



## **International criminal court and liability of china during COVID-19**

**Sangeeta Taak**

Rajiv Gandhi National University of Law, Punjab, India

### **Abstract**

The International Criminal Court (ICC) is a permanent International Court which is based on treaty of the Rome Statute. It is not an organ of the United Nations. ICC deals with the most heinous crimes which are not dealt in the domestic courts or national courts. As International criminal court has been criticized on the concept of state sovereignty, or it can be said that the ICC is a threat to the Sovereignty. Sovereignty is a concept in which the state has a control in its territory and no one can interfere. If we extend the concept of Individual criminal Liability, the during this COVID-19 Pandemic which has affected the whole world then can anyone be prosecuted before the ICC? It is a big question and a challenge before the ICC. This paper is an attempt to find if there is any omission made by China and Can China be held responsible for reparation under ICC for any loss during COVID-19 under various parameters of ICC.

**Keywords:** sovereignty of the state, repression, 'act' or 'omission' COVID 19

### **1. Introduction**

The International Criminal Court (ICC) is a permanent International Court which is based on treaty of the Rome Statute. It is not an organ of the United Nations. ICC deals with the most heinous crimes which are not dealt in the domestic courts or national courts. It deals with the Genocide, War Crime, Crime Against Humanity and Aggression. It is situated in the Hague, Netherlands. It has complementary jurisdiction. It means that the ICC shall not take up any case unless the domestic courts are unwilling and shows their inability to deal with it. It has a special feature that ICC does not give any immunity to any state official. If someone commits heinous crime which comes under Article 5 of the Rome Statute, the state immunity cannot protect the officer.

### **2. State Sovereignty and International Criminal Court**

International criminal court has been criticized on the concept of state sovereignty, or it can be said that the ICC is a threat to the Sovereignty. Sovereignty is a concept in which the state has a control in its territory and no one can interfere. The State can take appropriate measures to protect its citizens. State can also use weapons for the defense of its citizen. However, it is pertinent to mention that sovereignty has no scope in International Criminal Court when an individual commits heinous crime i.e., Genocide, Crime Against Humanity and War Crime. It is an International Crime and if any individual commits this crime, s/he should be responsible for the conduct and that to individually. The main and best feature of ICC is that it has given no immunity to anyone. It means that no one is above the law and no one can take immunity just because of his/her official capacity. If a crime is committed the individual is a criminal and s/he cannot escape from the liability.

### **3. Individual Criminal Liability**

ICC deals with the Individual Criminal Liability. Individual criminal liability is also a unique feature of the ICC. It can further be elaborated with an example like, if Mr. A, citizen

of State A commits genocide in State B. Then Mr. A should be held responsible for the behaviors and the whole state should not be made criticized for the act of one person, responsible. If Hitler has an approach to kill the Jews, then Germany should not be criticized for the commission of the crime of the Genocide.

International crimes cannot be restricted in the boundaries of the National Laws or Jurisdiction or sovereignty. International criminal is a criminal of the whole world and must be prosecuted at International Criminal Court.

### **4. Jurisdiction of the International Criminal Court**

However, ICC is bound by its Jurisdiction which is mentioned in the Article 12 of the Rome statute. Since ICC is a treaty bound law it is not ratified universally. ICC cannot succeed in its objective till the date all the nations sign and ratify the Rome Statute. Rome Statute must get universal jurisdiction. Otherwise the issue shall remain unsettled.

### **5. Admissibility and International Criminal Court**

It has further limitation of admissibility under Article 17 of the Rome Statute. Which is again a question mark on the prudence of ICC? ICC has a lot of challenges but I think the most important is the admissibility as after proving the jurisdiction of the ICC again the question remains the same and that is whether ICC will consider the case of Genocide Admissible or not? This admissibility can be trapped in the political issue also. The Genocide case of Rwanda was grave and we can take the admissibility of genocide has to reach to the scale of the Rwanda genocide so that the case may be considered admissible in the ICC.

### **6. Role of United Nations Security Council and ICC**

Further the United Nations Security Council under Chapter VII can exercise the right to refer the case even if the members of the UNSC are members or not. It means that UNSC has rights in ICC and no liability and the hypothesis of my paper is can ICC make any UNSC member liable in

the ICC if it has committed some most heinous crime? I believe it will be too utopian to think that law is supreme in this case. In my paper I shall make analyses of ICC's admissibility. The biggest challenge of ICC is to deal with the UNSC members with their wide powers. The question is how ICC can deal the sovereignty issue when it comes to in conflict with the members of the UNSC and when it is some other state non UNSC member.

### 7. Individual Criminal Liability and COVID-19

If we extend the concept of Individual criminal Liability, the during this COVID-19 Pandemic which has affected the whole world then can anyone be prosecuted before the ICC? It is a big question and a challenge before the ICC. For the past so many years the ICC is criticized for prosecuting only African cases...now is the time to prove that ICC can take action when it is required or when something affects the whole world a permanent criminal court can take the initiative.

