



**JURISDICTION OVER THE  
INTERNATIONAL CRIMINAL COURT  
FOR NON MEMBER STATE:  
REFLECTION FROM ARREST  
WARRANT AGAINST AL BASHEER**

*By Srirupa Choudhury  
From ILS Law College India*

International Criminal Court has been established to fight impunity and holding the perpetrators accountable of the most serious crimes. For this purpose many international conventions, treaties, and statute have been framed to empower International Criminal Court (ICC) for punishing individuals. One of important statute is Rome Statute which was established and signed on 17<sup>th</sup> July 1998. This is the statute that led to formation of ICC. As on March 2019, 127 states are party to ICC. There are 128 articles in Rome statute. Some of the important article relevant to subject areas per following **Article 13(b)** gives power to ICC for exercise its jurisdiction for crime referred in **Article 5(1)** i.e. crime related with crime of genocide, aggression, war and against humanity. **Article 13(b)** further include condition that Security Council may refer case to prosecutor to initiate action under UN Charter ( Chapter VII), due to this condition even non member state will have to cooperate ICC.

Further **Article 87(5)(b)** also empower ICC to invite cooperation and assistance even from non member state. ICC may go for an ad hoc arrangement with state. However in case of non cooperation even after agreed arrangement intervention of Security Council will be required.

**Article 25** “Individual criminal responsibility” of Rome Statute empowers ICC to punish a person for his crime within jurisdiction of ICC. Further Article **27(ii)** contains that immunity due to the official capacity of a person shall not bar ICC to exercise its jurisdiction. However Article **98 (i)** restricts power of ICC to arrest a person with state or diplomatic immunity unless the Court can first obtain the cooperation of that third State for the waiver of the immunity which is not generally available easily.

The co-operation of the non-member states with the ICC has been envisaged in Rome Statute of the International Criminal Court to be of voluntary nature However, even states that have not acceded to the Rome Statute might still be subjects to an obligation to co-operate with ICC in cases when same is referred to the ICC by the UN Security Council all UN member states are obliged to co-operate, since its decisions are binding for all of them. Under such condition arrest warrant against non member may be issued.

**Non State parties obligation to Cooperate  
ICC**

Effectiveness of ICC for its intended purpose depends upon level of cooperation by member states as well as non party states. States which have accepted and ratified Rome Statute are bound to cooperate with ICC for prosecution of nationals guilty of international crime of mass atrocities. There are other international Treaties, conventions, protocol and over and above UN Charter which make cooperation to ICC obligatory even to non party states. Generally these treaties and charter have been framed with the intention of bringing international order



,peace and prosperity .Major treatise and statute relevant to subject are<sup>1</sup>

Geneva Convention 1949.b) Vienna Convention 1969 c) UN Charter d) Rome Statute.

The ICC differs from conventional judicial system of state because it has no police force, no armed force, no structured system to enforce prosecution, indictment , executing arrests of defendants thus ICC is entirely dependent upon the concerned state judicial infrastructure. In this condition cooperation of state is of utmost importance. ICC works on following three principles:-

- i) Principle of complementarity :- As per Roy S Lee<sup>2</sup>this principle means that the ICC will complement, but not to replace, national jurisdiction. National courts will continue to have priority in investigating and prosecuting crimes committed within their jurisdictions, but the International Criminal Court will act when national courts are 'unable or unwilling' to perform their tasks.
- ii) To address most serious crime against humanity :- As per Article 5 of Rome Statute crime pertaining to genocide, war crime, crime of aggression and crime against humanity are under purview of ICC

#### Statutory Provisions regarding cooperation by Non Part State:

In the Rome Statute, there are different provisions for state parties and non state parties. First of all **Article 12 read with Article 86** makes it mandatory for State parties to cooperate and accept jurisdiction of ICC in its investigation and prosecution of

crimes within the jurisdiction of the Court. However **Article 12(3)** include condition that non State party by declaration lodged with the Registrar, may 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.

Further there are provisions in the **Article 13** "Exercise of Jurisdiction" which empowers ICC to exercise its power on state party in respect of crime mentioned in **Article 5**. State party may request ICC in accordance with **Article 14 and 15** to investigate the crime and prosecute the guilty. However for non State party there is provision in **Article 13(b)** which include that in case of non state party Security Council under Chapter VII of United Nations Charter may refer the case to ICC prosecutor. Chapter VII of the United Nations Charter empowers UN Security Council's to maintain peace. It allows the Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to take military and nonmilitary action to "restore international peace and security"

There is an important provision in **Article 87(5)** regarding co-operation by non-party states with the ICC. It provide that the Court "may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis." Only state parties are obligated to cooperate. This corresponds to the general principles of treaty law. **Article 34** of the Vienna Convention on the Law of Treaties,

<sup>1</sup>The Geneva Conventions extensively defined the basic rights of wartime prisoners, civilians

and military personnel. Vienna Convention, article 34 and 35 for obligation of third state.

