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# International Criminal Court: Jurisdictional Issues

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## ABSTRACT

*The paper begins with the evolution of the concept of international criminal court. Then, the emergence of the ICC with the Geneva Convention and the Nuremberg Convention are also emphasized. The paper also deals with the provisions of Article 12 and Article 13 of Rome statute of International Criminal Court (ICC), which deals with the jurisdiction of the International Criminal Court and issues of complementarity and universality. The paper also deals with the issue of nullen crimen sine lege and the concept of nulla poena sine lege in the criminal jurisdiction of the ICC. The court also deals with the issues of defining genocide, and the thin line where the jurisdiction of an individual country ends and that of the ICC commences. The influence of the Security Council and the issues of sovereignty are also dealt by the ICC. The opposition of the United States of America meted out to the ICC only for the sake of hegemony over the other countries is also discussed in this paper.*

**Keywords:** Genocide, war crimes, Article 12 and Article 13 of the ICC, complementarity rule, Universal Jurisdiction.

## I. INTRODUCTION

*“The best chance humankind has ever had to end the ‘culture of impunity’ is within our grasp. We must not let it fall.”<sup>2</sup>*

The need for setting up an International Criminal Court (hereinafter referred in as ‘ICC’ or ‘Court’) to prosecute crimes, which are International in nature, was first recognized by the United Nations (UN).

In last 50 years, there have been many instances of crime against humanity and war crimes for which no individuals have been held accountable. Massacre and mass killings continues in many regions of the world.<sup>3</sup>

The International Law Commission was invited “to study the desirability and possibility of

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<sup>2</sup> Quoted from Kofi Annan’s address to the opening plenary of the Preparatory Commission for the International Criminal Court delivered on 16.2.1999.

<sup>3</sup> In Cambodia in the 1970s, an estimated 2 million people were killed by Khmer Rouge. In armed conflicts in Mozambique, Liberia, El Salvador and other countries, there has been tremendous loss of civilian life, including horrifying numbers of unarmed women and children.

establishing an International Judicial Organ for the trial of persons charged with genocide and other in international crimes.....”. Respect for Human Rights and Fundamental Freedoms for an individual is primary objective of the United Nations. To achieve this end, the establishment of the permanent International Criminal Court was seen as a definite step.

That “end”, in a limited sense, was reached after the adoption of the draft statute by the International Law Commission (ILC) in 1994, which led to the espousal of “Statute of the International Criminal Court” (referred in as ‘the statute’) on 17.7.1998 creating the world’s first independent and permanent International Criminal Court in 2002.

The idea of ICC is not a new one. It is upshot of four *Ad Hoc* International Criminal Tribunals: 1) International Military Tribunal (Nuremberg Trials); 2) International Military Tribunal for the Far East (Tokyo Trials); 3) International Criminal Tribunal for Former Yugoslavia; and 4) International Criminal Tribunal for Rwanda.

### 1. Nuremberg Trials and Tokyo Trials

After the Second World War, tribunals were established in Nuremberg and Tokyo to prosecute most notorious perpetrators for crimes against peace, war crimes and crimes against humanity. Both tribunals took up three categories of offences established under the London Charter, namely, “Crimes Against Peace”, “War Crimes”, and “Crimes Against Humanity”<sup>4</sup>. The major legal problem encountered at that time “was the absence of clearly established and defined crimes and sanctions under which such persons were to be prosecuted”. It raised serious problems with respect to the principles of legality in criminal law that were applicable to these proceedings, namely the prohibition against *ex post facto* laws and the maxims *nulla poene sine lege*, *nullum crimen sine lege*.<sup>5</sup> Following the Nuremberg and the Tokyo trials, the need to codify international crimes and to establish a permanent ICC was felt.

In 1946, the UN General Assembly adopted a Resolution<sup>6</sup> which endorsed and codified the principles<sup>7</sup> of the Charter and the Judgment of the International Military Tribunal at Nuremberg.

The 1948 Genocide Convention<sup>8</sup> ‘merely provides’ that in the event an International Criminal

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<sup>4</sup> Only one country *i.e.* India ratified this convention

<sup>5</sup> Experts also criticize the double standard of applying the newly enacted norms exclusively to the vanquished. One may recall the dissenting opinion delivered by Radha Binod Pal in the proceedings of the International Military Tribunal for the Far East.

