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THE INTERNATIONAL CRIMINAL COURT;
Development of International Law Related To Sovereignty of State and the Concept of Universal Jurisdiction

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Abstract: Prior to World War II and during the Cold War, states were reluctant to violate the sovereignty norm to hold leaders accountable in international tribunals. The establishment of the ICC is considered breaking up the traditional notion of state sovereignty, which the state is subject of international law in nature. Under the international obligations, individual as subject of international can be found not only in the Rome Statute 1998 but also in some of international document such as Nuremberg Charter, Tokyo Charter the Genocide Convention, the Geneva Conventions and their additional protocols, and the Universal Declaration of Human Rights, The Covenants on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, Statute of ICTY, and Statute of ICTR. Based on these international obligations, every state has a duty to protect people’s rights. Therefore, the prohibition of war crimes, crimes against humanity, genocide and the crime of aggression has become part of jus cogens and every State has an obligatio erga omnes to punish them.

Kata Kunci: Sovereignty, Jurisdiction, State, Individual.

A. Introduction

Since the Second World War around 250 conflicts of different kinds have taken place and during these conflicts some 170 million people have been killed. Such victimisation has included genocide, crimes against humanity, and war crimes, all of which constitute serious violations of international law and human rights law.

In 1998, the International Criminal Court (ICC) was established and opened for signature. It entered into force on 1 July 2002, when the required sixty states had ratified.

Prior to the ICC, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have for the first time ever applied the international humanitarian conventions. These tribunals created after World War II that expressly makes political and military leaders responsible for the actions of individuals under their command.

Thus, prior to World War II and during the Cold War, states were reluctant to violate the sovereignty norm to hold leaders accountable in international tribunals.

Today, especially with the creation of the three tribunals, the ICTY, the ICTR and the ICC, many states of the world have decided that liability for war crimes, crimes against humanity and genocide is a more privileged norm than sovereignty in some circumstances.\(^2\)

The ICC is empowered to exercise its jurisdiction over a crime even if that case is being tried by national authorities, and thus to override national jurisdiction, in the event, inter alia, a State is unable or unwilling genuinely to carry out the investigation or prosecution.\(^3\)

Many people believe that with the creation of the ICTY, the ICTR and the ICC, the international community has taken the most significant steps to reach inside the state to protect individuals from, and prosecute individuals for, violations of international humanitarian law.

However, there is some scepticism. The scepticism is based on the fact that some big countries such as the United States, the Russian Federation, Israel, Syria and Egypt have not agreed to ratify it. Michael Struett states since the Bush administration withdrew the U.S. signature from the ICC Statute, many commentators have wondered whether international humanitarian law can really be impartially enforced.\(^4\) He argues that the ICC is powerless to consider violations of the laws of war by American or Iraqi forces in Iraq, where the Court’s jurisdiction is limited to those states that have agreed to ratify it.

Based on the description above, the purpose of this essay is to study the development of international law related to sovereignty of state and the concept of universal jurisdiction.

Initially, this essay will examine state sovereignty principle in international law. Secondly, this essay discusses the concept of universal jurisdiction. After that, the next section will analyse the Rome Statute 1998 or the ICC.

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related to development of state sovereignty and the concept of universal jurisdiction in international law. The last section is conclusion of whole essay.

B. State Sovereignty

The concept of state sovereignty has been established over 500 years ago in Europe and has undergone constant change. The fundamental of international law with regard to sovereignty were shaped by agreements concluded by European states as part of the Treaty of Westphalia in 1648. Generally speaking, international law is generated by states, and is primarily a set of rules about how states are to interact with one another.

The core elements of state sovereignty were codified in the Montevideo Convention on the Rights and Duties of States 1933, which include three main requirements: a permanent population, a defined territory, and a functioning government. Theoretically, state sovereignty is powers by a state over its territory and the people living in that territory. State sovereignty is related to jurisdiction. Jurisdiction may describe the authority to make law applicable to certain persons, territories, or situations (prescriptive jurisdiction); the authority to subject certain persons, territories, or situations to judicial processes (adjudicatory jurisdiction); or the authority to compel compliance and to redress non-compliance (enforcement jurisdiction).

