

India's defence exports and humanitarian law

The Supreme Court of India, earlier this month, dismissed a public interest litigation (PIL) asking that the central government be directed to stop exporting defence equipment to Israel as Tel Aviv is allegedly committing war crimes in Gaza. The top court refused to intervene, reportedly because foreign policy is not its domain. However, the issue that the PIL raised is a normative one that goes beyond Israel. It must be clearly understood given India's aspirations to become a major defence exporting nation.

It is critical to recall that quite a few countries have curbed defence exports to Israel. For instance, a court in the Netherlands ordered the Dutch government to block the export of all F-35 fighter jet parts to Israel. The basis of this order is a European Union (EU) regulation, which prohibits military equipment export to a country if there is a clear risk that the recipient country would use such equipment to violate international humanitarian law (IHL). Likewise, the United Kingdom government, acting under the Export Control Act, reviewed Israel's compliance with IHL concerning the ongoing conflict in Gaza. It concluded that there is a clear risk: if certain arms are exported to Israel, they would be used to commit or facilitate serious violations of IHL.

Legal gap

There is no equivalent of the U.K.'s Export Control Act or the EU regulations in Indian law requiring an assessment of a country's compliance with IHL obligations in deciding whether to export defence equipment to such a country. The Indian Foreign Trade Act, 1992 (FTA) read with the Weapons of Mass Destruction and their Delivery Systems (Prohibition of



Prabhash Ranjan

Professor at the
JIndal Global Law
School, O.P. JIndal
Global University

Having India amend its domestic laws would be a better way to strengthen its credibility and assess the international humanitarian law-compliance of countries importing its defence goods

Unlawful Activities) (WMDA) Act, 2005 empowers the central government to regulate the export of designated goods relevant to India for various reasons. These reasons are listed in Sections 3(5) and 2(i) of the WMDA and FTA, respectively. In addition to things such as India's national security, an important factor listed in these sections is India's "international obligations under any bilateral, multilateral or international treaty, Covenant, Convention". In short, the central government can prohibit the export of defence goods due to India's international law obligations. This is the closest Indian law gets to connecting the export of defence goods with international law. As per India's domestic law, the central government, unlike in the U.K. and the EU countries, is not under an obligation to review the IHL compliance of the country to which India is exporting defence goods. Thus, the legal gap.

The Supreme Court, in several cases, such as *Vishakha vs State of Rajasthan*, has not just used international law to enlarge the content of domestic law but has also judicially incorporated international law to fill the vacuum created by the absence of domestic law on the subject. The current situation falls squarely in this category. This is how we need to legally frame this issue instead of making it a foreign policy topic. So, the next question is about what the international law on arms trade is and how it binds India.

International law

The most important treaty in this regard is the Arms Trade Treaty (ATT), aimed at regulating international trade in conventional arms. Article 6(3) of the ATT bars a country from supplying conventional arms if it has the "knowledge" that these arms "would be used" to inter alia commit war crimes. Article 7 obligates states to assess

whether the conventional arms they export would be used by the importing country to commit or facilitate a serious violation of IHL.

Interestingly, India is not a signatory to this treaty. As a result, this treaty is not binding on India and cannot be judicially incorporated, though some provisions of the ATT reflect customary international law.

The obligation

What about India's liability under the IHL? Common Article 1 of the Geneva Conventions, which is binding on India, obligates all states 'to respect and to ensure respect for' IHL. As it was held by the International Court of Justice in *Nicaragua vs United States*, this provision imposes a negative obligation on states. Thus, countries are under obligation not to supply weapons to a country 'if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions'. Scholars argue that the certainty required for the exporting state that its weapons will be used by the importing state to commit violations of the Geneva Conventions is quite high.

When India's domestic laws, the WMDA and the FTA, are read in light of India's IHL obligations, a clear duty arises not to supply weapons to a country that would use them to breach its IHL obligations. But rather than deriving this obligation using international law, it would be better for India to amend the WMDA and the FTA, to explicitly assess the IHL compliance of countries importing Indian defence goods. This way, India will shore up its credibility as a responsible defence-exporting nation.