

Pakistan's Reservations on The Rome Statute: A Critical Analysis from Legal and Political Perspectives

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Pakistan has ratified seven out of nine significant international conventions on human rights. The country strongly supported the foundation of the International Criminal Court and voted in favour of the Rome Statute. However, the country has not ratified the Rome Statute and has expressed its reservations, which inter alia, include more immunity for the head of state, jurisdictional triggers initiated by the UN Security Council, and the doctrine of command responsibility. These reservations are considered a compromise on the state's sovereignty and jurisdiction. This article critically analyzes the reasons of Pakistan's non-ratification of the Rome Statute. The article further explores the country's legislative framework embedded in the Constitution that enables it to ratify international treaties, the role of the Parliament, and the Ratification of International Treaties Act, 2013. This study also critically examines the political and legal implications of non-ratification of the Rome Statute. The ratification of the Rome Statute by Pakistan may significantly impact the country's good ties with other nations, military and government relations, the country's GSP Plus status, and domestic legislation following Islamic injunctions. The result of this study suggests that the country must adopt a balanced approach to ratifying the Rome Statute while considering the crucial aspects of state sovereignty, and carefully considering the legal, political, and strategic perspectives involved in such ratification.

1. Introduction

The Rome Statute was ratified by representatives from 160 nations on July 17, 1998. The Statute gave birth to the International Criminal Court. In this historic move, the ratifying States agreed to be subjected to the authority of International Criminal Court. This Court was made responsible for prosecuting individuals committing crimes against humanity within the borders of a State. The Statute entered into force on July 1, 2002, and accordingly, the ICC became the first permanent and independent International Court to conduct investigations and prosecute prisoners of State parties who are criminally liable for the most severe crimes related to human rights abuses (Laden, 2013). Kofi Annan, the former UN Secretary-General, stated that establishing the ICC is a milestone in the ongoing struggle against indemnity for the gravest international crimes (United Nations, 2009).

Presently 124 States have formally ratified the Rome Statute (International Criminal Court, 2024). Pakistan has not ratified the Rome Statute and instead, it became an observer State. Pakistan still needs to ratify the Rome Statute but the reasons behind the country's reservations not to ratify the Rome Statute are complicated, touching the issues of legality and sovereignty. The country has reservations on matters encompassing the indemnity of heads of State, armed conflicts that are not international, strategic factors and the trigger mechanism of the UN Security Council. The country's unwillingness to ratify the Rome Statute raises significant political and legal implications, which include potential strains in international relations, limitations on foreign aid, resource constraints, economic barriers, compromising the political sovereignty and jurisdiction, removal of indemnity of the head of state and intervention in military issues as well as the need for domestic legal reforms to address crimes against humanity.

Despite numerous reservations and challenges, Pakistan has a structured mechanism to ratify the international treaties including the Rome Statute. Thus, the Parliament has the sole prerogative to ratify or not to ratify any international treaty. However, the Parliament passed the Ratification of International Treaties Act 2013, to regularize and formalize the treaty ratification process. This domestic law ensures that international treaties are ratified after proper scrutiny considering their conformity with Pakistan's constitutional and legal framework. However, the country has to make a firm policy decision on ratification after discussing such reservations with the States that have not yet ratified the Statute.

2. Literature Review

2.1 Domestic Mechanisms for Ratifying International Treaties in Pakistan

The Constitution of Pakistan has provided the procedure through Article 70 concerning subjects falling in the Federal Legislative List (Khan, 2023). Thus, Treaty-making being the subject of the Federal Legislative List, a bill concerning it may originate

in the Parliament (Amanullah, 2023). Moreover, the federal legislative power and the respect for regional autonomy are both delicately balanced in Article 141.

The Constitution recognizes the need for a unified legal system that can handle domestic concerns regardless of place by giving the Parliament the power to legislate for the whole country, including legislation with extra-territorial applications. Domestic laws must be compatible with Islamic principles (Constitution of the Islamic Republic of Pakistan, 1973). Since the Parliament is the highest political and legislative body, the only determinant for Pakistan's ratification of the Rome Statute is public opinion. These provisions reveal that there are no restrictions for Pakistan to ratify treaties like the Rome Statute (Ahmad et al., 2022). However, the Constitution does not contain any explicit provision providing a mechanism for ratifying foreign treaties. To cope with such a situation, the country enacted 'The Ratification of International Treaties Act of 2013', which laid down a comprehensive legal framework for ratifying international treaties (Rabbi et al., 2022).

