

INTERNATIONAL CRIMINAL COURT: JURISDICTIONAL ISSUES

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I INTRODUCTION

The International Criminal Court (ICC) is the first permanent, treaty based international criminal court established to promote the rule of law and ensure that the gravest international crimes do not go unpunished. The Rome Statute sets out the Court's jurisdiction, structure and its functions. The ICC is providing a renewed hope for ensuring accountability of individuals. It strives to deter what the preamble describes as "unimaginable atrocities that deeply shock the conscience of humanity", which threaten the peace, security and well being of the world. The hopes of the international community from the ICC are high but the question is whether the ICC will be a panacea to the problem of international criminality keeping in mind the States' concern about shortcomings of the Rome Statute. One of the most delicate issues in the creation of the International Criminal Court is the determination of its territorial and personal jurisdiction.¹ In this paper, an attempt is made to address the jurisdictional issues of the international criminal court.

II PRINCIPLES OF JURISDICTION

The jurisdiction of the international criminal court is based on following principles-

Subject-matter (*ratione materiae*) Jurisdiction

The subject-matter jurisdiction refers to the crimes within the jurisdiction of the court. According to article 5 of the Rome Statute, the Court shall have jurisdiction over the following crimes-

- (i) The Crime of Genocide
- (ii) Crimes Against Humanity
- (iii) War crimes
- (iv) The Crime of Aggression

The subject-matter jurisdiction of the Court is limited to the above four categories of crimes. For the time being, the Court cannot exercise its jurisdiction over the crime of aggression, as the Rome Statute has not defined it. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.

*Temporal (*ratione temporis*) Jurisdiction*

The Statute provides under Article 24 that no person shall be criminally responsible under this Statute for his conduct prior to the entry into force of the Statute. articles 11 and 24 are to be read together². Even with

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¹ William A. Schabas, *Jurisdiction and Admissibility: An introduction to the International Criminal Court*, Cambridge University Press 54 (2001).

² Rome Statute, art. 11 (1) provides that the Court shall have jurisdiction only with respect to the crimes committed after entry into force of this Statute. Art. 24 (1) provides that no person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute

respect to a particular State, the Court will exercise jurisdiction over the crimes committed on the territory of a State after the State becomes party to the Statute.

Territorial (ratione loci) Jurisdiction

According to article 12 (2) (a)³, the Court will have jurisdiction over crimes committed on the territory of the State parties, regardless of the nationality of the offender. This jurisdiction is based on the principle of territoriality, i.e. the Court shall have jurisdiction over the crimes in case they are committed within the territory of a state that is party to the Rome Statute. The Court will also have jurisdiction on the territory of those [non-party] states⁴ that accepts the jurisdiction on ad-hoc basis, and also on territory so designated by the Security Council acting under Chapter VII of UN charter.⁵

Personal (ratione personae) Jurisdiction

According to Article 12 (2) (b), the ICC will have jurisdiction over nationals of a State party who are accused of a crime. The Court can also have jurisdiction over nationals of a State not party to the Statute on ad-hoc basis i.e. when the State by declaration accepts jurisdiction of the Court for that particular crime⁶. The Court's jurisdiction over nationals of a non-party State could also be in case the situation is referred to by the Security Council under Article 13 (b), provided referral is made by resolution adopted under Chapter VII of the UN charter. The Court shall exercise its jurisdiction over all persons alike without any distinction based on official capacity.

It is important to mention that jurisdiction of the ICC is complementary to the national jurisdiction of the state, i.e. the ICC will have jurisdiction only when the state party is unwilling or unable to exercise its jurisdiction. So, the question is when the states were already having power to exercise jurisdiction over the crimes covered under the Rome Statute then what was the need for establishing the ICC? Another conflicting principle of jurisdiction is the universal jurisdiction of states over the category of international crimes that have been covered under the Rome Statute conferring international criminal jurisdiction over the ICC. The issues regarding jurisdiction are discussed as under.

³ See Rome Statute, art. 12 (2). It provides that the Court may exercise its jurisdiction if one or more of the following States are parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3 (mentions about acceptance of jurisdiction by non-State parties)- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national.

⁴ Rome Statute, art. 12 (3) provides that if the acceptance of a State, which is not a Party to this Statute, is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

⁵ See Rome Statute, art. 13 (b). It provides that the Court may exercise its jurisdiction with respect to a crime referred to in art. 5, if a situation in which one or more of such crimes appears to have been committed is referred to the prosecutor by the Security Council, acting under Chapter VII of the charter of the United Nations.