The Post 1945, under the United Nations (UN) Charter, it is made clear that sovereignty is one of the fundamental values protected by the UN and the current system of international law. Article 2 (1) of the UN Charter states: ...The Organization is based on the principle of the sovereign equality of all its Members.

The UN Charter 1945 has several specific provisions that protect national sovereignty and protect nations from the use of force by other states that would interfere with their sovereignty. Article 2 of the UN Charter states that:

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

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6 Malcolm N. Shaw, above n 2, 25.

7 The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Moreover, within the Charter of the UN, there is an explicit prohibition on the world organization from interfering in the domestic affairs of member states. The Article 2 (7) provides that:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state ...

Additionally, the Second World War gave rise to two significant documents: the UN Charter established as one of its aims, promoting and encouraging respect for human rights and fundamental freedoms for all without distinction, and the Nuremberg Charter unequivocally raised the issue of individual accountability for war crimes and crimes against humanity. This development followed by the Genocide Convention 1948, the Geneva Conventions and their additional protocols, and the Universal Declaration of Human Rights 1948, The Covenants on Civil and Political Rights 1966 and the Covenant on Economic, Social and Cultural Rights 1966.

By these international obligations, a State cannot assume absolute sovereignty without demonstrating a duty to protect people’s rights. The sovereignty of states is no longer based on the right of governments or head of states, it depends on their duty when governing to respect human beings and also the sovereignty of states means the sovereignty of people, not of leaders.

The notion that individuals can be held responsible for violations of international law challenges predominant conceptions of state sovereignty in international law. By creating an individual standard of accountability for violations of the international obligations, potentially places meaningful restrictions on the way states can employ organized violence.

On this basis it may be inferred that state sovereignty may be limited by customary and treaty obligations in international relations and law. States sovereignty is a states’ right to exercise power on a defined territory in an acceptable method which accepted by international obligation. Thus, States are legally responsible for the performance of their international obligations, and state sovereignty therefore cannot be an excuse for their non-performance.
C. The Concept of Universal Jurisdiction

Under Article 5 (1) The Rome Statute 1998 states that the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole which are, the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Moreover, Article 13 of the ICC Statute states that the ICC may obtain jurisdiction over a case in one of three ways,

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) 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; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

In this concept, international obligations apply to individual; it does not matter whether they are head of state or head of government or in other word, political and military leaders responsible for the actions of individuals under their command.

The concept of universal jurisdiction in the ICC Statute is not something new. After World War II there were two tribunals at Nuremberg and Tokyo which examined war crimes. The Nuremberg and Tokyo Charters provided for individual criminal responsibility for preventing and punishing violations of the laws and customs of war, and removed the act of state immunity that had protected leaders from liability for actions taken by the state.\(^\text{8}\) The principles articulated in the Nuremberg Charter and Judgment, including the principle that heads of state may be held criminally responsible for crimes against humanity, have long been recognised as part of general international law.\(^\text{9}\) The evidence that this principle is part of customary international law includes resolutions of the UN General Assembly, international treaties and instruments, decisions of national courts, extradition requests sent and honoured by executive


officials, state proposals for international criminal courts, reports and codifica-
tions of international law by the International Law Commission, writings of
international law scholars and statements by intergovernmental organisations.

These developments ushered in major change, not only were individual
human beings the subject of international law, but also in respect to some crimes,
universal jurisdiction was recognized. If some crimes were truly crimes against
humanity, it followed that they were committed not only against the victims or
the country in which they were committed but against all of humankind. Interna-
tional crimes are generally characterised by their mass scale and by their im-
 pact on whole societies, and hence the purposes for seeking accountability
for these crimes are somewhat different from the purposes for bringing ordi-
nary criminals to account.

