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Is the Jurisdiction of International Criminal Court an Extension of National Criminal Jurisdiction? Some Dilemmas

“Justice in the life and conduct of the State is possible only as it first resides in the hearts and souls of its citizens”

Dr. H.B. Alexander¹

1. Introduction

The birth place of war and peace is non-other than a human mind. If humanity, brotherhood, justice and mercy dominate one person’s heart, such a person will never kill his own brothers and sisters. However, this is not a general perception that can be found in the hearts of most people. Hence, the world is inevitably subjected to the fear and threat of war.

Therefore, to eliminate and prohibit various types of criminal activities relating to humankind at an international level, it was proposed to have an International Criminal Court (ICC).

The idea of formulating an international court to prosecute criminals who engage in crimes

¹ Inscription over the 10th street entrance of the U.S. Department of Justice Building, Washington, D.C.

² The Rome Statute of the International Criminal Court was adopted on 17 July, 1998 and entry into force on 01 July 2002.

against humanity, war crimes and genocide had a long running history, until it reached its destination in 1998.²

However, even after establishing such a platform, some countries are not willing to be bound by the authority vested in ICC, based on certain sovereignty issues, fear of politically motivated accusations and the doubt of intervention from the dominant players of the international system into the ICC.³

This Article examines the pros and cons of ratifying the Rome Statute of the ICC. Furthermore, it aims to discuss the apprehensions of ratifying the Rome Statute and how and to what extent such ratification would help to overcome some uncertainties relating to adjudication and administration of justice in the sphere of international criminal law. Further, by considering whether the jurisdiction of ICC is an extension of national criminal jurisdiction or not, it discusses the scope and the functions of the ICC and finally concludes with an

³ V. Toon, ‘International Criminal Court: Reservations of Non-State Parties in Southeast Asia’ (2004) 26 Contemporary Southeast Asia 218, 220.

analysis of the merits and demerits of ratification of the ICC Statute.

2. Rome Statute and ICC

“As long as the world shall last there will be wrongs, and if no man objected and if no man rebelled, those wrongs would last forever.”

Clarence Darrow (1857-1938)

Though, the idea of prosecuting for international crimes can be traced back to the 15th century, it was very rare to find actual prosecutions in place.⁴ After the World War II, the Nuremberg Tribunal was established for the purpose of punishing Nazi war criminals.⁵ However, these trials were opened to criticism as a biased reflection of ‘victors’ justice’.⁶ Thereafter, a United Nations Commission was appointed in 1948, to study on the possibility of establishing a permanent international criminal court. However, due to some political and social upliftment the idea was pushed back.⁷ In 1993 UN Security

Council established the International Criminal Tribunal for the former Yugoslavia (‘ICTY’)⁸ and in 1994, International Criminal Tribunal for Rwanda (‘ICTR’)⁹ was established as *ad hoc* international criminal tribunals as the first real international attempt to enforce IHL.¹⁰ Nonetheless, with the inefficiencies carried out in ICTY and ICTR, the idea of having a permanent international criminal court was once again stressed and bloomed in international arena. Having undergone a debated passage of discussions, finally the ICC was established¹¹ as ‘a giant step forward in furtherance of human rights and the rule of law.’¹²

Though the establishment of ICC gave hope to humankind that justice is being served by eliminating grave crimes which threaten the peace, security and well-being of the world,¹³ once it was established, however, attention naturally turned to practical issues, such as whether it would be able to operate normally as any court

⁴ M.K. Marler, ‘The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute’ (1999) 49Duke Law Journal 825,826

⁵ This tribunal proceeded under the Hague and Geneva Conventions and the judgements were pronounced by the elite parties.

⁶Toon (n 3) 227.

⁷ Ibid

⁸SC Res 827, UN SCOR, UN Doc S/RES/827 (25 May 1993).

⁹SC Res 955, UN SCOR, UN Doc S/Res/955 (8 November 1994)

¹⁰ B.O Proster, “Justice Goes Global”, Time International, July 27, 1998. At p.46.

¹¹ 124 countries casted their votes for Rome Statute, while 07 opposed including United States of America and 21 countries were abstained. Thereby, the ICC was established with the majority of well-wishers.

