization around these two treaties was globalization and the entry into India of cable television in the 1990's. In 1960, television was a rare luxury commodity, and the only radio station was run by the government. In 1993, by

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[75] *Vishaka & Others vs. Rajasthan*, 1997.

[76] Long Title, Armed Forces (Special Powers) Act, 1958 reads: An Act to enable certain special powers to be conferred upon members of the armed forces in disturbed areas in the State of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura.

[77] The Indian army had been able to capture and secure many posts in Kashmir, but the war was suspended after a cease-fire brokered by the United Nations, with a Line of Control being drawn where the forces were presently stationed. Till date, Kashmir remains divided between India and Pakistan, causing much acrimony between the two states. See: "Resolution adopted by the United Nations," document No.1100, 1948.

[78] Datta, "Secessionist Movements in North East," 536-558.

[79] Simmons, *Mobilizing for Human Rights,* 15.

[80] North, "Delhi 1984: India's Congress party," February 18, 2014.

[81] Bose, "The evolution of Kashmiri resistance," August 2, 2011.

contrast, television had become a household item and private channels had not only gained airtime, but were also hosting news channels. Newspapers had changed their stance from Freedom Struggle-inspired nationalism to post-Emergency criticism and were quick to oppose the government at every wrong move.[82] It was easier to inform groups of their rights around the time CEDAW was ratified, as compared to the time when the Fourth Geneva Convention was ratified.

The imposition of AFSPA in Kashmir brought it into public attention when the families of disappeared persons formed a coalition to protest.[83] The imposition of AFSPA in Kashmir also coincided with the media boom of the 1990's, and made people aware of the torture mechanisms of the Indian army. As the internal conflict comparatively declined in the mid-2000s, criminal complaints against army officers started turning up in courts. A complaint filed in 2006 was heard in appeal by the Supreme Court in 2011 and finally decided in 2012. This case, *General Officer Commanding vs. Central Bureau of Investigation*, was the turning point in AFSPA litigation. The Supreme Court held that:

> ii) The competent Army Authority has to exercise his discretion to opt as to whether the trial would be by a court-martial or criminal court after filing of the charge-sheet and not after the cognizance of the offence is taken by the court….
> iv) In case the option is made to try the accused by a court-martial, sanction of the Central Government is not required.[84]

Wedging apart the requirements of the sanction and court martial has created a slightly broader avenue for victims to seek redress of human rights violations. In the year following this judgement, the Supreme Court instituted a Commission to make recommendations for keeping police and security forces within legal bounds and without compromising the fight against insurgency. The principal recommendation of the commission was that the central government be given a reasonable time limit to pass an order under Section 6 of AFSPA, preferably within three months from the date it received the request of the prosecution. If this failed, sanction would be presumed. This recommendation was made in March 2013. In 2015, a court martial sentenced six officers (two commissioned and four non-commissioned) to life for fake encounter killings they committed in 2010.[85]

Conclusion

Bollywood, which has been a strong framer of public opinion in India, released the movie *Haider* in 2014 – an adaptation of Hamlet, set in Kashmir, that was extremely critical of the AFSPA regime. The movie brought the issue of military abuse into public glare and reconvened the discussion on the legality of AFSPA. The incentive to mobilize surfaced briefly, with the Jammu Kashmir Coalition of Civil Society releasing its report on violence committed by the Indian state in Kashmir in 2015.

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[82] Roy, "More News is Good News," 1-17.
[83] Association of Parents of Disappeared Persons, "About APDP."
[84] *General Officer Commanding vs. CBI*, 599.
[85] Ashiq, "Six army men sentenced," September 7, 2015.

However, with the change of political regime at the Centre in 2014, and the conservative, Hindu right-wing forces gaining power, the political will to undertake such reforms no longer exists. Those aware of the existence of the Geneva Convention Act should bring it to public attention and knowledge the next time the political situation is opportune to act upon military abuses again. Armed with the rights guaranteed under that Act, rights groups shall have the leverage to litigate for an amendment to Section 17 and make the protections of the Fourth Geneva Convention a reality for civilians who are facing gross human rights abuses at the hands of the armed forces.

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