

Sovereignty of the International Criminal Court

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Abstract

Appalled by the increasing brutality and emboldened by the collapse of ideological barriers, international law now intends to reach out for criminals hiding behind the veil of sovereignty. It aims to sensitize the world against gross human rights violations through the threat of legal action. The rapid entry of the Rome Statute on July 1, 2002, heralds a new era in international politics. It opens new avenues for the international community to monitor human rights violations within states and bring the delinquent individuals to trial.

One of the main reasons for the court to come into existence after the end of the Cold War is that many crimes committed against humanity have been ignored by states either due to “military necessity” or under the national sovereignty and territorial integrity clause. The International Criminal Court (ICC) does involve a certain sacrifice of sovereignty because it envisages asserting itself when a state refuses or fails to use its national criminal justice apparatus to deal with the perpetrator of crimes against humanity.

This paper argues that the ICC challenges the exclusivity of sovereign states. The ICC imposes certain restrictions and limits on state authority and competes with the state in the exercise of authority.

Keywords: Rome Statute, Sovereignty, International Criminal Court, Human rights, Violations

Introduction

Announcing the entry into force of the International Criminal Court (ICC), the United Nations secretary general Kofi Annan, said, "is a great victory for justice and for world order, a turn away from the rule of brute force, and towards the rule of law." He further added, "The process we are now witnessing marks a decisive break with the cynical worldview", according to which in Stalin's words, "a single death is a tragedy, a million death is a statistic".

The ICC challenges the exclusivity of sovereign states. The ICC imposes certain restrictions and limits on state authority and competes with the state in the exercise of authority. However, the onus of protecting and in fact, enhancing their sovereign status now rests more with states than ever before. By upholding the principles of international law within their territories, states can now prevent supranational interventions. This could lead states to value justice over narrow political considerations. James Gow, identified this shift in the state's primary source of sovereignty from the “will of the people” to its obligations towards maintaining an international equilibrium as “the revolution” in the sovereignty principle.

The paper is divided into two parts. The first part briefly touches upon the formation of the ICC and its basic structure. Part two deals with the impact of the ICC on sovereignty. First, it looks at the metamorphosis of the individual from “object” to “subject” in the eyes of international law. Second, it examines the impact of ICC on the changing nature of the sovereignty discourse.

Background to ICC

In July 1998, the Diplomatic Conference of Plenipotentiaries on the establishment of an ICC concluded by adopting a statute for such a court. The statute's principal inspiration came from the Nuremberg and Tokyo Tribunals. The process of the Rome Statute was further guided by the experience acquired from the operation of two ad-hoc International Criminal Tribunals (ICTY and ICTR) set up to deal with prosecution of individuals for violations of international criminal law in Yugoslavia and Rwanda.

The seeds for an international criminal court were sown in the year 1864 by Gustave Moynier, one the founders of the International Commission for Red Cross (ICRC). In 1947, Henri Donnedieu de Vabres, the French judge on the International Military Tribunal at Nuremberg, made a proposal for a permanent court. The job of establishing an international criminal court had begun in 1947. The United Nations General Assembly (UNGA) entrusted the International Law Commission (ILC) with the task of drafting the statute of an international criminal court derived from Article VI of the Genocide Convention, along with the “Nuremberg principles” and the “Code of Crimes against the Peace and Security of Mankind”. In addition, the UNGA also constituted in 1952, a committee comprising representatives of 17 states, for drafting the Statute of the ICC. In 1954, the ILC submitted its proposal for the ICC. However, all further work on the ICC was suspended in the wake of Cold War imperatives.

In 1989, Trinidad and Tobago initiated the process of establishing an international court to try individuals charged in connection with criminal offences, illicit trafficking in narcotic drugs across national frontiers and other transnational activities. In 1993, the UNGA again requested the ILC to prepare a draft statute for an ICC. 1994, saw the UN General Assembly constituting an ad-hoc committee to review the draft. The ad-hoc committee was followed by a preparatory committee, which met thrice from 1996 to 1998 to clear issues pertaining to the text of the statute. The ad-hoc committee was headed by Adriaan Bos, legal adviser to the Ministry of Foreign Affairs of the Netherlands, who was replaced just prior to the Rome conference by Philippe Kirsch, the legal adviser of the Ministry of Foreign Affairs of Canada. The final product of the preparatory committee, which emerged in July 1998, had about 1400 brackets or points of disagreements on various issues contained in the text.

