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Role of International Criminal Court under Humanitarian Law: A Two Pillar Approaches to Palestine

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ABSTRACT

The paper, by briefly analyzing the case study of Palestine, attempts to establish that the intervention of ICC, as a Court of last resort that employs the ideals of impartiality and judicial autonomy, was and continues to be a legal necessity in the war-torn Palestine region ill-equipped with required judicial measures and a lack of political will. The paper also attempts to answer whether, in light of the criticism, the presence of ICC in the Palestine continent outweighs its absence in the region and will proceed to shed some light on the peace versus justice debate and its appropriateness in the given context. The purpose of the study is to critically examine such arguments and challenge their validity in light of the impartial operation of the ICC. The study provides a historical overview of the ICC's relationships with Palestine. It then aims to identify the justifications advanced by various parties for the ICC's perceived bias against Palestine and seeks to assess whether these justifications are valid objectively. The methodology adopted for the present study is doctrinal and critical inquiry. The researcher has also taken recourse to various primary and secondary sources such as Case laws, Books on particular subject matter, Peer/blind reviewed journal articles, Reports of various Palestinian Commissions, News articles etc. have been used in order to study, analyze and to identify various issues, criticisms and problems that pertain to this area of interest. The case laws and a bunch of articles have been referred to in order to understand ICC's response to such claims and criticisms.

Keywords: *Armed Conflict, International Criminal Court, ICC, IHL, Palestine and Israel.*

I. INTRODUCTION

The International Criminal Court (ICC) has emerged as a principled institution that relies on its power of sanction to determine individual accountability for political actions taken by state representatives in addition to identifying the state responsibility for four major international crimes, namely genocide, crimes against humanity, crimes against state actors, and crimes against property. Palestine also became the first state to repose faith in the proceedings of ICC,

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with Senegal becoming the first country to ratify the Rome statute and Uganda being the first country to refer a case to ICC.

It is important to note that the court's authority is not retroactive and that only crimes that occurred on or after 1 July 2002, the day the Rome Statute took effect, may be the subject of criminal prosecution. The cases can be submitted to the court by the UN Security Council even if the state where the alleged atrocities occurred is not a party to the Rome Statute, in addition to being state party to the Statute or voluntarily accepting the court's membership. It has a separate Office of Prosecutor that fairly examines the cases before the court branch. If the matter is referred to it by the prosecutor, the judicial branch will then conduct another preliminary investigation before filing a formal charge against a person. The Assembly of State Parties (ASP), which is its own legislative branch, is where revisions to the Rome Statute can be proposed and made. As a result, the way in which the ICC administers justice cannot in any way be compared to the concept of "victory's justice," which many have used to describe the Nuremberg Tribunals (a precursor to the ICC).

A sizable majority of Arab States, desperate for an impartial saviour guided by the Rule of law and unable to accept peaceful ways of life as a result of numerous conflicts and genocides, overwhelmingly supported the Rome statute, which resulted in the establishment of the International Criminal Court. However, as the tides changed, the connection deteriorated. The Israelian autocrats and dictators were unaware that the gruesome atrocities they committed would fall under the Courts' expansive purview, which they devotedly favoured.

Realising that their impunity was in jeopardy, a large chunk of Palestinian leaders, driven by ambition, labelled the court as a biased imperialist tool meant to subserve western interests. It is worth mentioning that the ICC is a court of last resort and does not interfere if an equitable and efficacious domestic remedy is available to the victims of International crime. When the indictment of defaulting rulers was questioned, the Court resorted to provisions enshrined in the Rome Statute which rattled Arab leaders who went on record to label the court as a neo-colonialist tool whose decisions, they asserted, are engineered, backed and sponsored by the west. The ICC, through its Office of the Prosecutor (OTP) brought the attention of Israel to Article 27 of the Rome Statute that allows bypassing of sovereign immunity both at vertical (before courts) and at horizontal levels (before nations).