⁶ See Rome Statute, art. 12 (3)

III JURISDICTIONAL ISSUES

Universal Jurisdiction of the State versus International Criminal Jurisdiction

The individuals accused of committing the most heinous crimes under international law can be prosecuted by states on basis of principle of universal jurisdiction. It was until recently that only states had jurisdiction to try such individuals, but with the establishment of the ICC, such individuals can also be tried by the ICC on the basis of principle of international criminal jurisdiction. The basis of the principle of universal jurisdiction is that the offenders committing such serious crimes under international law must not go unpunished. Any state can have jurisdiction over a person accused of genocide, crimes against peace, war crimes, crimes against humanity, etc, if the person is found in the territory of that particular state, regardless of his nationality or the place of commission of that offence.

As pointed out by Starke, “An offence subject to universal jurisdiction is one which comes under the jurisdiction of all states wherever it is committed in as much as by general admission the offence is contrary to the interests of the international community, it is treated as a delicate “*jure gentium*” and all states are entitled to apprehend and punish the offenders. Clearly the purpose of conceding universal jurisdiction is to ensure that no such offence goes unpunished”⁷.

The principle of universal jurisdiction was applied to some extent in *Eichmann Case*⁸. Eichmann, a German national and the Head of the Jewish office of the German Gestapo, was the administrator incharge of “the final solution” – the policy that led to the extermination of between 4,200,000 and 4,600,000 Jews in Europe. Eichmann was found in Argentina in 1960 by persons who were probably agents of Israeli Government and he was abducted to Israel without the knowledge of the Argentinean Government. There he was prosecuted under Israeli Nazi & Nazi Collaborators (Punishment) Law of 1951 for war crimes, crimes against Jewish people, the definition of which was modeled upon the definition of genocide in the Genocide Convention, and crimes against humanity. He was convicted and sentenced to death. His appeal to the Supreme Court of Israel was dismissed.⁹ The District Court in its judgment observed that the abhorrent crimes defined in the law [of 1951] are not crimes under Israeli law alone. These crimes, which strike at the entire mankind and shock the conscience of nations, are grave offences against the law of nations itself (*delicta juris gentium*). The Court quoted from a number of authors¹⁰ who take the view that “crimes against international law” generally or war crimes in particular give rise to universal jurisdiction.

In *Gen. Augusto Pinochet* case, the issues of jurisdiction were raised in the House of Lords¹¹. Lord Millet, dissenting, analyzed and observed, “In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe *jus cogens*. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order”. He opined that the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and

⁷ J.G. Starke, *Introduction to International Law*, Tenth Edition 234 (1989).

⁸ *Attorney- General of the Government of Israel v. Eichmann* (1961) 36 I.L.R.5. (District Court of Jerusalem)

⁹ The Supreme Court affirmed the reasoning of the district court in (1962) 36 I.L.R. 277.

¹⁰ These included Hyde, *International Law*, Second Edition Vol. I, 804 (1947) and Cowles 33 CALIF.L.R. 177 (1945). Also see in D.J. Harris, *Cases and Materials on International Law* (Fifth Edition) Sweet & Maxwell (1998).

¹¹ [1999]2 WLR 825 at 911- 912, in Ian Brownlie, *Principles of Public International Law* (Sixth Edition) Oxford University Press 304.

crimes against peace as an international crime for which U.K. has jurisdiction to try and prosecute Gen. Augusto Pinochet.

(i) With the establishment of the ICC, an alternative mechanism is now available for prosecuting the individuals for committing international crimes. The ICC has been conferred jurisdiction, under the Rome Statute, over the most serious crimes under international law, i.e. Crime of Genocide, Crimes Against Humanity, War crime and Crime of Aggression.¹²

The issue here is the conflict of jurisdiction between the states and the ICC. The states have jurisdiction over the same category of crimes under the principle of universal jurisdiction, over which the ICC also has been conferred jurisdiction under the Rome Statute. Otherwise too, the states have been given power to exercise jurisdiction before the ICC can exercise its own jurisdiction over such serious crimes. The principle is known as principle of complementarity. The jurisdiction of the ICC is limited under the principle of complementarity, i.e. it will have jurisdiction over crimes only if the territorial state or the state of nationality of the offender is unable or unwilling to try and prosecute the accused.

Amnesty- An Antithesis to the Jurisdiction of the ICC

The provision of complementarity principle creates confusion. For instance, a state, after prosecuting its offenders and holding guilty, may grant them amnesty. In such cases, will the ICC have the power to re-open such a prosecution? Can it be said that the State was unable or unwilling to prosecute an offender, whereas the prosecution had actually been conducted by the state? In my view, in such cases, the ICC should have no power to re-open the case.