¹² G. Roberts, ‘Assault on Sovereignty: The Clear and Present Danger of the New International Criminal Court’ (2001) 17 American University International Law Review 36

¹³ See the Preamble of the Statute of the International Criminal Court, Rome 17 July 1998.

would and perform its historic mission due to various reasons.¹⁴

3. Ratification of Rome Statute: Implications on the Parties

Once it is clear that the international community will no longer tolerate monstrous acts, it is hoped that those who would incite a genocide (and other crimes against humanity) will no longer find willing helpers.¹⁵

ICC can exercise its powers and functions on the territory of any State Party and by special agreement, on the territory of any other State.¹⁶ Furthermore, upon the ratification of the Rome Statute, the parties are primarily bound to accept the jurisdiction of the ICC¹⁷ with respect to the crimes referred to in Article 05 of the Rome Statute.¹⁸ As set out in Article 13 of the Statute, exercise of the jurisdiction of ICC is based on three basic limbs;

- a. Referral of a situation by a State Party.
- b. Referral by the Security Council acting under chapter

VII of the Charter of the United Nations.

- c. Initiation of investigation by the prosecutor.

Also, the ICC was established on a ground with compliance to the accepted principles of criminal justice viz. *nullum crimen sine lege*¹⁹, *nulla poena sine lege*²⁰, *ne bis in idem*²¹ and *elements* of crimes and its rules of procedure and evidence.²²

Thus, it is clear that if a State Party recognizes the jurisdiction of the ICC it can be considered as an extension of national criminal jurisdiction with the consent of that particular State.

Though the Rome Statute expressly provides a limitation of not to intervene on national criminal jurisdiction of the State Parties, ICC can interfere with an issue in a situation, if the State Party is unwilling or unable genuinely to carry out the investigations or prosecutions.²³ Also, it stipulates that in order to determine unwillingness the court shall consider the due process recognized by international law.²⁴ Furthermore, the proceedings for shielding the

¹⁴ Z. Venqi, 'On co-operation by states not party to the International Criminal Court' (2006) 88International Review of the Red Cross 88

¹⁵ United Nations, Overview of Rome Statute of the International Criminal Court (1998), available at <<http://www.un.org/law/icc/index.html>>

¹⁶ Rome Statute 1998, Article 4(2)

¹⁷ Ibid Article 12(1)

¹⁸ Which refers to the crime of genocide, crime against humanity, war crimes and the crime of aggression

¹⁹ Rome Statute 1998, Article 22

²⁰ Ibid Article 23

²¹ Ibid Article 20

²² Ibid Article 21

²³ Ibid Article 17

²⁴ Ibid Article 17(2)

criminals, unjustifiable delay and lack of impartiality of the proceedings would amount to the unwillingness of the parties to carry out the investigations or prosecutions.²⁵

It indicates that the State Parties should have a comprehensive criminal justice administration system in their countries to deal with the jurisdiction of ICC. Nonetheless, State Parties should recognize all four criminal offences enshrined in the Rome Statute as offences in the domestic sphere too.²⁶

When considering the Asian experience Afghanistan and Cambodia are the only countries which ratified Rome Statute of ICC.²⁷ Though Bangladesh is not a party to the Rome Statute of ICC, in 1973 it enacted the International Crimes Tribunal Act²⁸ which incorporates genocide, crime against humanity, war crimes and other crimes in international law into domestic law.²⁹ Also, expressly provides a territorial jurisdiction to the War Crime Tribunal to try and punish any person irrespective of his nationality who committed the aforementioned offences in the

territory of Bangladesh.³⁰ Thus, it is noteworthy to point out here that other Asian countries also can follow the Bangladesh experience and incorporate international crimes into domestic law prior to ratifying the Rome Statute. Then it can be argued that, if a country which ratifies the Rome Statute with sufficient and substantive domestic legal framework relating to international crimes, the ICC will not be able to override the national jurisdiction of such a country. However, having a comprehensive legal framework would not always be an excuse to intervene such a country. International and domestic politics would play an important role on extending the ICC's jurisdiction to the State Parties. There may be some countries that are unwilling or incapable to try criminals who committed such crimes, not because of the lack of jurisdiction, but because of political manipulations.³¹ Inevitably, in such a situation the jurisdiction of ICC would extend by overriding the national criminal jurisdiction of such a State Party.

The controversies between national jurisdictions and the jurisdiction of ICC can be identified very clearly in The

²⁵ Ibid Article 17(2) a,b,c

²⁶ Rome Statute 1998, a 12(1)

²⁷ V.S Mani (ed), *The Handbook of International Humanitarian Law in South Asia* (Oxford University Press, New Delhi, India, 2007)

²⁸ Act XIX of 1973, Bangladesh Gazette Extraordinary, dated 20 July 1973.

²⁹ Mani (n 27) 54.

³⁰ Ibid.

³¹ Even though the Pakistan did not agree to prosecute, in 1974 Bangladesh allowed India to repatriate 195 alleged violators of Geneva Conventions to Pakistan due to political agreements. Thus, one can argue that the jurisdiction of ICC would pave the way for securing the rights of all persons.