<sup>6</sup> “Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal,” UN GA Res. 95 (1).

<sup>7</sup> See MARK A. BLAND. “An Analysis of the United Nations International Tribunal to Adjudicate war Crimes Committed in the Former Yugoslavia: Parallels, Problems, Prospects,” Global Legal studies Journal, 1 Bland, pp. 5-6.

<sup>8</sup> Convention on the prevention and punishment of the crime of Genocide opened for signature 9.12.1948, entered into force 12.1.1951.

Court is established, it would have the jurisdiction over the convention subject matter.<sup>9</sup> The four Geneva Conventions of 1949<sup>10</sup> codified many of the laws of war and established the individual responsibility of grave breaches of those laws. The 1972 Apartheid Convention also provides for the establishment of an ICC.<sup>11</sup>

The work on the ICC was initiated in 1948 in the UN General Assembly and in 1949 in the International Law Commission.<sup>12</sup>

## 2. Post Nuremberg Era

A major milestone in the efforts to create an International Criminal system occurred in 1993 when the UN Security Council established the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTY) under Article 41 of Chapter VII of the UN Charter to hold individuals accountable for the violations of the International Humanitarian Law.<sup>13</sup>

The establishment of ICTY was followed by a similar *ad hoc* Tribunal for Rwanda (ICTR) in 1994. These two bodies strengthened the consensus in favour of a permanent ICC and with the change in the attitudes of the Government led to the establishment of ICC.

## II. NEED AND IMPORTANCE

*“One must not underestimate the symbolic importance of the demonstrated collective international interest and commitment to the prosecution and eventual punishment of offenders who have committed international and transnational crimes that affect the interest and well being of the world community as a whole.”*<sup>14</sup>

Do we need an International Criminal Court? Though it may seem like an allegorical question, there are some, even though there is some not in favour of its establishment, advocating reconciliation in post-conflict situations by devices such as truth commissions, where issues are addressed in the context of confession and forgiveness rather than conviction and punishment.

The importance of this Court is that it covers the area left by will in the jurisdiction of International Court of Justice. It deals in the cases of criminal act by individuals, as to which ICJ deals only with disputes between states. The International Court of Justice has been

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<sup>9</sup> See M. CHERIF BASSIOUNI, *International Criminal Law Conventions and their Penal Provisions* (New York, 1977), p. 30.

<sup>10</sup> Geneva Conventions of 1949: Geneva Convention for the Amelioration of the condition of the wounded and sick in Armed forces in the field.

<sup>11</sup> M. CHERIF BASSIOUNI, note 8

<sup>12</sup> Rome Statute of the ICC: Overview

<sup>13</sup> M. CHERIF BASSIOUNI, note 8, p. 7.

<sup>14</sup> See M. CHERIF BASSIOUNI, & CHRISTOPHER L. BLAKESLEY ; The need for an International Criminal Court in the new International World Order.

restricted in jurisdiction.

ICC reduces the chance of impunity for those who commit serious crimes, though its jurisdiction is complementary in nature, assisting national justice system. Permanent international criminal Court also helps to overcome the demonstrated problems of the *ad hoc* approach. *Ad hoc* approach faces time and space limitations as well as logistic difficulties. Experts say why those tribunals were not established in the countries where there were violations. Observers say that the Security Council reached a point of “tribunal fatigue”<sup>15</sup> A permanent ICC would be established not by the Security Council but by a multilateral treaty process, so that each State party stands on equal footing.

International Criminal Court would also curb failure of National systems where nations are unwilling to call their own citizens to accountability as ICC potentially eliminate these national shortcomings by providing a consistent, predictable forum for justice.<sup>16</sup>

### III. JURISDICTION

The term ‘Jurisdiction’ refers to the legitimate assertion of authority to affect legal interests, Jurisdiction may describe the authority to make law applicable to certain persons or territories.<sup>17</sup>

The Jurisdiction of the ICC is limited to the most serious crimes of concern to the International Community. The rationale behind limiting the jurisdiction of the Court to the most serious crimes of concern to international community is the need to strengthen universal acceptance of the Court and to avoid overburdening the Court.