<sup>2</sup>As per McGeorge School of Law Articles



adopted on 23 May 1969, clearly provides that A treaty does not create either obligations or rights for a third State without its consent. Further **Article 35** stipulates that an obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing. This may be one of the reasons that Rome Statute makes different provisions for state parties and for non-party states on the issue of state co-operation. In short we can say that non party state may be approached and invited by ICC for providing assistance on ad hoc arrangement basis thus this is a cooperation of legal category.

#### **Scenario of cooperation by Non Party State**

Basic requirement of ICC to execute the task of punishing guilty of mass crime is to obtain full and unconditional cooperation of both State and non state party. Statutory provisions empower ICC in case of assistance or help from State Party but are of obligatory nature for non part state. It has been always difficult to ICC for getting support from these state. It is Article 25 of the UN Charter which provides respite to ICC in this regard. As per this article all decision of UN Security Council are binding upon all the member state of UN. Accordingly when Security Council refer any criminal case to ICC it is mandatory on the part of member state to assist and cooperate in its investigation of case with the aim of keeping world peace and order. One of the reasons for non cooperation may be perceived threats of state regarding encroachment of national sovereignty and security and also infringement in its existing legal system.

<sup>3</sup> By one's own motion, suo moto

#### **Investigation of alleged war crime in Afghanistan by the American officials.**

There are many angles to this case. First of all Chief prosecutor as per **Article 15** of Rome Statute may initiate investigation *Proprio motu*<sup>3</sup> on the basis of information of crime within the jurisdiction of ICC .and as per Article 15(2) may seek additional information from state, UN Organization , Government and Non Government Organization. If prosecutor conclude that there is reasonable basis to proceed he/she will submit a request to Pre Chamber Trial (Article 15(3)). Even refusal of Pre Trial Chamber cannot prevent prosecutor to present subsequent request based on new facts, **Article 15(5)**. Further **Article 17(1)(d) and 17(2)(b)** empower court not to admit case submitted by the prosecutor mainly on the basis case not having sufficient gravity or unjustified delay in proceeding.

Here it is pertinent to mention that US is not member to Rome Statute thus as per provision of **Article 13(b) and 87(5)** for taking investigation of non party state, there should be request from effected state or mandate from Security Council through resolution for investigation of case by ICC. Chief prosecutor of ICC as per provision of Article 15 Suo mote started investigation of mass atrocity in Afghanistan by military official of United State. Prosecutor as per provisions of **Articles 18(4), 57(3)(d)** submitted the case to Pre Trial Chamber of the court. Pre Trial Chamber rejected prosecutor request on the following ground

- a) Collecting evidences in troubled area of Afghanistan will have very thin chances to justifying charges against US officials



- b) There are very less probability of getting Afghanistan and US cooperation in the investigation.

As per the provisions of these articles prosecutor challenged the decision of Pre Trial Chamber in the Appeals Chamber. However appeal chamber also denied to continue the investigation on the following grounds:

- a) There is no national investigation is under process in Afghanistan, since role of ICC is complementary until there is request from state party investigation cannot be continued.
- b) Cases are very old and belongs to period 2003 i.e. almost 15 year old therefore now working on seriousness of crime and interest of victims will not serve the justice.

Since US is non member state investigation may be taken on the basis of requesting state or mandate from UN Security council. In fact US has threatens that it will veto any move brought before Security Council for investigation of its official in war crime. US has also revoked visa to ICC prosecutor to visit US.

It is evident from the case that ICC is helpless if there is instance of investigation against big and influential nations. Situations further aggrieved if investigation is against non party state. Though Afghanistan is a party to the Rome Statute, and therefore it has jurisdiction over acts committed on its territory but Afghanistan's adherence to the Statute could not confer jurisdiction against potential U.S. defendants for their actions in Afghanistan.