Prosecutor v. Germain Katanga

case.³² In this case the Democratic Republic of Congo (DRC) referred the Katanga's case to the ICC in 2004 by claiming that the DRC is not being able to prosecute against Katanga.³³ Then the prosecutor of ICC took over the case and found the accused guilty on 7 March 2014 of one count of crime against humanity and 4 counts of war crimes and ultimately sentenced for 12 years. Pursuant to the Article 103 of the Rome Statute Katanga was sent to the DRC for serving the sentence. However, the Presidency of ICC noted that the enforcement of the sentences of imprisonment shall be subject to the supervision of the ICC and shall be consistent with widely accepted international standards governing the treatment of prisoners.³⁴

Thus, it is clear that there are some grey areas in the complementary jurisdiction of ICC and various motives behind most States' reluctance to ratify the Rome Statute. The impact of the ICC on State sovereignty can be considered as one of the fundamental reasons for such reluctance.

³²ICC-01/04-01/07

³³ See *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06

³⁴"Thomas Lubanga Dyilo and Germain Katanga transferred to the DRC to serve their sentences of imprisonment" Press Release: 19 December 2015, <https://www.icc->

4. Jurisdiction of ICC: Some Dilemmas

Where after all, do universal human rights begin? Yet they are [begun] the world of the individual person;...unless these rights have meaning there, they have little meaning anywhere.

*Eleanor Roosevelt,
1958*

When considering the implications of being a State Party to the Rome Statute, the sovereignty issue will come into first place. As it was vehemently critiqued by some scholars 'the principle of "complementarity" is one of the most dangerous concepts enshrined in the Statute'.³⁵

The same argument was upheld by some country representatives in various forums by stressing the pressing concerns of their countries on the ICC. As it was connoted by Vietnamese official Nguyen Ba Son;³⁶ The principle of "primacy of national jurisdiction" ...had broadly been accepted in international law. It is therefore considered by our

cpi.int/Pages/item.aspx?name=pr1181 accessed on 03 December 2016.

³⁵Roberts (n 12) 54.

³⁶ Statement made by Nguyen Ba Son, delegation of Vietnam, at the UN Diplomatic Conference of Plenipotentiaries of the Establishment of an International Criminal Court, Rome, 18 June, 1998.

Government that any activity of the Court [the ICC] without prior consent of the States concerned constitutes an encroachment of the State Sovereignty.

Although, the principle of “complementarity” can be considered as a bridge which creates a consensus between national and international jurisdiction, it also critiques as a means that assaults the sovereignty of the State Parties.³⁷ Some writers pointed out that, even if Article 01 of the Rome Statute clearly limits the power of the ICC by the principle of “complementarity”, it would be a false sense of hope because of the rules stipulated in Article 17, 18 and 19 of the Rome Statute.³⁸ It indicates that the international jurisdiction would prevail over the national jurisdiction, only if the state is unable or unwilling to conduct proceedings. However, here the remarkable point is that who has the power to determine the unwillingness to prosecute. If the authority is the ICC, inevitably the ICC would be the ‘Supreme Court’ of all national legal systems.³⁹ In such a situation the decisions taking at the ICC also can be based on the ulterior motives of the key actors of the arena of international law. Thus, the “complementarity” jurisdiction also

would be a boomerang in the hands of the giants.⁴⁰

Nonetheless, the jurisdiction of ICC is frequently critique on the ground that the high possibility of being exposed to politically motivated accusations.⁴¹ The same fear fertilizes based on the power of the Security Council to refer matters to the ICC. It is inevitable that the members who are having veto in Security Council can use their power to water down the initiatives against the criminals in their country and to make politically motivated accusations on the citizens of other countries.

Moreover, the power of the prosecutor to initiate investigations pursuant to the Article 15 of the Rome Statute also questioned by some countries on the ground that the impartiality of the office of prosecutor. As it is correctly pointed out by Roberts; an aggressive prosecutor, in pursuit of his or her own notions of the law and in concert with the sympathetic tribunal, could severely inhibit the legitimate conduct of foreign relations, alter customary international law and even further restrict a nation’s sovereign rights.⁴² As discussed earlier it is clear that there are some accepted concerns

³⁷Roberts (n 12) 54.

³⁸Toon (n 03) 222.

³⁹Roberts (n 12) 55.

⁴⁰ See the statement made by R. Vengadeshnan (Malaysia Ambassador to Italy) at the UN Diplomatic Conference of

Plenipotentiaries of the Establishment of an International Criminal Court, Rome, and 18 June, 1998.

⁴¹Toon (n 03) 219.

⁴²Roberts (n 12) 59.

which cause a dilemma on ratifying the Rome Statute of ICC.