2.2 The Role of the Cabinet in Ratifying International Treaties in Pakistan

Before the promulgation of the Ratification Treaties Act 2013, there was no such relevant procedure. The Federal Cabinet was the principal body to ratify treaties, subject to its prior debate in Parliament and its consequential approval. Therefore, the Federal Cabinet had the virtual power to ratify treaties instead of Parliament. Since ratification followed debate in the Parliament and the Federal Cabinet, in theory, represented the legislative intent in its decisions (Khan, 2005).

2.3 The Ratification of International Treaties Act, 2013

The procedure for ratifying foreign treaties has been prescribed by this Act. This act seeks to clearly define the objectives of a particular treaty, identify any contradictory laws, and tackle concerns related to national security and the consequences that may arise after entering such a treaty (Ratification of International Treaties Act, 2013). The memorandum further aims to address numerous crucial questions, including the extent to which signing the treaty promotes or compromises Pakistan's interests in both the short and long terms (Ratification Treaties Act, 2013).

The Federal Minister for International Affairs must consult with the Law, Justice, and Human Rights Division before drafting a bill, which is then introduced in the Parliament for ratification within three months of the Cabinet's approval. The legislative branch can approve a bill with or without reservations. Moreover, the Federal Government may only ratify a treaty if the bill is ratified by the Parliament in terms of Section 4 of the Ratification of International Treaties Act, (2013).

2.4 Grounds for Non-Ratification of International Treaties as the Rome Statute

The Act has categorically provided that Parliament shall not support a treaty which conflicts with the fundamental rights guaranteed by the Constitution. Another reason for the non-ratification of a treaty is that it may jeopardize national interest. A bill may also not be ratified if it adversely affects the economy, environment, social order, or culture. The Act has barred the Government from ratifying a treaty which had earlier been turned down by Parliament through a referred bill. Thus, a careful perusal of the Act of 2013 reveals that the authority to ratify treaties and implement them within the domestic jurisdiction is exclusively vested in the Parliament (Ghouri, 2019).

3. Research Methodology

The qualitative research method was used to analyze the reservations of Pakistan on the statute of Rome.

4. Analysis

4.1 Leading Factors Behind Pakistan's Decision in Non-Ratifying the Rome Statute

Pakistan has a long history of support for the cause of peace, justice, and security and making appeals for the protection and promotion of human rights (Shahzad, 2023). In this regard, Mr. Justice Rustam Sohrabji Sidhwa, Judge, Supreme Court of Pakistan was amongst the first eleven Judges of the International Criminal Court (ICC) for the former Yugoslavia and worked from 1993 until July 1996. Mr. Justice Saad Saud Jan assumed the position after the resignation of Mr. Justice Rustam Sidhwa on health grounds. Mrs. Justice Khalida Rashid Khan, Judge of Peshawar High Court also served as Presiding Judge of the International Criminal Court for Rwanda from July 2003 to May 24, 2007 (Khan, 2014). These appointments and the role of Pakistani Judges show their dedication to maintaining the rule of law and combating crimes against humanity and human rights abuses (Kanwel, 2024).

Although the country has expressed its support for the goals of the ICC and voted for the Rome Statute at the UN Conference of Plenipotentiaries in 1998, it has not signed the Statute (Dawn, 2003). The country has several reservations about the mechanism of justice by the ICC. However, some of the critical reservations are discussed as under:

4.1.1 No Immunity to the Head of the State

Under international law, specific high-ranking State officials are granted immunity. This immunity is typically associated with their office or the official's standing (Pedretti, 2013). Both customary and conventional international law acknowledge the idea of immunity (*Democratic Republic of the Congo v. Belgium*, 2002). The Rome Statute vests the ICC with the jurisdiction to prosecute persons who are suspected of committing international crimes. Article 27 of the Rome Statute has categorically provided that the heads of the States are no exceptions and that they are no longer exempt from criminal liability (Singhi, 2021). In contrast, the Pakistani Constitution (1973) has

specifically provided indemnity to the head of the State from the institution of criminal proceedings in any court of law during the term of their office (Business Recorder, 2010). The principle of 'Sovereign Immunity' as contained in the customary international law as well as the Vienna Convention on Diplomatic Relations, (1961) have categorically acknowledged the privileges and immunities of diplomats and heads of State. While sovereignty is one of the fundamental doctrines within international law, the Rome Statute contravenes this doctrine by facilitating the prosecution of heads of State. This restricts Pakistan's unquestionable authority and is seen as external meddling in a country's internal matters (Ezennia, 2014).

