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The United States reluctance to join the international criminal law statute: an analysis

Abstract

The International Criminal Court statute (ICC statute hereinafter) is a treaty based and its jurisdiction is applicable on those states who signs and ratifies the statute. In order to explain the working of the International Criminal Court, it is necessary to define the jurisdiction to which it is applicable. Although the model of the International Court of Justice was available, yet no one had ever tried to create a court with such a wider scope and application. The Predecessor examples of the Nuremberg Tribunals, International Criminal Tribunal Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) etc. had territorial jurisdiction in nature. It means that the ICTR had the jurisdiction over those crimes only which were committed by the Rwandan nationals in the neighboring countries.[1]

The only distinguished feature of ICC statute from its predecessors is that the Jurisdiction of ICC is consent based. The states who signs and ratifies it shall be subject to its jurisdiction.

As in the words of W. Chadwick Austin and Antony Barone Kolenc, "These are the fundamentals of the court's jurisdiction that individual states are entitled to exercise with respect to the same crimes. Moreover, the drafters of the Rome Statute sought to limit the ability of the court to try cases over which it has, at least in theory, jurisdiction. Only when the domestic justice system is unwilling or is unable to prosecute, can the International Criminal Court take over. This is what the Statute refers to as admissibility".[2]

Not every case is admissible even if it has jurisdiction. Moreover, ICC is getting support from its member states. Unlike other global courts, ICC has less limitation for enforcement. In foreign courts, which rely on universal jurisdiction laws are limited by their lack of international support and political influence to enforce their decisions.[3] If we compare the International Court of Justice (ICJ), it has limited enforcement power. The support and cooperation of U.S Domestic courts make it convenient to enforce the jurisdiction and power to carry out their decisions.[4] On the other hand, in case of ICC, it is independent institution from the U.S. did not ratify the ICC statute. In this case it is a challenge before ICC to gain universal jurisdiction of the court and to enforce the decision of the court. To make this court universal in nature, it is necessary to make the jurisdiction of the court fair and suspicion free in the provisions of the Rome Statute. It is also important to make the countries liable who are not party to it but they have committed a crime under the ICC Statute.[5]

One of the most important arguments is as to who can trigger the jurisdiction of the ICC. In this article I shall be focusing on the argument of U.S for not signing the ICC. I shall be analyzing the practical reasons for not signing the ICC Statute and the arguments advanced by the U.S.

The analysis of the non-state parties is also explained to make it clear that why states are still reluctant to sign the Rome statute. India, U.S and China have major objections for signing the Rome Statue. In this paper I shall be explaining the objection of United States in joining the ICC.

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Review

For every nation, justice is an important point. One of the reasons why the ICC could be created was because it had the massive support of various states behind it. Out of these states if we mention Africa as an example, the African States knew the ICC as a protection against those crimes that were being committed on their territory. Africa has 27 States which are Party to the Rome Statute. Can we say that only the weak states are approaching the ICC for justice? If we see that in total the Court had received seven situations where crimes had been committed.[6] How far the success has been achieved and where are the limitations. In this chapter, I have mentioned the arguments of the countries like the People's Republic of China, India, Indonesia, Islamic Republic of Iran, Russian Federation, the United States and a few other nations which are reluctant to sign the Rome Statute.[7]

The United States stance in not joining the ICC statute

The United States has always dreamt of a Permanent International Criminal Court. If we consider the precedents like Nuremberg Tribunals, and the International Criminal Tribunals for the Former Yugoslavia and Rwanda, it has always advocated. Initially U.S. signed the Rome Statute but it did not ratify it. The United States did sign the Rome Statute on December 31, 2000;[8] U.S signed the treaty but never ratified it.[9] The United States, is having certain concern for not to ratify the Statute.[10]

Now it is more reluctant to sign and ratify the ICC statute. How does U.S stay away from not signing the ICC statute when it is already a member of various international humanitarian treaties, such as the Geneva Convention.[11]