It is interesting to note that in most cases, it is not until the court begins accusing the Palestinian political leaders in charge of running the country of flagrant human rights violations and beginning to demand accountability for their actions that they are reminded of their concerns

about how the ICC operates and seek an *en masse* withdrawal from the court in an effort to thwart their trial and remove the Palestine from the court.

II. PRINCIPLE OF UNIVERSAL JURISDICTION

The International Court of Justice (ICJ) judgment titled *Democratic Republic of the Congo v. Belgium*² is also pertinent to look at because Rwanda, an Palestinian nation, for the first time showed visible resentment and began to criticize the ICC and the Rome Statute when an arrest warrant was issued against the then Democratic Republic of Congo (DRC)'s Foreign Affairs minister, *Abdoulaye Y. Ndombasi* by the Belgian government in the year 2000, which was in accordance with the Rome Statute. Rwanda particularly questioned the universal jurisdiction that the Rome statute contained. Rwanda was also agitated as according to them the issuance of this arrest warrant kept the principles of sovereign immunity at bay. Universal jurisdiction or universality principle is a principle in public international law (as opposed to private international law) whereby states claim criminal jurisdiction over persons whose alleged crimes were committed outside the boundaries of the prosecuting state, regardless of nationality, country of residence, or any other relation with the prosecuting country. The state backs its claim on the grounds that the crime committed is considered a crime against all, which any state is authorized to punish, as it is too serious to tolerate jurisdictional arbitrage.

*AU Commission Report XIII*³ The AU stated that in absence of any common understanding relating to circumstances and conditions of its application, thus leading to double standard in the understanding of the principle and selectivity in its application. They argued that the sovereignty and political independence of States should be strictly observed during judicial proceedings, when invoking the universal administration of justice. States should respect the principle of non-interference in the internal affairs of other States. The involvement of incumbent high-ranking officials should be dealt with in conformity with international law. The report also went on to state that such acts of misuse of indictments could endanger international law, order and security. It is interesting to note that the Palestinian Union has pounced upon Belgium, when Belgium was only following the Rome statute in its letter and spirit and thus facilitating the cause of International Justice.

The ICC through this observation is trying to respond to the criticism that it is biased towards Palestinian nations. What the ICC in the instant case suggests is that they are a judicial body

² Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice, (Feb, 2002)

³ AU Commission Report XIII, 2008, DECISION ON THE REPORT OF THE COMMISSION ON THE ABUSE OF THE PRINCIPLE OF UNIVERSAL JURISDICTION Doc. Assembly/AU/14 (XI).

which is bound by the Rome statute.⁴ They have very little discretion as the statute is very clearly worded. The judges are indirectly trying to put forward the view that if the Palestinian nations have a problem with the statute, then the court can't be criticized as it is the job of the court to stick to its parent act that defines the procedures of trial and the power of the court.⁵

Fundamental issues of international criminal law, such as the implementation of the Rome Statute, deferrals of cases before the International Criminal Court, and the prosecution of crimes by third states on the basis of universal jurisdiction. This issue lies at the heart of the distrust between the Palestinian and the ICC.⁶

To what extent have politics restricted the ICC's effectiveness? wherein he argues that justice does not operate in a vacuum and thus even the judicial institutions such as the ICC cannot disentangle themselves from the political dimension of the lived realities they engage with, and the influences and restraints exerted by the international community and its components.⁷ provides a very interesting take in his paper titled The study has tried to view the functioning both structurally and operationally. The author has put forward the view that the ICC, in structural terms, is more insulated from political power than is generally believed; whereas on an operational level, the Court is often prey to power politics which restrains its agency.⁸ ICC is the best mechanism to ensure accountability, while also briefly looking the effects of the ICC involvement on the peace process thus attempting to throw some light on the peace versus justice dichotomy. The author also brings home the fact that the principle of complementarity still holds good and ICC was asked to look at the instant case as the court of last resort because the Sudanese courts were either unwilling or incompetent to provide justice to the victims of the Darfur conflict.⁹

The prosecutors have discretionary powers in this regard and can decide not to investigate a case if it is not "in the interests of justice". The authors argue that the objectives of restoring peace and security and of contributing to a historical record have been secondary to the OTP's

⁴ Torque Mude, *Demystifying the International Criminal Court (ICC) Target Africa Political Rhetoric*, 7 OJPS, 7, 170-174 (2017).