A recent example to support the country's stance on the 'heads of State immunity principle' is the case of the former President of Kenya, Uhuru Kenyatta, who was the first incumbent head of State ever to be summoned before the ICC. The African Union (AU) (2013) objected to the indictment of Kenyatta, stating that such an indictment could not only threaten the State sovereignty of Kenya but also that of other Member States. To preserve the sovereignty of the Member States, the African Union decided that no foreign court or tribunals would be permitted to prosecute any incumbent African Union Head of State. The accusations against Kenyatta were withdrawn in 2014 following the refusal of the Kenyan Government (*Prosecutor v. Uhuru Muigai Kenyatta*, 2014). The case law demonstrates how a State which had ratified the Rome Statute was eventually compelled to safeguard its national sovereignty by granting immunity to the head of state who was previously indicted by the ICC following the Rome Statute.

4.1.2 UN Security Council's Authority to Invoke ICC Jurisdiction

The Rome Statute (2002) grants the United Nations Security Council (UNSC) the authority to refer any matter that falls under Article 7 of the Statute to the ICC Prosecutor. Thus, it becomes the duty of the UNSC to preserve and restore peace and security worldwide (Galand, 2019). However, the most controversial trigger mechanism is the referral by the UNSC because it confers the jurisdiction to the ICC to prosecute member States of the UN that have not even ratified the Rome Statute. This trigger mechanism undermines the idea of complementarity, and the role of the UNSC in the ICC is Pakistan's main objection (Bharadwaj, 2003).

It is essential to discuss the principle of complementarity and how the trigger mechanism of the UNSC undermines this principle. The ICC operates in a manner that supports and supplements the criminal authorities of individual nations. This implies that it is primarily the responsibility and power of the States to investigate and bring charges against individuals for international crimes. According to the concept of complementarity, the ICC may initiate only when national legal system is unwilling to do so effectively (Carter, 2010).

The ICC implements the complementarity concept by applying Articles 17 and 53 of the Rome Statute. According to this principle, a case cannot be brought before the ICC where a State with jurisdiction over the crime is already investigating it. The principle of complementarity enables the ICC to exercise jurisdiction in situations when a State is either unable or unwilling to investigate or where an investigation is conducted with malicious intent or motive, to protect a criminal from criminal liability (Adigun, 2021). This concept ensures that the ICC is a final judicial authority which assumes jurisdiction only in cases where a State has failed to investigate and prosecute a criminal.

Thus, if the UNSC decides to refer a situation to the ICC, it might potentially undermine the principle of complementarity and the jurisdiction of domestic legal systems. Article 16 of the Rome Statute further provided that the UNSC may postpone investigations or prosecutions for twelve months, which period may also subsequently be renewed. Such a situation may adversely impact the principle of complementarity and the prosecution before the ICC may be stayed based on political interference by the UNSC. Moreover, UNSC being politically motivated may enfeeble the independence and credibility of the ICC which may eventually has a discouraging effect on national prosecution and pose legal and practical obstructions that affect the course of justice for the human rights violations and the affected communities (Philippe, 2006).

Pakistan opposed the involvement of the UNSC based on the concept that its interference was tantamount to hindering the working of a judicial system set up under the ICC and that it is the need of the hour to revisit the provisions of the Rome Statute. Prominent nations such as the United States, Russia, China, India, and Indonesia have not ratified the Rome Statute (Klobucista & Ferragamo, 2023). Mohammad Siddiq Khan Kanju, the former Minister of State for Foreign Affairs, said that the role of the Court is to supplement rather than replace existing national legal systems (Press Release, 1998). Lahiri (1998), the then leader of India's Delegation to the Rome Statute stated that giving the UNSC a prominent role in vesting jurisdiction to the ICC may violate both the concepts i.e. sovereign equality and equality before the law. This assumption is based on the premise that the five governments with veto power do not commit the crimes in terms of Article 5 of the Rome Statute. Pakistan argues that such a trigger mechanism may be used for political gain which may lead to biased and discriminatory enforcement and application of international law and undermines sovereign equality. Pakistan supports the idea that such a mechanism should only be activated by a state party since only that State may determine its capacity to adequately handle relevant situations (Dawn, 2003).