Role of the state in ICC

The ICC is a permanent body, which has come into existence through a treaty among the member states of the UN. It is binding only on the signatories of the treaty. The ICC has no jurisdiction over states or legal entities. Its purpose is to try individuals who are accused of committing crimes of international concern. Such crimes include genocide, crime against humanity and war crimes and aggression.

The Rome Statute contains 13 parts, including 128 Articles. According to Mahnoush Arsanjani, the three principles around which the Rome Statute was built are:

1. Complementarity - upholding the primacy of national courts over ICC.
2. Confining itself to dealing with more serious crimes against international community as a whole.
3. Remaining within the realm of customary international law. That is, any provision in the Statute, which conflicts with or is inconsistent with general international law, shall be subordinate to it except in case of Article 53 of the Vienna Convention on the Laws of Treaties, 1969.

The most debated and controversial part of the Statute is Part 2, which deals with the Jurisdiction, Admissibility and Applicable Law. Articles 12-19 deal with the issues of jurisdiction of the court, the trigger mechanism and admissibility.

Member states of the UN have acted as the primary agent for creating an international body like the ICC. Through the principle of complementarity, the ICC primarily displays its trust and respect for the national judicial system. The court intends to deal only with the most serious crimes of concern to international community as a whole and leaving the conventional crimes like terrorism and illicit drug trafficking to individual states' jurisdiction. It is argued that terrorism has not been included in the Statute because of the absence of an internationally acceptable definition of terrorism. Moreover, the perception of many countries with regard to terrorism is that it is an individually driven project which is carried out by private individuals in an isolated and not widespread or systematic manner. Therefore, to proceed ahead with the formation of the ICC, controversial topics like terrorism, supported by India, were conveniently dropped.

The Court intends to deal only with those cases where the national procedures are unavailable or ineffective. One of the significant developments that could make states even more vigilant against serious violations of international crimes is the inclusion in the ICC Statute, of crimes perpetrated in civil wars, internal conflicts and non-international armed conflicts. The Statute also omits any nexus between crimes against humanity and armed conflict, thereby meaning that the crimes against humanity can be committed in times of peace as well.

Why ICC?

The process of holding individuals accountable for human rights abuse had been on the agenda of international society since the end of the First World War. Since the First World War, five international investigative commissions and four ad-hoc international tribunals have been established to try individuals for crimes against humanity. However, the common complaint against all these trials has been that they have been carried out at the behest of the victor.

It goes to the credit of the ICC that it has been brought out with the consent of a majority of nations to bring about a change in the international order and not any practice of the victor influencing the course of justice after the conflict. The Rome Statute was adopted by 121 votes in favor, seven against and 21 abstentions. The seven countries that cast a negative vote were the USA, China, Israel, Libya, Iraq, Qatar and Yemen. India abstained from voting. The representatives of 14 international organizations and 236 non-governmental organizations (NGOs) representing some 800 members of the International NGO Coalition for the ICC also attended the Rome conference.

One of the main reasons for the Court to come into existence after the end of the Cold War is that many crimes committed against humanity have been ignored by states either due to "military necessity" or under the national sovereignty and territorial integrity clause. The ICC does involve a sacrifice of sovereignty, because it envisages asserting itself when a state refuses or fails to use its national criminal justice apparatus to deal with the perpetrator of crime against humanity.

Another reason for the formation of a permanent court is that the ad-hoc tribunals are time consuming, relatively expensive and loaded with extensive logistic problems. The insights provided by Spain's request for the extradition of Augusto Pinochet from the United Kingdom for crimes committed against the Spanish people in Chile, also proved valuable in the ICC. The Pinochet event set alarm bells ringing in the international community, because such extradition could set a precedent. This, according to Antonio Perez, could "become a vehicle for bootstrapping the exercise of universal jurisdiction into a much more powerful tool of unilateral law enforcement, where each nation on its own or perhaps with a slight assist from the rendering state, could become an international policeman".

Individual and sovereignty

The judges of the International Military Tribunal at Nuremberg had reached a conclusion that "crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced". This was the first successful attempt to hold the individual responsible for acts detrimental to international society.

Towards constitutional sovereignty

The charisma of state's authority is under strain. The staggering rise in intra-state conflicts post "Cold War" and the growing tentacles of transnational terrorism have raised questions about state legitimacy. States are no longer considered to be the most effective means of enforcing international norms and order among individuals.

