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ICC'S INTERVENTION OF SRI LANKA WAR CRIME TRIALS HYPOTHETICAL

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ABSTRACT

This study analyses the Rome Statute pertaining to the restrictions upon International Criminal Court (ICC) intervening war crimes trials in Sri Lanka. The Court was founded to investigate the crimes like genocide, war crimes, crimes against humanity and crimes of aggression. It has been established through the Rome Statute which entered into force on 1 July 2002 which has provided a legal framework to intervene and conduct war crimes trials against persons who have committed crimes within its jurisdiction. The Rome Statute itself imposed many restrictions upon the Court. The author analyses these restrictions and establishes that ICC cannot intervene on the war crimes trials of Sri Lanka unless the state makes a declaration accepting its jurisdiction or enter into an 'ad hoc' arrangement or agreement or the UN Security Council refers the same to the Court.

KEYWORDS: Rome Statute, International Criminal Court, War Crimes, Jurisdiction, Principle of Complementarity

INTRODUCTION

ICC ('the Court') could issue a warrant of arrest of a person if it is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and the arrest of the person appears necessary to ensure the person's appearance at trial, to ensure that the person does not obstruct or endanger the investigation or the Court proceedings or where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances¹.

The said warrant could be even issued to an individual because a person, who commits a crime within the jurisdiction of the Court, shall be individually responsible and liable for punishment.² For instance, in the case *The Prosecutor v. Dyilo*,³ Thomas Lubanga Dyilo was forwarded to the trial in January 2009 and convicted in 2012 for conscription and use of child soldiers in Congo. If an accused is convicted, ICC could punish him with penalties such as imprisonment for a specified number of years which may not exceed a maximum of 30 years, a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

Additionally, the Court may order a fine under the criteria provided for in the rules of procedure and evidence and a forfeiture of proceeds, property and assets derived directly or indirectly.⁴ ICC could

request a State Party to surrender a person. The meaning of 'surrender' is delivering up of a person by a state to the Court in pursuant to the Rome Statute.⁵

SRI LANKA IS NOT A STATE PARTY TO ROME STATUTE

It is a precondition to the exercise of jurisdiction of ICC that a state becomes a Party of the Rome Statute.⁶ Only State Parties could refer their issues to the Court.⁷ For instance, Uganda, Congo and the Central African Republic have made references to the Court regarding issues within those countries. In other words, ICC has jurisdiction mainly over the State Parties. Alternatively, it may exercise its jurisdiction if a non-State Party has accepted the jurisdiction of the Court by declaration, in respect of the crime in question.⁸

Accordingly, a state which is not a party of this statute, may by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court in respect to the crime in question and the accepting state shall cooperate with the Court without any delay. Alternatively, even if a state is not a party to the Rome statute the Court may exercise its jurisdiction if there is a situation in which one or more of the crimes appear to have been committed is referred to the Prosecutor by the UN Security Council (UNSC) acting under Chapter VII of the Charter of the United Nations.⁹ For instance, ICC intervened in the matter in Darfur Sudan through a reference by the UNSC. In a rare occasion, the Court may exercise its jurisdiction if the Prosecutor has initiated an

¹ Rome Statute of the International Criminal Court, art 58(1).

² *ibid* art 25.

³ ICC-01/04-01/06.

⁴ Rome Statute, art 77.

⁵ art 102 (a).

⁶ art 12 (1).

⁷ arts 13 (a) & 14 (1).

⁸ art 12(3).

⁹ art 13 (b).

investigation ‘*proprio motu*’ on the basis of information on crimes within the jurisdiction of the Court.¹⁰

Furthermore, the Court may invite any state which is not a party of the Rome Statute to provide assistance under this part on the basis of an ‘ad hoc’ arrangement or an agreement with such a state or any other appropriate basis. If such a party which entered into an ‘ad-hoc’ arrangement or an agreement with the Court fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.¹¹

Sri Lanka is not a state party to Rome Statute and we have never accepted the jurisdiction of ICC by way of any declaration as defined in Articles 12 (2) and (3). Thus, ICC cannot any time intervene in Sri Lanka under Article 13 (a) or (c). And there has been no reference to the Prosecutor by the Security Council acting under the aforesaid Chapter VII. Further, Sri Lanka has not accepted any invitations of ‘ad hoc’ arrangements so far and therefore, ICC cannot intervene through Article 87 either.

Not only Sri Lanka but ICC still has no jurisdiction over many states which are not State Parties of Rome Statute. Even United States and India are not State Parties to the Court. Although United States signed the convention they have not ratified it. India has neither signed nor ratified the same. Another example is Syria where the Court does not have jurisdiction. ICC could exercise its jurisdiction if Syria was a State Party of the Rome statute or if it made a declaration accepting ICC’s jurisdiction under Article 12 (3). Syria is neither a State Party nor it has made any declaration accepting the jurisdiction of the Court and there is no reference from UNSC.