5. Is the Jurisdiction of ICC, Really an Extension of the National Criminal Jurisdiction?

If one were to look at the entire notion of the ICC with a lens of humanity it would be possible to see some merits in the mission of ICC. Though, the States are based on the idea of sovereignty⁴³, we cannot identify sovereignty as an absolute concept in modern context. However, it can be argued that, if the sovereignty is a right of a State, what is the duty attached to that right? Certainly, the duty is to protect the individuals and their dignity and the human rights of the people of the country who are the rightful owners of sovereign power.⁴⁴ Thus, one can firmly argue that the State is only a trustee who holds the sovereign power of the people for the beneficial interests of the people. Therefore, it should be a bounden duty of the State as a good trustee to take necessary measures to enhance 'human security' in the country.

As legal scholar Sandra Jamison candidly pointed out; 'the absolute

doctrine that a State is supreme in its own authority, and need not take into account the affairs of other nations, is no longer tenable.'⁴⁵ Thus, it is noteworthy to point that a State should 'start from the premise that the threat of life and limb of millions of individuals should take precedent over military and national security interests.'⁴⁶

Therefore, when considering the preamble and the preparatory works of the Rome Statute it enshrines the idea of having a permanent solution to try and punish persons who commit the crimes against humanity, war crimes, genocide and aggression. Nonetheless, it proposes the principle of "complementarity" to respect the authority of the national court jurisdiction. In that sense, the ICC would not be able to encroach upon the national jurisdiction unless and until the national jurisdiction fulfills its obligations genuinely under the mandate of Rome Statute and other Human Rights and IHL treaties. Therefore, it can be argued that the ICC also based on the principle of '*pacta sunt servanda*' and the

⁴³ See Article 2(4) of the United Nations Charter.

⁴⁴ All most all the Constitutions of the world, contains a clause which indicates that the 'sovereignty is in the People and is inalienable'.

⁴⁵ Sandra L. Jamison, 'A Permanent International Criminal Court: A Proposal that Overcomes Past Objections' (1995)

⁴⁶ Denver Journal of International Law & Policy Review 432

⁴⁶ B. Mcrae, and D. Hubert, eds. *Human Security and the New Diplomacy: Protecting People, Promoting Peace* (McGill-Queen's University Press, 2001)<http://www.jstor.org/stable/j.ctt13x0nsn>. accessed on 03 December 2016.

agreement should be kept by the State Parties.

If a country has a comprehensive criminal justice administration system and due recognition to the international crimes, such country has no reason to have a dilemma on the ratification of the ICC statute. Undoubtedly, in such a context, the ICC can be considered as only an extension of national jurisdiction.

6. A Way Forward

"Justice delayed is justice denied"

William E. Gladstone

The concerns of the countries that are not willing to ratify the Rome Statute, reveal that they are stagnated in the concept of State sovereignty. However, as a member of the world community a State cannot just neglect its duties towards the entire humankind. Nonetheless, non-ratification of Rome Statute does not make room for a country to evade from the liability arising out of the violation of the inviolable norms accepted by entire world. That means the universal jurisdiction and the power vested in the UN Security Council is there to monitor countries in such a situation. Besides, the countries are bound by the basic Human Rights and IHL treaties too. Thus, being a member or not being a member to the ICC would not make any difference on the sovereignty of a country, when the country reaches to a turning point,

because the international realm is preeminently a political one.

Thereby, as an effective means of eliminating international crimes, the mandate, vision and mission of the ICC should be respected by all the countries. However, to minimize the interference of the ICC into national jurisdiction a country can establish a comprehensive criminal justice administration system, independent judicial system and uphold the rule of law in the national level and then ratify the Rome Statute. It means that if you have a well-covered roof it would never let the rain drops drip into your home. Thus, it is better considering all these pros and cons of the Rome Statute and the ICC and re-envisaging the possibilities of ratifying the Rome Statute.

7. Conclusion

As discussed throughout this Article, Rome Statute and the ICC can be considered as a pragmatic step that has been taken to establish international peace and order in one sense. However, due to some sovereignty reasons and political reasons some countries of the world are reluctant to ratify the Rome Statute and to recognize the jurisdiction of ICC. Nevertheless, when discussing the jurisdiction and functions of the ICC as well as the role of implementing IHL, it suggests that it is worth recognizing the jurisdiction of ICC which is only limited to the International Criminal Jurisdiction on

certain crimes. If a country is capable and willing to exercise its national jurisdiction relating to international crimes, the jurisdiction of ICC has nothing to do with the national jurisdiction of such a country. Thus, it is high time that each and every non-State Party to the Rome Statute reconsider its decision based on the greater good of the entire humankind.