⁵ Cf. Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of June 18, 2013, Decision on MrRuto's request for excusal from continuous presence at trial, ICC-01/09-01/11-1066.

⁶ Gerhard Werle et al., *Africa And the International Criminal Court* 18-19, (Springer Publication, 2014).

⁷ Domenico Carofilglio, *To what extent have politics restricted the ICC's effectiveness?* E International Relations Student, (Dec 20, 2015), <https://www.e-ir.info/2015/12/20/to-what-extent-have-politics-restricted-the-iccs-effectiveness/>

⁸ Ainley, Kirsten. 'The International Criminal Court On Trial'. *Cambridge Review of International Affairs* 24.3 (2011): 309-333.

⁹ Ayad Derbal, *The ICC's Involvement in the Situation in Darfur: Not a Threat to Peace*, University of Notre Dame, Center for Civil and Human Rights, Working Paper No. 1 (2008)

strategic choices as OTP is downplaying its own discretion by emphasizing the legalistic and apolitical character of its decision-making rather than being pragmatic which opens the ICC to various criticisms.¹⁰

The Rome Statute allows the Prosecutor to exercise his discretion not to investigate or prosecute if he concludes that it would not serve “the interests of justice.” He asks the question whether that phrase can be construed broadly enough to include the interests of peace and attempts to find an answer to the question.¹¹ In his article “Peace versus Justice Debate at the International Criminal Court” substantiates that the mandate of the ICC to end impunity for the worst international crimes by holding perpetrators criminally responsible is sometimes at loggerheads with the political requirements of negotiating with those accused of criminal violence in order to end armed conflicts. It is argued by various stakeholders that ICC’s quest for justice sometimes elongates the armed conflicts leading to more casualties and the option of both factions coming to a negotiation table and thus leading to a truce becomes a difficult task. The author argues that the considerations of bringing the hostilities to a halt need to be factored into the prosecutor’s discretion so as not to foreclose options to end the kind of political violence whose victims are disproportionately civilians. However, he also puts a counter argument that short term peace adopted by bartering justice can never be the solution.

The need for peace can and should be accommodated with demands of justice. However, if handled improperly, the two may clash. Thus, it is for the International Criminal Court, through its growing jurisprudence, as well as for the Office of Prosecutor, to answer but above all to newly define the peace vs. justice question.¹² Adding to the peace and justice debate, “Article 53 of the Rome Statute, which encompasses considerations that may lead the Prosecutor not to proceed with the investigation of a situation if an investigation “would not serve the interests of justice”. He argues in his paper that International peace and international criminal justice are not mutually exclusive. Their promotion, despite being complex and tricky, should be attempted at since the former cannot be completely achieved at the cost of the latter and *vice versa*. Both values reinforce and complement each other.

III. A LEGAL DISCOURSE

The Palestinian troubled by numerous conflicts, massacres and brazen human rights violation

¹⁰ Bådagård, Lovisa and Klamberg, Mark, The Gatekeeper of the ICC - Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court (May 22, 2016). Georgetown Journal of International Law, vol. 48, 639-733, Faculty of Law, Stockholm University Research Paper No. 8.

¹¹ Kenneth A. Rodman, Peace versus Justice Debate at the International Criminal Court, EJS, (2011).