According to Bassiouni, the factors of international crimes that link to
the policy of international criminalisation are:

"... the prohibited conduct affects a significant international interest,
including threats to peace and security; the prohibited conduct consti-
tutes an egregious conduct deemed offensive to the commonly
shared values of the world community, including conduct shocking
to the conscience of humanity; the prohibited conduct involves more
than one state, transnationals implications, in its planning, prepara-
tion or commission either through the diversity of nationality of
its perpetrators or victims, or because the means employed transcend
national boundaries; the conduct bears upon an internationally pro-
tected interest which does not rise to the level required by (a) or (b)
but which cannot be prevented or controlled without its interna-
tional criminalisation" ¹⁰

Additionally, the 1977 Additional Protocol I to the 1949 Geneva Con-
ventions on the Protection of Victims of International Armed Conflict did
set forth regulations regarding the duty of commanders, in addition to being
responsible for their own orders that violated international humanitarian laws,
Article 86 of Additional Protocol I holds commanders liable for failing to act to
prevent violations if they:

¹⁰ Peter Finell, 'Accountability Under Human Rights Law and International Crimi-
nal Law for Atrocities Against Minority Groups Committed by Non-State Actors' (2002)
Abo Akademi Institute for Human Rights, 34.
Knew or had information which should have enabled them to conclude in the circumstances at the time, that a subordinate was committing or was going to commit such a breach of the Conventions or of this Protocol and if they did not take all feasible measures within their powers to prevent or repress the breach.

Under the Statute of the ICTY\textsuperscript{11} and the Statute of ICTR,\textsuperscript{12} both provide that all those in positions of authority are liable for the criminal actions of their subordinates. Article 7(3) of the ICTY Statute and 6(3) of the ICTR Statute contain similar provision, which state:

3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

These articles provide that superiors are liable for their subordinates’ criminal behaviour when the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.

Genocide, crimes against humanity and serious human rights violations are broadly acceptable as international crimes where universal jurisdiction apply. The description below will briefly describe three of the crimes within the jurisdiction of the ICC.

1. Genocide.

Under the Rome Statute in Article 6, as well as the Convention on the Prevention and Punishment of the Crime of Genocide\textsuperscript{13} was adopted in
1948, in Article II of the Convention, define the crime of genocide as “... acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group”.

2. Crimes Against Humanity
Statute Rome 1998 in Article 7 defines crimes against humanity as “...acts when committed as part of a widespread or systematic attack directed against any civilian population, ... murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender; enforced disappearance of persons; the crime of apartheid; inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”

3. War Crimes
War crimes are prohibited in Articles 49/50/129/146 of the Four 1949 Geneva Conventions and Articles 85-87 of the 1977 First Additional Protocol to the Geneva Conventions, and some of the crimes as components in crime against humanity are prohibited in Article 4 of the 1973 Apartheid Convention and Article 6 of the 1984 UN Torture Convention. The Rome Statute in Article 8 defines war crimes as “... wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering, or serious injury to body or health; extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement; taking of hostages”
The Crimes of genocide, crime against humanity and war crimes have traumatised the consciousness of mankind and affected the interests of the international community as a whole. As Griffin points out that the concept of universal jurisdiction is permissive by definition, allowing any State to apply its laws to certain offences even in the absence of territorial, nationality or other accepted contacts with the offender or the victim.\textsuperscript{14} Therefore, the prohibition of these crimes has become part of \textit{jus cogens} and every State has an \textit{obligatio erga omnes} to punish them.

**D. International Criminal Court**

The ICC is a permanent international criminal court, established by treaty for the purpose of investigating and prosecuting individuals who commit the most serious crimes of international concern as stated above.

The theoretical foundation of the \textit{Rome Statute} was the principle of \textit{jus cogens}, the idea that peremptory moral norms bind all human beings regardless of national identity. The importance of convention form for this kind of \textit{jus cogens} because as Shawn states, convention are usually formulated to replace or codify existing custom.\textsuperscript{15}

The ICC affirms in its Preamble that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by international cooperation. Thus the ICC recalls that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, and emphasises that the ICC shall be complementary to national criminal jurisdictions.