If we start analyzing the case of China as a state responsible then we have to see whether it has violated any international treaty for which it can be prosecuted?

1. If we make an analysis of International Covenants of on Economic, Social and Cultural Rights, it has violated the Universal Declaration of the Human Rights. It has also disclosed the information of the pandemic without any justification
2. and has violated the regulations of the World Health Organization regulations
3. The Rome Statute <sup>[1]</sup> is the document that reflects the individual criminal liability and many states ratified it believing that law is over and above any individual or state. China has intentionally caused the great suffering. Which comes under the "*Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health*" <sup>[2]</sup>.
4. China has also violated the *its international obligations under the 2005 International Health Regulations (IHR), a treaty established under the auspices of the WHO by hiding the information of COVID-19 for a longer time due to which the unnecessary suffering has caused to the individuals.*

After alleging all these points, the next issue is whether the reparations under the ICC is possible? If not, then what is the recourse, it can be the payment of the compensation "*for loss sustained which would not be covered by restitution in kind or payment in place of it*" <sup>[3]</sup>.

In Le grans case, 2001, the assessment of damages must be accompanied with an apology and assurance that such conduct shall not be repeated in the future. The link has to be established for the breach of an international obligation and the damages sustained by the suffering states <sup>[4]</sup>.

Is it practical to make China liable? Or is it possible to use good offices, mediation, conciliation and settling the dispute <sup>[5]</sup>. Can China be compelled to agree for compulsory arbitration <sup>[6]</sup>? It looks utopian in case of China. But had it been an African Country or if this Pandemic would have broken in some under developed country then the things and laws and situation should have been different. Then ICC might have taken initiative with the different approach.

Sovereign immunity also works differently for different states. To substantiate my point, I would like to mention the

incident of an attack of U.S in Hiroshima and Nagasaki and no one discuss to make the U.S liable.

Many questions go unanswered when it comes to the security council members or the so called super power countries. No one has a right to call its state Superpower/ Because no one can become super power by destructing one state to bring peace in other state. However, as per the Buddhist concept the if you save someone then you are more powerful than the others. So, in COVID-19 situation no state has been able to make vaccine to save the lives. How can one get a right to call itself a super power? Super power builds scientists, researchers and not nuclear bombs. No one is ever going use the nuclear bomb still we have it. But we need vaccine to save our citizens we don't have it. Isn't it a question to be addressed? No one is superpower we all are sailing in the same boat. Need to understand...the practical approach.

Sovereign Immunity has no place in the ICC in the case of heinous crime <sup>[7]</sup>. So the concept of sovereign immunity should not be considered inexistence in the case of International crime. Moreover, individual criminal liability must be considered in the present situation of COVID-19. Let us consider another issue of Jurisdiction of ICC.

### 7.1 China and International Criminal Court

Whether ICC can try China as per its Jurisdiction? The International Criminal Court has a Rationae Temporis Jurisdiction. It means that Article 11 of the Rome statute shall be application for any Crime committed by the state party if ICC has jurisdiction. As per Article 11 the Jurisdiction shall be considered only with respect to crimes committed after the entry into force of this statute <sup>[8]</sup>.

It has further explanations that if the Court the declaration is made under Article 12(3) of the ICC statute <sup>[9]</sup> the court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph <sup>[10]</sup>.

Another measure can be taken by the United Nations General Assembly Resolution 377A, the "Uniting for Peace" resolution which states that in case the UN Security Council is not able to act due to unanimity or any other reason then General Assembly may issue necessary recommendation in order to maintain to maintain international peace and security <sup>[11]</sup>.

China's jurisdiction can also be invoked by those states which are party to the Rome statute under the territorial jurisdiction <sup>[12]</sup>. Under Territorial Jurisdiction <sup>[13]</sup> of the ICC Individual can be prosecuted if the crime is committed within the territorial jurisdiction of the ICC state or he has committed the crime. It means the state parties to Rome statute have right to approach ICC against the China under the territorial jurisdiction <sup>[14]</sup>.

The main hurdle shall be veto power which can be used in case Security Council invokes the jurisdiction under Charter VII.

If International Crimes of Uighurs in Xinjiang by Chinese can be considered as an international crime within the Court's jurisdiction for crime against humanity to Cambodia and Tajikistan, which are parties to the statute.

Then in COVID- 19 Pandemic has more strong case to be taken by the ICC <sup>[15]</sup>. Taking a situation for preliminary investigation does not mean that china is liable. The procedure has to be followed. The precedent of Uighurs can

be taken for initiating the preliminary Investigations before the ICC.