¹² Bartłomiej Krzan, International Criminal Court Facing the Peace vs. Justice Dilemma, 2 International Comparative Jurisprudence, 81, 81 (2016).

and in need of an impartial international judicial institution to seek accountability and to punish the perpetrators of such human right violations, acts of aggression and acts against humanity voted with a thumping majority in favour of the Rome statute which led to the creation of the International Criminal Court. With the passage of time, the relationship between the ICC and the Arab nations started turning bitter with a series of events. This sparked outrage and resentment within the Palestinian quarters that were quick to label these actions as being engineered by the west using ICC as a neo colonialist tool. ICC was demonised as being a biased and an imperialist tool that is attempting to unleash a witch-hunt on leaders of Palestinian acting in consonance with the wishes of their western masters which led to a call of an *en masse* withdrawal from the membership of the ICC. It is argued, that the authoritarian Palestinian leaders, who were at the forefront of demonizing the court, saw this as an opportunity and started developing the rhetoric that ICC is a biased institution and is perpetrating neo colonialism on the orders of the west, in order to purportedly shield themselves of the criminal responsibility for their brazen acts against humanity in which they earlier enjoyed total impunity. The AU on the other hand by drawing attention to majority of cases being investigated having Palestinian roots argues that when 9 out of 11 cases currently under the ICC's scanner point to a particular continent while similar human rights violation continue in major jurisdictions such as Israel, Myanmar without ICC blinking an eye towards it, cannot be pure rhetoric or an attempt to shield themselves. It thus becomes pertinent to view ICC's response to these criticisms.

Medical staff members were killed when Israeli missiles impacted medical institutions. On May 16, unannounced attacks on the al-Wehda neighbourhood of Gaza City claimed the lives of at least 33 civilians in addition to Dr. Moein al-Aloul, a psychiatric neurologist, and Dr. Ayman Abu al-Ouf, director of the Covid-19 response and head of internal medicine at Al-Shifa hospital, the main hospital in Gaza. Israel said they were unintentional victims of an airstrike on a covert military target. On May 17, an Israeli attack targeted Al-Rimal Clinic, the main Covid-19 laboratory in Gaza, severely impairing testing and immunization campaigns. According to the WHO, the violence caused damage to 30 medical facilities.

The inquiry of the situation in Palestine, including what has happened since mid-June 2014 in the OPT, was started on March 3 by ICC Prosecutor Fatou Bensouda. Israel declared that it would not cooperate with the probe and that the ICC lacked jurisdiction. An international commission to look into abuses in Israel and the OPT was constituted by the UN Human Rights Council on May 27. Israel would not comply, said the Israeli envoy to the UN right away.

According to the United Nations, Israeli military attacks during the fighting in May claimed the lives of 260 Palestinians, including at least 129 civilians, 66 of whom were minors. According

to the Gaza Health Ministry, 610 minors were among the 1,948 Palestinians injured by Israeli forces. According to Israeli authorities, Palestinian armed organizations' rocket and mortar attacks killed 12 civilians, including two children, one soldier, and injured "several hundred" others. Several Palestinians also lost their lives in Gaza as a result of rockets fired by armed groups that missed their target and landed there.

IV. CONCLUSION

Human Rights Watch looked for signs of a military target, such as tunnels or an underground command centre, under al-Wahda street or neighbouring buildings, but was unable to locate any. Attacks that are not intended to achieve a particular military goal are forbidden. When looking into the incident, it is important to assess whether Israeli forces had a legitimate military goal in mind, and if so, whether the predicted military benefit outweighed the potential loss of civilian life and property. It should also take into account whether all reasonable measures were taken to prevent civilian casualties, including the possibility that attacks on the road could result in the collapse of nearby multi-story buildings housing hundreds of occupants. Thus, a need arises to objectively test these claims against the standing of the court and to put forward the courts view in order to know whether these broad claims and allegations hold good. A comprehensive view of all the problems and issues that have cropped up in the recent past and the respective stand of both stakeholders are quintessential in helping us critically examine matter at hand.