ICC IS ONLY COMPLEMENTARY

The jurisdiction of the ICC is based on the ‘principle of complementarity’. The Preamble of the Court says ‘the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions’¹². The Article 1 says, ‘ICC shall be complementary to national criminal jurisdiction’.¹³ This means the Court could intervene in a domestic matter only if the State Parties had failed, unable or reluctant to investigate it. Hence, even if Sri Lanka had signed the Rome Convention, ICC could have never interfered with National Court proceedings or investigations unless there had been a serious failure or neglect in the domestic proceedings.

ICC is not hailed by default. In other words, without the expressed authority and approval of the National Court, ICC cannot initiate its proceedings or intervene in domestic prosecutions and offer its service. The mandate of the ICC is not to replace the state criminal procedure but to act as a complement to it. In other words, it does not replace the domestic criminal justice system. Thus, ICC could effect prosecutions in regard to cases only in circumstances where State Courts are passive or found inadequate. ICC has to rely on the cooperation of the state to enforce warrants. It has no freedom in terms of prosecution because it should work only as a complement to the domestic system.

In view of it, the ‘*principle of complementarity*’ has gradually limited ICC’s freedom of prosecution and investigation in cases where the domestic Court proceedings are pending. In addition, the Court has no jurisdiction to hear a matter which has been already investigated at the domestic level.

¹⁰ arts 13 (c) & 15 (1).

¹¹ art 87 (5) (a-b).

¹² Rome Statute, preamble, para 10.

¹³ art 1.

When state parties wish to cooperate with ICC, they shall not disregard the procedures laid down in national laws. In other words, domestic civil and criminal procedure laws should not be negated while complying with a request of the Court to assist investigations or prosecutions.¹⁴ These circumstances further indicate the complementary nature of the Court.

In the absence of the consent of Sri Lanka or the representing Government, ICC cannot obtain any documents or evidences required for investigation or prosecutions. Requests for assistance shall be executed in accordance with the relevant procedure under the law of Sri Lanka and, unless prohibited by such law in the manner specified in the request including procedure outlined in the Rome Statute or permitting persons specified in the request to be present at and assist in the execution process.¹⁵

JURISDICTION OF ICC IS LIMITED

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community. The Court has jurisdiction in accordance with the Rome Statute in respect of the following crimes: (a) the crimes of genocide, (b) crimes against humanity, (c) war crimes, (d) the crimes of aggression.¹⁶ The Article 8 (1) says, ‘the Court shall have jurisdiction in respect of war crimes in particular when committed’.¹⁷ Crimes against the humanity have been defined as, ‘... committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack’.¹⁸

Further, ICC elaborates the legal principle of ‘*nullum crimen sine lege*’. This means a person shall not be criminally responsible under the Rome Statute unless the conduct in question constitutes at the time it takes place, a crime within the jurisdiction of the Court.¹⁹ However, the Court may, upon request, cooperate with and provide assistance to a state party investigating or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting state.²⁰

NO WARRANTS, SUMMONS OR ARRESTS BEYOND JURISDICTION

Before the issue of a warrant of arrest or a summon to appear before the ICC, it has to satisfy that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and such an arrest is necessary to ensure the person's appearance at trial, to ensure that the person does not obstruct or endanger the investigation or the Court proceedings; or to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same.²¹

Even if a person is arrested by following a request of ICC, such a person shall be brought promptly before the competent judicial authority in the custodial state which shall determine, in accordance with the law of that state.²²

¹⁴ art 93(1).

¹⁵ art 99 (1).

¹⁶ art 5 (1).

¹⁷ art 8 (1)

¹⁸ art 7 (1).

¹⁹ art 22 (1).

²⁰ art 93 (10) (a).

²¹ art 58 (1).

²² art 59 (2).

ICC FORFEITS ITS RIGHTS TO INTERVENE IF THE CASE IS BEING INVESTIGATED IN SRI LANKA

Certain cases are inadmissible in ICC investigations. First, if the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution it is inadmissible.²³ Secondly, if the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute it is inadmissible.²⁴

In order to determine the aforesaid 'unwillingness' of a state to prosecute a case, the Court shall consider, having regard to the principles of due process recognized by international law, whether (a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court, (b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice, (c) the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.²⁵

To determine 'inability' of a state to prosecute a case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.²⁶ ICC cannot even initiate an investigation if the information available to the prosecutor does not provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed or the case is or would be admissible under article 17 mentioned above.²⁷ In such a case, the Court should not issue warrant or summons.²⁸

ICC'S JURISDICTION IS CHALLENGEABLE

ICC shall satisfy itself that it has jurisdiction in any case brought before it.²⁹ Its jurisdiction could be challenged in three ways. First, by an accused or a person for whom a warrant of arrest or a summons to appear has been issued. Secondly, by a state which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted. Thirdly, by a state from which acceptance of jurisdiction is required by declaration.³⁰