### **Immunity , a restriction on ICC**

For dealing with prosecution in crime within jurisdiction of ICC (Article 5 ) particularly with immunity Rome Statute has elaborated the provisions in **Article 25** “ Individual criminal Responsibility”, **Article 27** “ Irrelevance of official capacity”, and **Article 98** waiver of immunity. ICC is an international institution entrusted with to investigate mass scale crime in a particular state and to prosecute the individuals or group of persons involved in the crime. Such volume of crime is only possible with by very powerful and influential person generally holding very higher Government position or politically strong person. Since local judiciary system has not been able to deliver or if the matter is of interstate conflicts than only available option is intervention of ICC. First of all we will see the empowerment of ICC against immunity as per statutory provision. **Article 27(1)** stipulate that “statutory provisions shall apply equally to all persons without any distinction based on official capacity. Here this article further elaborates official capacity i.e.as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official. However official position shall not exempt them from personal responsibility nor from any reduction in sentence. **Article 27(2)** further strengthens ICC position that there will be no restriction or bar to the court from exercising its jurisdiction over such a person. There is another important **Article 98** in the Rome Statute which deals with immunity. It pertains to “Cooperation with respect to **waiver of immunity** and consent to surrender”. In this article important point is that before start of proceedings and subsequent prosecution and arrest waiver of immunity, cooperation and consent from third state is mandatory.



### Success of the ICC in the cases of immunity provided to individual

**Article 27** removes immunity both for action taken by ICC and the National courts. However in case a person has immunity both as per national and international law. In trial chamber<sup>4</sup>, South Africa case of Al Basheer dated 6/7/2017 chamber came with the view that provision of **Article 27 (2)** are not comprehensive and immunity in fact bar court from exercising its jurisdiction in such cases. If a person has got immunity by national and international law under some statute such as Vienna Convention of Laws of treaties (VCLT) then article 31 of this treaty will also be applicable and binding on state parties under the treaties. Under such condition state may refused to arrest such person being provided immunity by state itself or immunity under a treaty even on the request of ICC. This has recently happened in case of AL Basheer case and trial of Kenyan President.

Second issue regarding immunity under **Article 27(2)** pertains to effectiveness of implementation of this statute. There are two agencies one is State national system and another is ICC system. Both are driven by different set of law, rules and statutory requirement. ICC has no independent infrastructure or power to prosecute and arrest, they are dependent on states national authorities until unless person concerned itself present or surrender for questioning. Since National Authorities has granted immunity generally they will not cooperate and ICC will not be able to exercise its power to apprehend the guilty.

<sup>5</sup>Pre-Trial Chamber consist of group of judges who issue a warrant of arrest if there are reasonable grounds they believe that the person has committed a

**Cases I:-** Afghanistan is member state of Rome Statute where is America is nonmember state. Between USA and Afghanistan there is Bilateral Security Agreement (BSA ) dated 2014. As per this treaty United States has right to exercise jurisdiction in respect of any criminal or civil offenses committed on the territory of Afghanistan by U.S. forces and its civilian component. In other words Afghanistan has provided immunity to USA official. Even though Afghanistan is State Party to the Statute they have not entertained request of ICC to start prosecution. With reference to Article 98(1) and (2) and their bilateral agreement Afghanistan intimated ICC that for without USA consent no further action in the matter can be taken.

**Case II:-** Kenyan president and his deputy have been accused of violence resulting in death of around 1200 people in Kenyan elections in 2007. Both leader opposed and denied charges and avoided prosecution. Union of African countries (African Union, AU) also opposed the trial and informed that ICC is prejudice against AU. This union further insisted that **Article 27(2)** of Rome Statute should be amended to include conditions to provide immunity to head of state as against existing provision. Initially AU tried for special tribunal to investigate Kenyan genocide but after some futile attempts they requested ICC to take up the case. This is a unique case of failure of ICC to investigate the case in which head of state is involved. Prosecutor of ICC ultimately due to noncooperation of member state and other effected parties, drop the case of investigation against Kenyan president. This

crime within the Court's jurisdiction and that the person will not appear voluntarily before the Court.



case brought great damage to creditability and reputation of prosecutor of ICC.

Main reasons for the setback has been following:

- a) Since charges were against Kenyan serving president official of Kenyan Government intimidated and harassed key and potential witnesses as well as noncooperation by Kenyan Government
- b) Kenyan Government and their friendly state lobbied hard to differ the case in Security Council.
- c) Other nations of African union also due to their bilateral treaties with Kenya refused to Cooperate for want of waiver of immunity and consent of Kenya as per provision of Article 98 of Rome statute.

### Case of Al Bashir at ICC<sup>5</sup>

#### Background of the case

Darfur is region in western Sudan. Between March 2002 to July 2008 armed conflicts taken place between Local armored group, Government of Sudan and their supported militia group called Janjaweed. Local group at Darfur were supported by local population and were against Government of Sudan. Government of Sudan headed by its military leader Al Basheer started unlawful attack on local population and local group opposing the Government of Sudan. In this attacked Government of Sudan armed forces, Police, supported militia group took part from Government of Sudan. Sudan armed forces and their supported group plundered, raped murder, and executed thousands of civilian population including children and women. Original inhabitant of Darfur area was forced to vacate the area and Government supported population were settled there. This resulted in thousands of death.