The Court has its jurisdiction over the following crimes:<sup>18</sup>(1) the crime of Genocide; (2) crime against Humanity; (3) war crimes; and (4) the crime of aggression. The draft statute provisions regarding these statutes are as follows:

#### a. The Crime of Genocide

The term ‘genocide’ has been defined in Article 6 of the statute of the ICC. Genocide here means an act committed with an intention to destroy a national, religious or ethnic group by killing group’s members or by causing them bodily or mental harm.

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<sup>15</sup> A term coined by David Scheffer, Senior Counsel and Advisor to the United States Permanent Representative to the United Nations, in a speech at the 1994 International Law Weekend at the New York City Association of the Bar, in M. Cherif Bassiouni, “*Establishing an International Criminal Court: Historical Survey*”, *Military Law Review*, vol. 149 (1995), p.53

<sup>16</sup> See GREGORY P. NOONE AND DOUGLAS WILLIAM MOORE, An Introduction to the International Criminal Court, 46 *Naval L. Rev.*, pp.147 (1999).

<sup>17</sup> See ANJU RANI, *The International Criminal Court and International Jurisdiction*, 25 *Delhi Law Review*, pp. 220 (2003).

<sup>18</sup> Article 5, Rome Statute of the International Criminal Court

In 1948, the UN general assembly adopted a convention on the Prevention and Punishment of the crime of Genocide. It was in the resolution in the resolution adopting that Convention that the UN General assembly first considered the establishment of an International Criminal Court.<sup>19</sup>

### **b. Crimes Against Humanity**

Article 7 of the statute defines ‘crimes against humanity’. Crimes against humanity are distinguished from ordinary crimes. The acts constituting said crimes such as murder, must have been committed as part of a widespread or systematic attack. They must be knowingly directed against a civilian population and they must have been committed pursuant to a State or organizational policy.<sup>20</sup>

### **c. War Crimes**

The International Criminal Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as a part of large commission of crimes during armed conflict (whether internal or international) including acts such as torture, sex violence, pillage *etc.*

### **d. The Crime of Aggression**

The controversy of inclusion of crime of aggression in the International Criminal Court’s Jurisdiction centered on finding an acceptable definition of crime of aggression. Some states are of the view that excluding aggression from the jurisdiction of the ICC would leave a significant gap in the Court’s jurisdiction and would somehow affect the Court’s effort to break the cycle of Impunity.

The statute of the International Criminal Court does not contain any definition of the crime of aggression despite the fact that aggression is described as a crime within the jurisdiction of the Court. Thus the Court has no jurisdiction to deal with the crime of aggression and the conditions of the exercise of jurisdiction by the Court over the crime of aggression are set out in the statute of the Court.<sup>21</sup>

Apart from these the Court will have jurisdiction over crimes committed in the territories of ratifying States and over crimes committed anywhere by nationals of ratifying States.<sup>22</sup>The

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<sup>19</sup> See GURDIP SINGH (1998a): “*International Criminal Court: Ratione Materiae Jurisdiction.*” In: *International Journal of Contemporary Law*, at 4.

<sup>20</sup> Article 7, Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17-7-1998, UN Doc A/CONF 183/9 available at <http://www.un.org/law/icc/statute/romefra.htm>

<sup>21</sup> see ARTHUR K. KUHN: “*Editorial Comment: International Criminal Jurisdiction.*” In: 41 *The American Journal of International Law*, 430-33 (1947).

<sup>22</sup> See Rome Statue, *supra* 19, Article 12.

Statute does not provide for any immunities and the ICC can try any individual responsible for such crimes, regardless of his or her civilian or military status or official position.<sup>23</sup> States that do not ratify the treaty can choose to accept the Court's jurisdiction in particular cases.