The reason may be that a peace keeper state like U.S. can also

[1]William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, First Edition, 2001, pp. 54-70, at p. 55.
[2]William A. Schabas, 2001, at p. 55.
[3]*http:// www.cato.org/pubs/pas/pa-311.pdf.*
[4]W. Chadwick Austin and Antony Barone Kolenc, 2006,at p. 314.
[5]Sangeeta Taak, "International Criminal court and the Liability of China during Covid-19," International Journal of Law, Vol.6, Issue 4, 2020.
[6]Philip Kirsch, "The International Criminal Court," *The International Criminal Court Proceedings of a Dialogue in India*, KAF Publication Series No. 8, New Delhi, 2006, pp. 20-70, at p. 54.
[7]Shikhar Ranjan, Pursuit of International Criminal Justice in Darfur: An Overview, *AALCO Quarterly Bulletin*, Vols. 1-4, 2009, pp. 49-74, at p. 50.
[8]In 2000 President Clinton signed the Rome Statute.
[9]Fareed Mohd. Hassan and Noor Dzuhaidah Osman, The Obligation to Prosecute Heads of State under the Rome Statute of the International criminal Court (ICC) and Customary International Law: *The African and U.S. Perspectives, Malaysian Journal of Syariah and Law*, Vol. 7, No.1, 2019.
[10]Rosaria Vigorito, "The Evolution and Establishment of the International Criminal Court," *International Journal of Legal Information*, Vol. 30, Spring 2002, pp. 92-132, at p. 93.
[11]Kerstin Pastujova, "Was the United States Justified in Renewing Resolution 1487 in Light of the Abu Gharib Prisoner Abuse Scandal," *ILSA Journal of International and Comparative Law*, Vol. 11, Fall 2004, pp. 195-220, at p. 209.

commit war crime.[12] In the case of Abu Ghraib was prison in U.S. army detention center and he was abused there in 2003.[13]

Nancy E. Guffey-Landers explains

"The development of international judicial assistance and the carrying out of justice in the international arena has become of increasing concern in the United States. Up until the 1970s the United States was largely protected from international criminal activity due to geographic restrictions. With the increase in international travel, commerce, and telecommunications, however, this protection eroded. In response, the United States authorized federal courts to extend aid to foreign courts in obtaining testimony in this country for criminal proceedings abroad. In 1964, the U.S. Congress revised the existing statutes and designated the Department of State as the proper authority to administer requests for international judicial assistance between the United States and foreign countries. Since 1964, the U.S. has enacted additional federal statutes pertaining to international judicial assistance. Moreover, in recent years, the U.S. has negotiated several international agreements that provide for international judicial assistance and cooperation in specific criminal matters".[14]

If U.S joins the ICC statute then all the acts of states shall be under surveillance of the ICC. As there is no immunity in the jurisdiction of the ICC. The officials may be held for individual criminal liability under the ICC. There are some major concerns of the United States for not joining the Statute and the major objections are mentioned as under:

The Jurisdiction

The United States government is against the wider power of jurisdiction given to the ICC. The ICC statute deals with the triggering of Jurisdiction under Article 12 of the Rome Statute. Held the view that the International Criminal Court did not have jurisdiction over nationals of non-party States.[15] The United States argues that the exercise of jurisdiction under Article 12[16] and Exercise of Jurisdiction is mentioned in Article 13[17] of the ICC statute.

United States is also worried about its intervention as peacekeeper in other countries. David J. Scheffer, explains as "U.S also undertakes military actions on humanitarian and human rights grounds because their soldiers may be subject to prosecution under the Rome Statute"[18] This fear of U.S is real in case of state party referral.

Allison Marston Danner, explains the other reasons of U.S Concern as

"Recognizing the deficiencies of the status quo, the United States did not oppose the idea of an International Criminal Court in the negotiations over the Rome Statute. Nevertheless, it sought a prosecutor whose discretion could be controlled by the Security Council. The United States demanded the power to divest the prosecutor of the ability to investigate a case if it were being considered by the Security Council under the Council's Chapter VII authority, and any member of the Council would have the ability to put measures on the Security Council's agenda. In this structure, therefore, the United States could have taken any case out of the ICC's purview".[19]

United States was in favor of the ICC statute if it is controlled by the United Nations Security Council. In that case any member could have used the veto power so it was a safety for the super power countries to the permanent members. This is the situation at present also but he wider power of the Prosecutor under the Proprio Motu is really a big challenge for the countries Like U.S., China and India also.