Where the person sought for surrender brings a challenge before a National Court on the basis of the principle of '*ne bis in idem*' as provided in Article 20 of the Rome Statute, the requested state shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested state shall proceed with the execution of the request. If an admissibility ruling is pending, the requested state may postpone the execution of the request for surrender of the person

until the Court makes a determination on admissibility.³¹

NO PROSECUTION IS POSSIBLE AGAINST STATE IMMUNITY

The Court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law in respect of the state or diplomatic immunity of a person or property of a third state, unless the Court could first obtain the cooperation of that third state for the waiver of the immunity.³²

In addition to that, the Court may not proceed with a request for surrender which would require the requested state to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending state is required to surrender a person of that state to the Court, unless the Court could first obtain the cooperation of the sending state for the giving of consent for the surrender.³³

ICC CANNOT BE DETRIMENTAL TO NATIONAL SECURITY

A state could deny the disclosure of information to ICC in any case where the disclosure of the information or documents of a state would, in the opinion of that state, prejudice its national security interests.³⁴ If a state learns that information or documents of the state are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that state shall have the right to obtain resolution opposing it.³⁵

If in the opinion of a state, disclosure of information would prejudice its national security interests, all reasonable steps would be taken by the state, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means.³⁶ If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a state, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information.

If the originator is a state party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of Article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested state shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.³⁷

A State Party may deny a request for assistance, on the whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.³⁸ Alternatively, the state party could provide the assistance subject to conditions or provide the assistance at a later date in an alternative manner. ICC shall abide by them³⁹ if the documents or other types of evidence have been obtained with the assistance of

²³ art 17 (1) (a).

²⁴ art 17 (1) (b).

²⁵ art 17 (2) (a-c).

²⁶ art 17 (3).

²⁷ art 53 (1) (a-b).

²⁸ art 53 (2) (a).

²⁹ art 19(1).

³⁰ art 19 (2) (a-c).

³¹ art 89 (2).

³² art 98 (1).

³³ art 98 (2).

³⁴ art 72 (1).

³⁵ art 72 (4).

³⁶ art 72 (5).

³⁷ art 73.

³⁸ art 93 (4).

³⁹ art 93 (5).

a state, such transmission shall require the ‘consent of that state’.⁴⁰

NO PROSECUTION FOR MISTAKES AND SHORTCOMINGS

A ‘mistake of fact’ or ‘mistake of law’ shall be a ground for excluding criminal responsibility if they negate the mental element required by the crime.⁴¹ Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.⁴² The ‘knowledge’ means awareness that a circumstance exists or a consequence would occur in the ordinary course of events.⁴³ In addition, Rome Statute intends to believe that children have no intention and knowledge in respect of any crime in question. Therefore, ICC shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.⁴⁴

NO PROSECUTION FOR PAST CONDUCT

ICC is non-retrospective as it investigates the crimes committed only after July 2002.⁴⁵ The Rome Statute included two principles in this regard. The first principle is ‘non-retroactivity *ratione personae*’, which means no person shall be criminally responsible under that Statute for conduct prior to the entry into force of the Statute.⁴⁶ The second principle is, ‘*jurisdiction ratione temporis*’ which means the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.⁴⁷

If a state becomes a Party to the Rome Statute after its entry into force, the Court may exercise its jurisdiction only in respect of crimes committed after the entry into force of this Statute for that state, unless that state has made a declaration accepting the jurisdiction of the Court.⁴⁸

RESTRICTIONS GOVERNING PENALTIES

The Court may impose penalties on a person convicted of a crime. This could be an imprisonment, a fine or a forfeiture of proceeds, property and assets.⁴⁹ However, such penalties should not affect the application by states of penalties prescribed by their national law or the law of states which do not provide for penalties afore-prescribed.⁵⁰ A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered unless the state parties provide a waiver.⁵¹

CONCLUSION

The Rome Statute itself provides a very limited jurisdiction to ICC by imposing many restrictions upon it. These restrictions have made it far more impossible for the ICC to intervene in issues in Sri Lanka, unless the state makes a declaration accepting its jurisdiction or enter into an ‘ad hoc’ arrangement or agreement. Even if the UNSC referred Sri Lankan matters to the ICC, it could only act as a

‘complementary’ to our National Courts, Laws and Procedures. Eventually, Sri Lankan National Courts would never become secondary.

At a time when certain elements are looking up to the ICC to enter into the realm of Sri Lankan judiciary and makes it impact upon her system, it is absolutely essential to comprehend that the ICC has to function under very strong restraints and cannot in anyway intervene in war crime trials of Sri Lanka on some pretext or other.

REFERENCES

1. *Rome Statute of the International Criminal Court 1998 (as amended in 2010)*
2. *The Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/06)*.

⁴⁰ art 93 (10) (b) (ii) (a).

⁴¹ art 32 (1-2).

⁴² art 30 (1).

⁴³ art 30 (3).

⁴⁴ art 26.

⁴⁵ art 126.

⁴⁶ art 24(1).

⁴⁷ art 11 (1).

⁴⁸ art 11 (2).

⁴⁹ art 77(1).

⁵⁰ art 80.

⁵¹ art 101 (1-2).