## 7.2 Admissibility of the Situation of China under the Rome Statute

Even if the jurisdiction is proved the next question is of Admissibility as The Court will only initiate proceedings if a crime is of "sufficient gravity to justify further action by the Court <sup>[16]</sup>" Admissibility says that the situation must reach to a gravity that ICC should take it for its consideration. The admissibility has a separate criterion as the jurisdiction is. Admissibility can take various factors to consider the gravity like covid-19 did not affect only one state. It has affected every state. It can be considered as Aggression <sup>[17]</sup> under the Rome Statute.

The responsibility and accountability must be fixed <sup>[18]</sup>. Otherwise the law will be having no use it can be made applicable to only few states.

## 7.3 International Obligations of a state

The China has also breached the responsibility of a state for its internationally wrongful acts. Every internationally wrongful act of a state entails available at the international responsibility of that state. There is an internationally wrongful act of a State when conduct consisting of an action or omission <sup>[19]</sup>:

- a. Is attributable to the State under international law; and
- b. Constitutes a breach of an international obligation of the State <sup>[20]</sup>.

## 8. Conclusion

The coronavirus disease 2019 (COVID-19) pandemic has affected every state differently and how long the affect will be no one knows. Measures must be taken in order to protect the Human Right to Health <sup>[21]</sup> of an individual mostly women, children, old and health workers etc. The number of deaths is more than any world war could have done. It has violated International Treaties and moreover ICC can take initiative. Steps must be taken achieve progressively the full realization of all economic and social rights (Art. 2(1) ICESCR), including the rights to work, social security, adequate standard of living and education (Arts. 6, 9, 11 and 13 ICESCR) threatened by the very economic consequences of the pandemic <sup>[22]</sup>. If China is not a party to the Rome Statute, China cannot be prosecuted by the ICC.

However, the China itself has the obligation to introspect the 'act' which it has committed and the act which it 'omitted' to do. But the only issue is it can be done by the Chinese judiciary. Next problem is whether Chinese judiciary is competent and free to do so in China.

## References

1. Rome Statute establishing the International Criminal Court, 1998.
2. Article 7(1) (k) of the Rome Statute
3. *Chorzow Factory*, 1927.
4. In Bosnian Genocide Case, ICJ stated that the case must be represented in whole.
5. IHR Article 56 also preserves "the rights of States Parties under any international agreement to which they may be parties to resort to the dispute settlement mechanisms of other intergovernmental organizations or established under any international agreement"
6. COVID-19 and the WHO's International Health Regulations, 2005. available at, <https://www.lexology.com/library/detail.aspx?g=c2edb745-5f18-4cc7-8d13-00acf8ebdf10>
7. Article 5 of the Rome Statute
8. <https://www.icrc.org/en/doc/assets/files/publications/icrc-0739-part-ii-vol-i.pdf>
9. <https://www.icc-cpi.int/iccdocs/pids/tmp/representing%20victims%20before%20icc.pdf>
10. Article 11 of the Rome Statute. Jurisdiction *ratione temporis*
11. Akshat Bajpai, here's how China can be held legally accountable for coronavirus coverup, April 14, 2020. available at <https://www.wionews.com/opinions-blogs/heres-how-china-can-be-held-legally-accountable-for-coronavirus-coverup-292425>
12. The territorial jurisdiction of ICC can be invoked If a crime is committed in a state that is within the territorial jurisdiction of the Court.
13. Sangeeta Taak, Role of the security council in triggering the jurisdiction of the international criminal court, FRCIJ, 2017, 4(4). available at: <https://medcraveonline.com/FRCIJ/role-of-the-security-council-in-triggering-the-jurisdiction-of-the-international-criminal-court.html>
14. The court may prosecute an individual under the territorial jurisdiction or personal jurisdiction under the Rome Statute. (Article 12)
15. Douglas Guilfoyle, Is the International Criminal Court destined to pick fights with non-state parties? July 14, 2020. available at [https://www.ejiltalk.org/is-the-international-criminal-court-destined-to-pick-fights-with-non-state-parties/?utm\\_source=mailpoet&utm\\_medium=email&utm\\_campaign=ejil-talk-newsletter-post-title\\_2](https://www.ejiltalk.org/is-the-international-criminal-court-destined-to-pick-fights-with-non-state-parties/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2)
16. Article 17 of the Rome Statute
17. Article 8 bis of the Rome Statute
18. International Law can put into action in case of need so the need of the hour is to put that much liability as it is admissible in the case. It may be only for omission not for the outbreak of coronavirus.
19. Article 2 of the Elements of an internationally wrongful act of a State, Available at: <https://casebook.icrc.org/case-study/international-law-commission-articles-state-responsibility>
20. International Law Commission Report, A/56/10 August, 2001.
21. Art. 12 of the International Covenant on Economic, Social and Cultural Rights and Art. 11 of the European Social Charter (Revised, 1996).