Concurrent Jurisdiction of the ICJ and the ICC

It is possible that similar questions of law may be raised in cases before both the ICC and the ICJ. For instance, the ICJ has jurisdiction to decide disputes between states concerning- whether a State has violated the Genocide Convention by committing acts amounting to genocide on its territory or on the territory of another State. Now assuming that the States are also party to the Rome Statute, the ICC will have the duty of determining whether a given person has committed genocide as defined under the ICC Statute. The rules of decision in these two international forums permit different results to be reached on similar facts. In case of crime of genocide, both the State as well as an individual can be held responsible in different courts. State can be made responsible for having violated the Genocide Convention in the ICJ since only States can be parties in cases before the Court¹³. Similarly, an individual accused of crime of genocide may be held liable by the ICC for the acts under Article 6. The jurisdiction of the ICC and the ICJ run parallel over certain crimes, though making two different entities liable for the same crime. Since their decisions will be based on different principles of international law, there may be a situation where ICJ can hold that no case of genocide is made out in that state, in which State the ICC holds a person liable for having committed genocide. Their decisions will not be

¹² The ICC shall have jurisdiction over individuals committing such offences. In case of commission of any such crime, the matter will be referred to the Prosecutor as following- (i) Situation may be referred by the State party to the Rome Statute, (ii) Situation may be referred by Security Council acting under Chapter VII, or (iii) The Prosecutor may *proprio motu* take notice of the situation.

¹³ See ICJ Statute, art. 34

dependent on each other, but there may arise such conflict situation. As both the courts are independent and their decision will be based on individual fact-finding, therefore a situation can arise where both the courts may give inconsistent judgments. The ICC is not bound to apply the law determined by the ICJ either as a matter of its own statute or because of the place of the two tribunals in the UN system¹⁴. The jurisdiction of the ICC and the ICJ may overlap each other in such cases. Furthermore, at the present time, if an inconsistency were to arise between statements of law made by the ICC and the ICJ, there is no mechanism in place for promptly liquidating the inconsistency¹⁵.

Similar situation may arise in case of crime of aggression. Pursuant to Article 5 (1) (d) of the Rome Statute, the ICC has jurisdiction over crime of aggression. The Rome Statute has not yet defined the crime of aggression, as there was lack of consensus among the international community regarding the definition. But the Security Council may refer a situation, acting under Chapter VII of the charter, to the Prosecutor in case of an act of aggression in a particular State. Once the Security Council refers the act of aggression to the Prosecutor, after the initial investigation by the Prosecutor, the ICC will exercise its jurisdiction over crime of aggression. For referring the situation, the Security Council may be guided by the Definition of Aggression adopted by the General Assembly Resolution in 1974, which defines Aggression as; "...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 UN, as set out in this definition."

Further Article 2 of the Resolution provides that the first use of armed force by a State in contravention of the charter shall constitute prima facie evidence of an act of aggression. The definition of aggression under the G.A Resolution¹⁶ implies State responsibility for the act of aggression, i.e. a State can bring an action against another State for use of force in the ICJ. One may find number of cases decided by the ICJ in which use of force is there against the sovereignty, territorial integrity and political independence of another State. One such case is of *Nicaragua v. U.S.* In this case, President Reagan terminated economic aid to Nicaragua on the ground that it had aided guerrillas fighting against the El Salvador Government, which enjoyed good relations with the U.S., by allowing U.S.S.R. arms to pass through its ports and territory *enroute* for El Salvador. Nicaragua, claimed that the U.S. had, contrary to customary international law, used direct armed force against it by laying mines in Nicaraguan internal and territorial waters causing damage to Nicaraguan and foreign merchant ships and attacking and damaging Nicaraguan ports, oil installations and a naval base. This use of force by the U.S., as the allegations purports, is against the sovereignty and territorial integrity of Nicaragua, which may be termed as act of Aggression, under the Definition of Aggression adopted by the 1974 G.A. Resolution¹⁷. The ICJ decided that the use of force in this case was against the sovereignty, territorial integrity or political independence of Nicaragua. This can also be termed as aggression as it was the first use of force, which is a

¹⁴ Kenneth S. Gallant, *The International Criminal Court in the system of States and International Organizations*, 16 LEIDEN JOURNAL OF INTERNATIONAL LAW 576 (2003).

¹⁵ *Ibid* at 579

¹⁶ G.A. Resolution 3314 (XXIX) of 1974

¹⁷ G.A. Resolution 3314 (XXIX) of 1974

violation of Article 2¹⁸ of Resolution on Definition of Aggression.

The use of force in Nicaragua was in 1981, when the ICC had not come in force. Had ICC been in place at that time, the issue would have been regarding the choice of right forum to determine the situation, i.e. whether ICC or the ICJ is the right forum to determine aggression and hold individual criminals liable? There is a very thin line of distinction as to when ICC will have jurisdiction and when will the ICJ exercise its jurisdiction over similar acts that can be defined as crime of aggression. The jurisdiction seems to be overlapping.