#### **e. Universal Jurisdiction**

The Jurisdiction of the ICC is not chronologically or geographically limited. Some have argued that the crimes the ICC has jurisdiction over are recognized under international law as crimes of universal jurisdiction, meaning that any state may try individuals who commit these crimes, even if they are committed by foreign nationals on foreign territory. From this perspective, the state parties could therefore have authorized the ICC to exercise this universal jurisdiction on their behalf. That is not what the state parties did, however - they have chosen to limit the Court's jurisdiction to what is allowed under nationality and territorial jurisdiction. Jurisdiction based on a Security Council referral could be seen as a case of universal jurisdiction, but it could also be viewed as another (*sui generis*) jurisdiction based upon the UN Charter.

### **IV. THE CONCEPT OF COMPLEMENTARITY**

This concept became an organizing principle during the 1998 Rome Conference which drafted the Statute for the new International Criminal Court. In brief, it reflects the idea that priority must be given to trials for International crimes at the National level rather than at the Court. Only if a state with jurisdiction is unable or unwilling to genuinely prosecute will the Court be able to assert jurisdiction over the case.<sup>24</sup> The Court is designed to complement national Courts in a way which gives priority to national Courts, where a state with jurisdiction wants to prosecute. Although the Statute does not specify the content of complementarity, Article 17 which deals with the issues of admissibility, provides enough hints as to when the jurisdiction will not be exercised by the ICC under the complementarity principle. Although it is for the Court to decide the issues of jurisdiction and admissibility in a given case, the statute enumerates the criteria for determining the 'unwillingness' or 'inability' of the national jurisdiction to investigate or prosecute the perpetrators of crime. The issue of admissibility will be a delicate matter for the Court to decide and Article 17 enables the ICC to judge even the quality of national prosecutions.

### **V. EXERCISE OF JURISDICTION**

The ICC can exercise its jurisdiction with respect to crimes within its jurisdiction in three ways:

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<sup>23</sup> See Rome Statute, supra 19, Article 27

<sup>24</sup> See Article 17 (1), Rome Statute of the International Criminal Court.

(i) the matter is referred to the prosecutor by the security council acting under chapter VII of the UN Charter; (ii) the matter is referred to the prosecutor by a state party to the statute; or (iii) the prosecutor himself initiates the investigations in respect of such crimes.<sup>25</sup>

#### **a. Security Council Referral**

Under the UN Charter, the Security Council pleases a position in determining the threats to the international peace and security. The permanent members of the council can veto any decision of the council and there has been argument regarding retaining that veto. This veto in prosecution would have tempered with the independence of ICC. Finally, regarding the veto, a compromise was made which finds its place in Article 16 of the Rome treaty. This provision also insulates the veto power of the individual permanent members.

#### **b. Referral of a situation by a State Party**

Any state party may refer to the prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the prosecutor to investigate the situation in order to determine whether one or more specific persons should be charged with the commission of such crimes.

#### **c. Independent consideration by the Prosecutor**

Under Article 15 of the Rome Statute, the prosecutor under his independent investigative powers may bring a case before the Court with respect to crimes referred to in Article 5. He can, for this purpose, receive information on potential crimes from a number of sources including states, organs of UN, inter-governmental and non-governmental organisations and other reliable sources. Affected by number of oppositions, this power has been subjected to exercise to the judicial scrutiny of a Pre-Trial Chamber<sup>26</sup> comprising three judges.<sup>27</sup> If the Pre-Trial Chamber does not authorize the investigation, the prosecutor can always present a fresh request based on new facts or evidence regarding the same situation.

## **VI. OPPOSITION TO INTERNATIONAL CRIMINAL COURT**

The creation of the Court has been controversial with number of states mainly regarding nature and scope of its jurisdiction. The main points of contentions are mainly regarding the legal supervision of the Court, role of the prosecutor, its complementary nature with the national

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<sup>25</sup> *Ibid*, see Article 13 of ICC Statute

<sup>26</sup> According to Article 34 of the ICC Statute the Court shall be composed of the following organs: the Presidency, An Appeals Division, a trial Division and a Pre-Trial Division; the Office of the Prosecutor and the Registry. According to Article 39(2) the judicial functions of the Court shall be carried out in each division by chambers. And the functions of the Trial Chamber shall be carried out by three judges of the Trial Division

<sup>27</sup> Article 15(3) to Article 15(6) of Rome Statute

criminal jurisdiction and regarding the security council of the United Nations.