4.1.3 Criminal responsibility of military commanders and officers

The command responsibility of commanders and other military officials is addressed in Article 28 of the Rome Statute. According to this law, military leaders may be held accountable for crimes committed by armed forces (Jackson & Arnold, 2021). This applies to instances where the superior has also failed to take reasonable steps to

prevent their commission (Slidregt, 2009). However, the Constitution of Pakistan is silent about the command responsibility of military commanders and superiors. Section 33 of the Pakistan Army Act (1952) covered the cases of disobedience in the military and it aims to maintain discipline.

Pakistan is aware that holding military commanders and other superiors accountable before the ICC for criminal liability may undermine the State's sovereignty and jurisdiction. Such an aspect not only causes interference in the autonomy of the State but also puts the highest military officers of the country subject to investigations by the ICC, which other initiates references politically motivated by the UNSC.

4.1.4 Lack of Resources and Capacity

Pakistan is a developing country with limited resources and capacity building. It is an uphill task to execute the Rome Statute, including setting up domestic processes for investigating and prosecuting international crimes. The country is already facing other challenges on the domestic front like terrorism, economic instability, and regional security concerns, which comparably appear more important than signing the Rome Statute (Human Rights Commission of Pakistan, 2019).

4.2 Implications Of Pakistan's Decision in Not Ratifying the Rome Statute

There are several political and legal implications involved both on the domestic and international fronts if the country does not ratify the Rome Statute. Legally, it raises serious concerns regarding accountability and criminal liability. From a political perspective, the relations with State parties ratifying ICC may be negatively influenced and create serious doubts about Pakistan's commitment to global peace, justice, and human rights standards (Khan, 2019). The following are some implications:

4.3 Challenging the Principle of National Sovereignty

Ratification of the Rome Statute may compromise the principle of State sovereignty because the UNSC, being a political entity, may refer cases to the ICC, which adversely affects the jurisdiction of the ICC and raises suspicion over the impartiality of the ICC being tainted with politically motivated prosecutions. For ratification, the country must remove the provisions granting immunity to the Head of State from its Constitution in pursuance of the limitations granted by Article 27 of the Rome Statute. Articles 13(b) and 27 of the Rome Statute infringe on the State sovereignty and the principle of complementarity. Considering such a complex situation, Pakistan has no other option but to refrain from ratifying the Rome Statute due to such crucial reasons and impediments (Sufi, 2009). The State sovereignty is denied by the UNSC's referral power and has a devastating impact on the jurisdiction of ICC as is depicted from the study of the Darfur case as under:

4.4 Darfur case: An Attack on the State Sovereignty

Various human rights organizations and States have characterized the Darfur genocide as a conflict that began in February 2003 in Darfur (Sudan) between government forces and anti-state movements (2005). The allegations of genocide and violations of human rights were rejected by the President of Sudan, Omar Al-Bashir. The UNSC while resorting to Article 13(b) of the Rome Statute referred this case to the ICC on March 31, (2005). It was for the first time that ICC investigated the allegations of genocide, and President Omar Al-Bashir was the first to face charges of the crime. The Prosecutor, Luis Moreno Ocampo, relied on humanitarian reports that lacked legal admissibility and merely documented incidents of violence without firm evidence of genocide. Jordan, Mali, Chad, South Africa, the Democratic Republic of Congo, and the African Union were among the member States that refused to hand over Omar Al-Bashir for extradition. These States were justified in their decisions by invoking the immunity principle as a head of State even though the UNSC had referred the issue to the ICC (Jamshedi, 2013). This non-cooperation by the States eventually hindered the ICC's ability to freely exercise its functions and powers.

It appears that the ICC faced serious challenges due to politicized prosecutions based on references from the UNSC, a political organ of the UN that often interferes with the impartial and independent working of the ICC as an international judicial body responsible for criminal prosecutions in a fair manner (Cheruiyot, 2014). Such interference weakens the effectiveness of the ICC and limits its autonomy, making it challenging to resist the political pressures and groupings in the UN (Baker, 2019).