Limitation over Subject-Matter Jurisdiction of the ICC

The ICC has jurisdiction over only four categories of crimes. There are other very important and serious crimes that have been left out e.g. international drug trafficking, terrorism, money laundering, human trafficking, trafficking in small arms, use of nuclear weapons, willful damage to the environment and other contemporary crimes like Cyber crimes, cyber terrorism which have become a global problem having impact across the boundaries and on world order. It is important that these crimes be checked; otherwise they are threatening peace and security of the world.

Issues regarding the Principle of Nationality

As already discussed, the ICC shall have jurisdiction on the basis of the principle of nationality of the accused, i.e. if the state of nationality of the accused is party to the Rome Statute, then only the ICC can exercise its jurisdiction over that individual. A number of questions regarding nationality of the individuals remain unanswered. e.g. who is a National? Crimes can also be committed by Stateless persons or by those having dual nationality. In case of stateless persons, State of nationality can be equated to a State of permanent residence. But the problems may arise where an offender has dual nationality and one of the states of his nationality is a party to the Statute and the other one is not. In such cases, the ICC should look at whether a person's link with a given State is genuine and substantial, rather than it being governed by some formal and perhaps even fraudulent grant of citizenship¹⁹.

IV CONCLUSIONS AND SUGGESTIONS

The jurisdictional issues pose a threat to the success of the ICC. Still it is a good beginning towards administering international criminal justice and ending impunity. Any new institution has teething problems and ICC is no exception. The ICC aims at ending impunity, by recognizing individual criminal responsibility under international law and thereby, enforcing international justice. Here are some suggestions, which, if worked will strengthen our trust in international criminal court.

¹⁸ G.A. Resolution 3314 (XXIX) of 1974, art. 2 provides that, 'the first use of armed force by a State in contravention of the charter shall constitute prima facie evidence of an act of aggression, although the Security Council may, in conformity with the charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.'

¹⁹ *Nottebohm Case (Second Phase)*, Judgment of 6 April 1955, [1955] ICJ Reports 24 in William A. Schabas, *Jurisdiction and Admissibility. An Introduction to the International Criminal Court*, Cambridge University Press 64 (2001).

Widening the Scope of Subject-Matter Jurisdiction of the ICC

As discussed above, there are serious crimes which have been left out of the jurisdiction of the ICC. The jurisdiction of the ICC should be extended to such other types of international crimes, i.e. international terrorism, human trafficking, drug trafficking, arms trafficking and first use of nuclear weapons in armed conflict to be recognized as a war crime. These crimes involve serious violence and physical harm. Even the willful damage to the environment should be prosecuted by the international criminal court. Apart from conferring jurisdiction over the conventional crimes, there are contemporary crimes that need to be controlled at the international level, for example cyber crimes, cyber terrorism, money laundering, etc. There is a need for amendments at the review conference. This will be a welcome step as there are states, which have not signed the Rome Statute because of its limited subject-matter jurisdiction. For example, India and US support the idea that terrorism should be included within the jurisdiction of the Court. India also proposed that the first use of nuclear weapons should be recognized as a war crime. This will help ICC get support even from the states, which have not signed the Rome Statute as yet.

Exclusive Jurisdiction of the ICC

The suggestion is that the ICC should be empowered with exclusive jurisdiction over the offences. The jurisdiction should be exclusive and not complementary to the national jurisdiction. The need is to support the rule of international law. The ICC can strive for universality only by persuading more and more states to accede to the Rome Statute²⁰.

Relationship between the ICJ and the ICC

Both the tribunals have to run smoothly to avoid concurrent jurisdiction. There is one provision of the ICC Statute that could, if used properly, prevent ICC from creating a definition broader than that adopted by the ICJ while holding an individual criminally liable for his acts. The Rome Statute provides that definition of crimes shall be strictly construed and in case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted²¹. This can be used to prevent the ICC from criminalizing conduct that has been considered not within the definition of crime by the ICJ. Though it does not prevent inconsistencies from arising where the ICC is more lenient in describing criminal activity than the ICJ. Nor does it prevent the ICJ from later making a declaration of law more lenient than previous judgment of the ICC. There is a need to develop some relationship between each other and in such cases; the ICC should be allowed to directly approach the ICJ for its advisory opinion.

If the above suggestions are considered by the Review Conference, to be held in 2009 (Seven years after the entry into force of this statute²²), for incorporation in the Rome Statute, it will prompt the other important non-party states (like the US & India) to ratify the Rome Statute and promote the international criminal law. A beginning has been made towards a better future for international community and with the passage of time; more improvements can be made in the structural framework of Rome Statute and its functional area. In fact, Rome Statute can be described as one of the major achievements of the 20th century.

²⁰ Anju Rani, The International Criminal Court and Universal Jurisdiction, XXV DELHI LAW REVIEW 226 (2003).

²¹ See Rome Statute, art. 22 (2)

²² See the Rome Statute, art. 123