<sup>5</sup>ICC-02/05-01/09

Sudan is not member state of Rome Statute. Looking to the situation in the area Security Council in 2005 referred the case to ICC prosecutor Article **13(b)**. Case was referred to investigate alleged crime of genocide, against humanity and war crime, against official of Sudan, its armed force and militia group as per provision of **Article 5** of Rome Statute.

Pre Trial Chamber I (Article **15**, Prosecution) found that there is enough ground to establish crimes as per jurisdiction of ICC. Prosecutor found that Umar Al Basheer then President of Sudan played key role in counter insurgency and mass atrocity in Darfur. Pretrial Chamber further concluded that Government committed crime against civilian population not taking part in conflicts comes under preview of crime against humanity and genocide. Umar Al Basheer and his associates pledged that Government of Sudan is signatories of many internal Convention and Darfur conflicts is an internal conflicts thus not required any outside investigation. Not influenced by Stand of Sudan Government Security Council came to the conclusion that alleged crime in Darfur are extensive and organized and fulfill criteria to get it investigated by ICC. Secondly Sudanese justice system is unable and also reluctant to carry out the investigation and prosecution of perpetrators of these crimes. Security Council further directed Sudan Government to provide access without hindrance to United Nations human right commission for entire effected civilian population.

#### Effectiveness of ICC



As in the other cases generally ICC not able to apprehend the perpetrator of crime i.e. here Umar Al Basher and his associates case also due to noncooperation of member state ICC could not arrest the guilty and they are moving freely around the world despite having 8 year old international arrest warrant issued by International Criminal Court and backed by UN Security Council. In this particular case UN security has also not been able to provide requisite support. This shows helplessness and ineffectiveness of ICC at international level. Despite the issue of arrest warrant Al Basheer has visited many countries in which some of the countries are member of Rome Statute and some of the countries are non member state. Basheer has traveled many times to countries such as South Africa, Uganda, Tunisia and Jordan who are member of the Rome statute countries.

As per provision of **Article 59 (1)** *it is obligatory for member state to take immediate steps to arrest the person against which ICC has issued the arrest warrant.*

Further **Articles 89 (1)** and **Article 91** also confirm the obligation and procedure for member state to respond the request of ICC for arresting the person. When Al Basheer visited Jordan a member state, Jordan did not responded to request of ICC to arrest the Al Basheer despite its obligation under Rome Statute. ICC referred the case to UN Security Council. Jordan pleaded that they have bilateral treaty with Sudan to keep peaceful relation and secondly Al Basheer has immunity to be arrested being Head of State, though there are no such provision in Rome Statute for waiver of arrest to Head of State. Similar stand has been taken by Tunisia and South Africa.

Even big countries like China who is permanent member of Security Council also evaded arrest of Umar Al Basheer when he visited China despite Security Council Resolution and mandate to arrest. Resolution of UN Security council is applicable to all member state of UN even they are not member to Rome Statute. It is obvious from above examples and deliberation that ICC has not been effective to arrest perpetrators of international crime if the guilty person is Head of state. At present Umar Al Basheer could not have been arrested though he has been deposed by Sudan Army recently.

#### Conclusion

International Criminal Court has been established to punish perpetrators of international crime within ICC jurisdiction (Article 5 of Rome Statute) by investigation, prosecution and arrest. Since ICC works on principle of complementary i.e. ICC has to compliment, assist to national system of the concerned state. ICC comes in the picture only when national system is either unable or unwilling to take up the issues. However for complimenting the national system cooperation of state is essential. For Member state of ICC it is obligatory but for nonmember state there is no such compulsion. Statute provides that for nonmember state it requires having an ad hoc arrangement or there should be UN Security Council Resolution applicable on all member state of UN to initiate investigation and prosecution. **Article 25 and 27** strengthens ICC position to initiate action against individual irrespective of his/her official position but on other side **Article 98** incorporate condition of getting waiver of immunity and consent of state if person concerned belongs to nonmember state. Generally these consent and waiver of



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immunity is not received due to political compulsion and perpetrators are head of state or powerful and influential persons.

We have seen that apart from non member state even member state have not cooperated though they have obligation to cooperate and assist the ICC under Articles 59(1) and 89(1). This shows that gloomy picture of credibility and effectiveness of ICC in its endeavor to prosecute and punish guilty of international crime. In Umar Al Basheer's case despite member of ICC many African country evaded his arrest and allowed him to move freely in their territory whereas ICC has already issue arrest warrant. Instead of their duty to keep international order and piece nation have given priority to their bilateral agreement and economic consideration.

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