The legal issues related to definition of 'crimes'

The Definition of War Crimes is not satisfactory at the same time U.S. has an objection over the issue of Aggression. Why aggression has been included as one of the crimes in the Rome statute?[20]

The Law of treaties

The U.S. has an objection over the basic aspects of the law of treaties on the point of sovereignty. As ICC is having a right to persecute an individual if s/he commits a Crime under Article5 of the statute. U.S argues that a treaty should not be applicable upon those states who had not ratified it because "a treaty does not create either obligations or rights for a third State without its consent."

The U.S. government claims that the Statute violates this rule because, in some cases, it could allow the ICC to try individuals for serious international crimes without the consent of their national governments. The theory apparently is that if the ICC tries an individual for a crime, that individual's home State in some extended sense is being subjected to obligations under the Statute. This is a novel theory.

Equating the potential ICC jurisdiction over individuals with the idea that States are being inappropriately "bound" is a clever theatrical device, but as legal reasoning it is completely untenable. Like any treaty, the Statute creates obligations for the States Parties, these include the obligations to comply with requests for the surrender and transfer of suspects to the Court, to provide requested evidence, to give effect to fines or forfeitures ordered by the Court, and to pay assessments for the regular budget of the Court. None of these obligations applies to any non-party State, nor does the exercise of criminal jurisdiction against an accused individual bind that individual's home State.

The ICC treaty will not bring about a radical change in international law or in the international system. Whether they become parties to the treaty or not, all countries will retain their fundamental rights, including the right to try those accused of committing crimes on their territory and to try their own nationals for crimes committed anywhere.

As Bartram S. Brown in the article explains

"It will remain true that if a foreign national is accused of committing a crime on the territory of the United States, either this

[12]Abu Ghraib prisoner abuse scandal available at *https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib*

[13]Iraqi Prison Abuse scandal Fast Fact, CNN Editorial Research, available at https://edition.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/index.html

[14]Nancy E. Guffey-Landers, "Establishing An International Criminal Court: Will it do Justice"?, *Maryland Journal of International Law and Trade*, Vol. 20, Fall 1996, pp. 199-230, at p. 206.

[15]Zachary D. Kaufman, "Justice in Jeopardy: Accountability for the Dafur Atrocities," *Criminal Law Forum*, Vol. 1, No. 3-4, 2005, pp. 343-360, at p. 346.

[16]Preconditions to exercise the Jurisdiction of the Court available at *https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx#article12*

[17]https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx#article13

[18]David J. Scheffer, "The United States and the International Criminal Court," *American Journal of International Law*, Vol. 93, January 1999, pp. 12-20, at p. 14.

[19]Allison Marston Danner, "Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel," *Stanford Law Review*, Vol. 55, May 2003, pp. 1633-1664, at p. 1664.

[20]Bartram S. Brown, "U.S. Objections to the Statute of the International Criminal Court: A Brief Response," *New York University Journal of International Law and Politics*, Vol. 31, Summer 1999, pp. 855-830, at p. 870.

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country or his home country legitimately could try him. Every State has certain legal rights with regard to its nationals, but these are neither unlimited nor exclusive. General international law does not grant States exclusive jurisdiction over crimes committed by their nationals. Instead, it recognizes that States may have concurrent jurisdiction when the crimes committed affect the interests of more than a single State."[21]

No State, whether a party to the Statute or not, has a legitimate interest in shielding its nationals from criminal responsibility for genocide, crimes against humanity or serious war crimes".

If a state is shielding someone from being prosecuting it is like interfering the jurisdiction of the ICC and ICC can consider the case admissible under Article 17 of the Statute. Suggestions to the contrary evoke a colonialist concept of exclusive extraterritorial rights that was prevalent in earlier centuries but has little relevance to modern practice.