Article 1 of the \textit{Rome Statute} establishes the ICC as a court that shall have the power to exercise jurisdiction over persons for the most serious crimes of international concern. The individual has become the principle of individual criminal responsibility as stated in Article 25, which the \textit{Rome Statute} lists among the general principles of international criminal law applying to the activity of the Court.

Moreover, Article 25 (3) establishes a wide range of liability for criminal responsibility, including not only the commission of the crime, whether as an individual, jointly with another or through another person, but also if that individual orders, solicits or induces the commission of such a crime or aids, abets

\textsuperscript{14} Mary Griffin, 'Universal Jurisdiction' (NDP) \textit{International Review of the Red Cross} http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList106/9F9B884D66413C89C1256B6605F9C12> (1 May 2006).
\textsuperscript{15} Malcolm N. Shawn, above n 6, 116.
or otherwise assists in its commission or intentionally contributes to the commission of such a crime.

The Article 25 is reinforced by Articles 27 and 28, that of irrelevance of official capacity and that of responsibility of commanders and other superiors. Furthermore Article 28 concerning the responsibility of both military commanders and civilian superiors for acts that have been committed by forces or subordinates under his or her direct command, authority and control.

In accordance with Articles 5, 11 and 12 of the ICC, the States Parties have granted the ICC jurisdiction over the crimes provided for in the ICC when they are committed in the territory of a State Party or by a national of a State Party, or when the Security Council refers to the ICC a situation of crisis in which such crimes appear to have been committed. But this does not necessarily mean that, after the alleged commission of such crimes, the ICC may directly exercise its jurisdiction over them. On the contrary, the States Parties have granted to the ICC a jurisdiction which is deactivated and that is only activated with regard to a particular situation of crisis defined by personal, territorial and temporal parameters when the particular circumstances occur.

Broadly speaking, the ICC is therefore not a supranational body but an international body. It is only binding on its States Parties and no substitute for national criminal jurisdiction, rather the exercise of its jurisdiction is complementary to that of the national legal systems of its States Parties.

Thus, under Article 17 of the ICC, the power of the ICC cannot exercise its jurisdiction over the crimes unless the State concerned is unable or unwilling to investigate or prosecute the crimes. Furthermore, Yang concludes that as the ICC was established through an international treaty and most of the countries in the world involved in its drafting, the Court, on the one hand, has jurisdiction over the core crimes of international concern and, on the other, its power is limited by complementarity, i.e. the national jurisdiction comes first and ICC’s jurisdiction second. In addition, Yang states the basic idea for the complementarity is to maintain State sovereignty, under which it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes to enhance the national jurisdiction over the core crimes prohibited in the Statute, and to perfect a national legal system so as to meet the needs of investigating and prosecuting persons who committed the international crimes listed in the Statute.16

17 Ibid.
Therefore, based on complementarity principle under Statute, its depend on the ICC Prosecutor to assess whether or not a domestic trial may be considered a “sham” trial, and therefore eligible for the exercise of the ICC’s jurisdiction.

E. Conclusion

In conclusion, the International Criminal Court (ICC) 1998 has jurisdiction over war crimes, crimes against humanity, genocide and the crime of aggression. The establishment of the ICC is considered breaking up the traditional notion of state sovereignty, which the state is subject of international law in nature. However, under the international obligations, individual as subject of international law can be found not only in the Rome Statute 1998 but also in some of international document such as Nuremberg Charter, Tokyo Charter the Genocide Convention, the Geneva Conventions and their additional protocols, and the Universal Declaration of Human Rights, The Covenants on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, Statute of ICTY, and Statute of ICTR. Based on these international obligations, every state has a duty to protect people’s rights.

Additionally the ICC is a permanent international criminal court and established by treaty for the purpose of investigating and prosecuting individuals who commit the most serious crimes of international law. However, the power of the ICC to exercise its jurisdiction depends on the concern of the state whether such a state concerned is unable or unwilling to investigate or prosecute the crimes. Also the Rome Statute is complementary to national criminal jurisdictions. Thus it could be concluded that the aim of the ICC is not only punitive but also preventive and deterrent.

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