The detailed scrutiny of the human right records of certain countries by the international community is leading towards a new international order, where the absolutes of state sovereignty are being challenged. In the new international setting stability and order take precedence over equality among states. The sovereign immunity enjoyed by states is being restricted and limited by the emergence of international constitutional structures, which exist beyond the boundaries of states.

The ongoing trends in the discourse on sovereignty suggest that a perceptible shift is occurring away from the theories of national sovereignty, which had dominated the post-second world war world, towards constitutional notions of sovereignty that intend to limit sovereignty. At the end of the second world war, Charles E. Merriam had argued, "sovereignty must make friends with constitutional values, scientific values, idealistic values, which are the heart of our new civilization". The right to hold individuals responsible and accountable, and the thrust towards international humanitarianism are a part of the same cosmopolitan ideology. The advanced technology available with the international community enables it to look into the happenings within state territories. The spatial reach of the international community is leading towards the construction of an international moral solidarity against infringement of individual rights.

Applying the George Sorensen logic to the recently constituted ICC, one can safely argue that it does lead to a divided or truncated sovereignty for states. While the ICC acknowledges the constitutional validity of the states, it also undermines it by asking states to share their absolute authority, which they enjoy over their subjects, thus circumscribing their supremacy or "constitutional independence". It is claimed that the Court is not a supranational body but a membership of international society. It only identifies certain core constitutional values, which are shared by all national societies. Therefore, there is no master-slave relationship between sovereign states and international institutions. However, one sees that states will always be subordinate to the ICC because, the latter possesses the treaty powers to force states to comply with its requirements. Transactions between states and ICC are one-sided. It is only states that are required to give something (person or documents). ICC is not obliged to give anything in return to states. The ICC promises not to states but to its subjects, the protection of their rights.

Conclusion

Indian jurist Radha Binod Pal, in his landmark dissenting opinion at the Tokyo trials had come up with a verdict "not guilty" in favor of the Japanese. Justice Pal had offered the dissenting note in the year 1948 and had argued that, "so long as the international organization continues at the stage where trials and punishment for crime remain available only against the vanquished in a lost war, the introduction of

criminal responsibility cannot produce the deterrent and preventive effect". Justice Pal's argument could still be used in 2002, because the hierarchies among nations have not vanished. In fact, the divide between rich and poor nations in terms of wealth and therefore the power they exert, is continuously widening. One could support the argument that sovereignty which is dissipating from weak nations, without getting destroyed, is finally getting accumulated with big powers. The power and authority enjoyed by the small nations during the Cold War is diminishing in the age of globalization. The rules of admission to an international club of nation states are changing. New rules, once again dictated by the western world are being floated. In the medieval age, allegiance to Christianity was a prerequisite for entry into the club. The colonial era saw the demarcation of the world into civilized and noncivilized colonies. Now, once again, new demarcations based on premodernity, modernity and post-modernity are beginning to appear. The world is gradually moving towards "dual sovereignty" or truncated sovereignty, which, far from being absolute, only gives limited jurisdictional powers to the territorial state in certain specific spheres that are inconsequential to international society.

In an interconnected and interdependent post-Cold War world, the choices are becoming limited, as states have become transmitters of global norms into the national mainstream. Under such circumstances, it may be better for small and weak nations to pool their sovereignties in (Strategic Analysis, Vol. 27, No. 1, Jan-Mar 2003. Institute for Defense Studies and Analyses) international organizations rather than letting their sovereign energies flow towards a few or rather one powerful player in international politics, since the chances of receiving peace and justice within a larger international organization are much greater than relying on the sole superpower to deliver justice only through war.

Therefore, in deciding the future course of action on strengthening international organizations, rationality rather than realism should guide the policies of weak and small nations. If the state is a notional person, then sovereignty is its spine. According to neo-realists, the strength of spine (economic, military) determines the domestic and international standing of the country. However, a constructivist would argue that since no person (state) can keep its spine ramrod straight for long times, therefore, it is the flexibility of the spine, which enables the state to perform and maintain a healthy balance between its domestic and international obligations. But the moot point is how much a state should bend to ensure that its back doesn't break. Joining international regimes like the ICC may not damage sovereignty to an extent to which it would get affected, if one were forced to enter the global structures created by a global hegemon.

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