The political and the constitutional issues

The United States opposed the treaty for many reasons, but the principal basis of its opposition was concern that the deployment of military forces would be a vehicle for bringing false charges against its military personnel. Although the article was written several years before the conference in Rome, it is still a valuable source for understanding the dynamics of the United States political situation.[22] Allison Marston Danner says, "The United States believes that the ICC is unnecessary. It argues that individual states can prosecute these crimes domestically and argues that the Security Council can create ad hoc tribunals, if necessary. ICC supporters, however, disagree. History seems to be against the U.S. position".[23]

In summing up, it can be analyzed from the above-mentioned reasons that the arguments admired by the United states and their apprehensions come to a conclusive point that the ICC can work effectively if all the states sign the Rome Statute. Further, it will have the exclusive jurisdiction in case of 'Aggression'. Besides the United States, there are many states like the Sultanate of Oman, Japan, the Republic of Korea, the State of Kuwait, the Arab Republic of Egypt and Indonesia[24] are also of this belief that there should be a rule of law. The Court has to prove before getting a trust from all the countries. The decision of the Court should not be political convenient, rather legally correct.

ICC has to prove that all suspected criminals face justice in as fair and impartial court and a judicial process can be created. The critics of the ICC submit an argument that the world does not need another powerless body. The international community currently has the International Court of Justice which is well known for not meeting its potential. From 1946 to 1996, the Court heard forty-seven contentious cases between States, delivered sixty-one judgments and gave twenty-three advisory opinions. This is hardly the workload of a busy Court. Further, as noted, there are also many important agreements, signed with great fanfare by the nations of the world, that, though probably violated many times, have never been litigated upon.

On the other hand, states in favour of the ICC submit that we need an effective international criminal court or none at all. Perhaps the Court might gain fewer supporters in its early days as some argue, but the support of 123 nations in Rome cannot be discarded. If there are going to be violations of "the most serious crimes of concern to the international community as a whole", the system we set up to punish those violators, be they Canadian soldiers in Somalia, American soldiers at My Lai, or Serbian soldiers in Kosovo, must be effective. The Tadic case is also an example of implementation of the laws of the International Humanitarian Law. In the midst of a nation caught in a vicious civil war where human rights abuses were frequent, when the tribunal rendered its decision, the topic of most interest to the combatants was the Tadic decision and whether such a prosecution could happen to them. Such could be the legacy of the ICC-the creation of a lasting, effective, non-political legal order. The International Criminal Court may provide a more regular basis for such prosecutions in the future.[25] Another possibility outside the control of the state concerned is trial before a third state exercising universal jurisdiction.[26]

Promoting the United States government's interests in this way may also damage the International Criminal Court specifically and international justice generally. In the future, the other four veto-wielding members of the United Nations Security Council may imitate the United States government in this respect. And, as has been proposed, if the permanent membership of the United Nations Security Council expands to include, for example, Japan, Germany, Brazil, South Africa, and/or India, those additional States might also seize their prerogative within the Security Council to try to shield their own citizens from the International Criminal Court's jurisdiction while attempting to promote justice for certain atrocities in which they may have been involved.[27]

The Fear of the United States, in case it signs the Rome Statute, that the other states might take revenge, is baseless. ICC is not an institution of revenge taker. However, the intention of the ICC is to make the national courts capable to handle the most heinous crimes. If the National courts are handling the situation then ICC can never interfere in the system because of the supremacy of the sovereignty. Moreover, the Complementary jurisdiction do not allow ICC to intervene in the domestic judicial system unless and until the state is unwilling and unable for trial of a criminal and shielding a criminal, who has committed the crime under Article 5 of the ICC statute.

United States also need an immunity clause to be added for their military actions. This proposal cannot be accepted by the ICC statute because it will ruin the objective of the statute. ICC is independent

[21]Bartram S. Brown, U.S. Objections of the Statute of the International Criminal Court: A Brief Response, New York University Journal of International Law and Policy, Vol. 31, 1999.