The so called “like-minded” countries in favour of the Court pursued the goal of an effective, functional, independent and thus credible international criminal Court capable of exercising, on the basis of both clear and binding rules regarding its competence and the principle of complementarity.

Thus there lies a controversy between the countries adopting a restrictive approach toward an ICC and so called “like-minded” countries in support of the Court’s establishment.

## **VII. UNITED STATES OPPOSITION TO ICC**

The United States has not ratified the treaty creating the Court (ICC), and has stated it does not intend to do so. The country’s main objections are the interference with their national sovereignty and a fear of politically motivated prosecutions. As all the temporary tribunals, which the US supported were limited to investigate others; they could not hold US citizens accountable. Expecting Security Council supremacy over the Courts jurisdiction, which would not allow the Court to take action, US officials firstly supported the establishment of a permanent Court. The United States wanted a Court in which the prosecutor could not bring any charge against anyone from the US, although the US could bring charges against anyone through the Security Council. This approach of the US was opposed by everyone as all supported establishment of a Court with independent authority.

The reasons for the United States’ persistent refusal to accept the jurisdiction of an impartial Court over the conduct of its own “law-abiding” citizens, and not wanting international laws against war crimes and genocide, with which it agrees, being applied to itself are given below.<sup>28</sup> These reasons and justifications have been rebutted by a number of scholars and they have strongly supported the establishment of the ICC and the need for US support.<sup>29</sup>

Firstly, US officials fear that the mere existence of an independent Court might limit US uses of military power. The ICC is already, ready to investigate various US official for War Crimes. Secondly, US leaders fear that an international prosecutor might bring politically motivated charges against US officials.

Thirdly, the United States claims that the Court’s Prosecutor has too much independence to launch investigations, because he or she could do so without a Security Council decision.

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<sup>28</sup> For the reasons, justifications and philosophy forwarded by the US Government for opposing the ICC, see Marc Grossman, Under-Secretary for Political Affairs, American Foreign Policy and the International Criminal Court, Remarks to the Center for Strategic and International Studies, 6.5.2002

<sup>29</sup> For further details, see: “*War Crimes Court Created.*” In: *The Tribune* (19.7.1998) 98)

Fourthly, the United States now actively opposes the Court, even as a non-party to the treaty, claiming that it will exercise unjustified jurisdiction over US nationals by binding non-parties. Even if the United States does not ratify the treaty, the argument goes that the US citizens could be accused of a crime.

Thus, it can be concluded that opposition to the Court by US is purely political in nature and in particular is the fear and risk of losing its legitimacy as superpower.

## VIII. CONCLUSION

The International Criminal Court is part of a continuum, a process that was catalysed in Nuremberg and its establishment is a “victory of an idea born with Nuremberg Trial of Nazi war criminals, put in the deep freezer by the cold war, then revived in the ethnic bloodbaths of Rwanda and former Yugoslavia.”<sup>30</sup> And in my attempt in writing this paper, I realized the need of ICC to necessitate the existence of Human Rights.

ICC’s jurisdiction in such a case is needed in all the aspects of crimes against Humanity.

Restrictive approach by many countries, which is subjected to political motives, is not to be considered. Jurisdiction of ICC can also be extended to Terrorism, drug Trafficking *etc.* As regards the international aspirations of the Court, my hope is that, in years to come, there will be a broad and universal acceptance of the International Criminal Court by all nations. The beginnings are positive; let us hope for a Court which is, in time, worthy of its name and of our continued strong support.

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<sup>30</sup> See KOFI ANNAN, *Advocating for an International Criminal Court*, p. 21, *Fordham Int’l L. Jour.*, p. 363 (1997); BARTRAM S. BROWN, *US Objections to the Statute of the International Criminal Court: A Brief Response*, p. 31 *New York Univ. Jour. Int’l L. and Poi.*, p. 855 (1999); Lynn Sellers Bickley, *US resistance to the International Criminal Court: Is the sword mightier than the law?* 14, *Emory Int’l L. Rev.*, p. 213 (2000).

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