4.5 Unrest in Civil-Military Relations

Pakistan also argues that the Rome Statute (2002) violate its independence and freedom to make decisions regarding national security. The military personnel could be held responsible for crimes committed by forces under their command or authority. Such liability extends even in cases where military commanders fail to control their forces properly. This could lead to investigations and prosecutions for alleged war crimes during conflicts or military operations.

Pakistan maintains its official stance for not ratifying the Rome Statute due to its internal security reasons. Thus, for ratification, consensus needs to be built between the civil government and military establishment as any step without adequate consultation with the major stakeholders may create unrest and lead to political turmoil in the country.

4.6 Economic Barriers as a tool

Pakistan's ratification of the Rome Statute may benefit it with GSP Plus economic incentives and benefits from the European Union. Ratification of the Statute results in a substantial intrusion into the State's sovereignty. There are a lot of human rights activists and most of them are funded by the European Union. Thus, the threats of trade sanctions are used to persuade the country on the pretext of human rights compliance and the

European Union constantly criticizes the country for its so-called human rights abuses and threatens to withhold its GSP Plus status on such basis (Malik, 2022).

4.7 Effects on Inter-State Relations

The recognition of the Rome Statute has noteworthy implications for its relations with the State parties and hostile States. The ratification fosters a sense of solidarity among State parties and also strengthens diplomatic ties as well as legal and judicial cooperation for commitment to international justice. It appears to be the collective responsibility of every State party to assist the ICC in fulfilling its mandate, and in this way, relations between States may be improved (Wierczyńska, 2022). On the other hand, the ratification of the Rome Statute may have several negative implications that may result in increased legal and judicial scrutiny and diplomatic pressure, which may lead to alteration in regional security dynamics. These implications may raise tension and impact strategic countermeasures by the hostile States.

4.8 Alignment of Rome Statute with Islamic Legal Principles in Domestic Legislation

Pakistan needs to ratify the Rome Statute subject to the conformity with the Injunctions of Islam. This is because the entire domestic legislation must conform to the Islamic precepts (the Constitution of the Islamic Republic of Pakistan, 1973).

4.9 Discussion

Pakistan being a developing country, resource constraint is also a major concern as the country is presently confronting more serious issues concerning terrorism, political turmoil, economic instability, and regional security threats. Considerable investment and capabilities are required to include the Rome Statute in domestic legislation. The domestic legislation must be based on scientific knowledge, considering the ground realities and taking experts on board (Ajmal & Rasool, 2023a; Ajmal & Rasool, 2023b; Ajmal & Rasool, 2024a; Ajmal & Rasool, 2024b; Ajmal et al., 2023).

In addition, Pakistan's non-ratification may adversely impact the economy, particularly concerning the GSP Plus status from the European Union and Grey-list status from FATF. The ratification from the country's perspective may result in hostile relations between its civil and military establishments, strained relationships with neighbour and hostile States, infringement of State sovereignty, the risk of political persecution by the UNSC, and violation of the principle of complementarity besides other internal and external disturbances. Considering such background, Pakistan's reservations about the Rome Statute are justified.

At this stage, the only solution is to engage in dialogue with other States that are yet to ratify the Statute and to negotiate with the ICC to address specific concerns. Pakistan's ratification process could be facilitated by applying the jurisdictional principle of complementarity to resolve the impediment. Moreover, the complex issues involved in

international criminal justice necessitate a thorough evaluation of economic, political, and legal implications. Pervez Musharraf, the former President of Pakistan, expressed that the country preserves the principle of international justice and prioritizes the doctrine of State sovereignty and national interest when considering the ratification of the Rome Statute.

5. Conclusion

Non-ratification of the Rome Statute (2002) results in complex legal, political, and strategic implications for the country. Pakistan has repeatedly demonstrated its commitment to maintaining international justice by supporting the Rome Statute of the ICC. The presence of Pakistani Judges in the ICC further strengthens the country's commitment. Despite supporting the Statute, there are substantial reservations for the country. Thus, withdrawing the State's sovereignty by eliminating the indemnity of the Head of State, the UN Security Council's referral power under Article 13(b) of the Statute compromising the principle of complementarity, and the doctrine of command responsibility under Article 28 of the Statute poses a serious threat to the autonomy, integrity and national security of Pakistan besides manifest clash with country's constitutional norms and principles of sovereign immunity available under the customary International law and the Vienna Convention on Diplomatic Relations, 1961.

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