[22]Hays Butler, "A Selective and Annotated Bibliography of the International Criminal Court," *Criminal Law Forum*, Vol. 10, No. 1, 1999, pp. 121-145, at p. 138.

[23]Allison Marston Danner, p. 1662.

[24]Report on the Forty Eighth Annual Session of Asian African Legal Consultative Organization, *Chinese Journal of International Law*, Vol. 9, March 2010, pp. 179-189, at p. 186.

[25]Simon Chesterman, "Rough Justice: Establishing the Rule of Law in Post Conflict Territories," *Ohio State Journal on Dispute Resolution*, Vol. 20, 2005, pp. 69-95, at p. 93.

[26]A well empowered ICC can improve upon dismal record. Although in 1998 Madam Justice Arbour had to argue with Slobodan Milosevic regarding her Tribunal's jurisdiction over supposed crimes committed in Kosovo, Yugoslavia, in 1998, with the Rome Statute there would be no such burden-as Prosecutor, she could simply launch an investigation. It took a decision of the House of Lords to determine that Augusto Pinochet was not, simply by being a Head of State at the time, immune to extradition to face trial in Spain for his alleged crimes. Under the Statute, Article 27, being a Head of State is specifically excluded as a possible defence to a crime within the Court's jurisdiction.

[27]Zachary D. Kaufman, p. 358.

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from the United Nations organ and therefore it has major responsibility to prove its fairness.[28]

The Court will never be able to be in a position to completely or effectively fulfill its role as was expected by states unless states ratify the Statute. If of course, states do not ratify the Statute then the Court as much as it would seem it might have a role, would be unable to intervene in certain situations. Then, only the Security Council is a possibility and the Security Council as we know has always been selective in deciding where international tribunals should intervene.[29]

On the question of sovereignty of course sovereignty remains a pillar of the international system. One is that the ICC is not a human rights court in the conventional sense. It is true massive crimes, genocide crimes, crimes against humanity, war crimes of that magnitude are also violations of human rights court, and it is a criminal court.

All a state does is to delegate the exercise of its criminal jurisdiction in certain circumstances to the ICC, as is often the case, under an extraordinary treaty. There is nothing very major in that kind of approach. The United States has not become a fan of the Court yet but it is clear that here as elsewhere the level of apprehension has greatly diminished particularly in the past year which is clear and observable. The issue of Aggression was resolved in the review conference[30] of the ICC.[31]

Transparency is the rule, confidentiality is only applied on a very temporary basis for conditions of safety and protection of lives involved but clearly none of the steps that are taken by the Court can be taken to the determent of rights of the accused and that would be absolutely clear when actual decision shall come out.[32]

Conclusion

In conclusion, it may be appropriate to mention that this court was not created fifty years ago. The court should be given a chance to breathe and develop a little bit before an announcement is made that it is not going to work. In the long term, it is necessary and useful for the Court to expand its jurisdiction for reasons. If states are not yet convinced of the basis of the legal foundations of the Court, which 124 States think is absolutely impeccable and solid then it is up to the Court to demonstrate in practice, that it does do in practice what it is supposed to do in principle, which is to be a judicial body not influenced by the political considerations.[33]

In this article I tried to elaborate the concerns of the states for not signing and I have also endeavored to analyze that the apprehensions of the states are baseless. Despite of all the other arguments, the Jurisdiction of the court has been considered as a common issue for not signing the Rome Statute. The objective of the ICC can be achieved only if all the states signs and ratify the Rome statute. It is the right time to join ICC so that the victory over immunity may be achieved. Besides the concerns of U.S are just an argument without any reasonable justification. Hope the United State, India and China may join the ICC soon.

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Conflicts of interest

Author declares that there is no conflict of interest.

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[28]Allison Marston Danner, p. 1655.

[29]Philip Kirsch, 2006, p. 55.

[30]For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a)The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b)Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c)The blockade of the ports or coasts of a State by the armed forces of another State;

(d)An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e)The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f)The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g)The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

[31]Philip Kirsch, 2006, p. 57.

[32]*id.*

[33]*ibid.,* p. 58.

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12. Preconditions to exercise the Jurisdiction of the Court.

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