

## ROME STATUTE ICC: SHOULD MALAYSIA RATIFY IT?

Oleh

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### **What is the Rome Statute ICC?**

Rome Statute is an international treaty which established the International Criminal Court (ICC) to try four major international crimes. It came into force on 1 July 2002.

As of March 2019, 124 of the 193 UN members have ratified the agreement. These include countries with constitutional monarchy system such as Belgium, Cambodia, Denmark, Japan, Jordan, Lesotho, Liechtenstein, Luxembourg, Netherlands, Norway, Samoa, Spain, Sweden and the United Kingdom. Countries having kings with absolute power like Saudi Arabia reject it. Great powers like the United States, Russia, China and India reject it. Israel rejects it. All our neighbors Singapore, Indonesia, Brunei and Thailand have not accepted it. Philippines has just withdrawn its membership as a state party. Malaysia has signed its acceptance on 4 March 2019.

### **Major international crimes**

The Rome Statute creates four major types of international crime - genocide, crime against humanity, war crime, and crime of aggression. Examples of the major crimes are:<sup>[AHBHM1]</sup>

#### *“Article 6 Genocide*

*For the purpose of this Statute, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*

- (a) Killing members of the group;*
- (b) Causing serious bodily or mental harm to members of the group;*
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- (d) Imposing measures intended to prevent births within the group;*
- (e) Forcibly transferring children of the group to another group.”*

Note, for example, murder as such is not genocide. It must be " committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".

*“Article 7 Crimes against humanity*

*1. For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*

*(a) Murder;*

*(b) Extermination;*

*(c) Enslavement;*

*(d) Deportation or forcible transfer of population;*

*(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*

*(f) Torture;*

*(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;*

*(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;*

*(i) Enforced disappearance of persons;*

*(j) The crime of apartheid;*

*(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”*

Note that the above-mentioned offences only become crimes against humanity if they are *“committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”*

*“Article 8 War crimes*

*1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.*

*2. For the purpose of this Statute, ‘war crimes’ means:*

*(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:*

*(i) Wilful killing;*

*(ii) Torture or inhuman treatment, including biological experiments;*

*(iii) Wilfully causing great suffering, or serious injury to body or health;*

*(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;*

Note that these offences only become war crimes if they are “committed as part of a plan or policy or as part of a large-scale commission of such crimes.”

### **Jurisdiction of ICC**

Article 13 provides three ways in which the ICC may exercise its jurisdiction, that is, when:

*“(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.”*

The ICC will only try the four major international crimes if the state party is unable or unwilling to do it themselves. The jurisdiction of the court is complementary to the jurisdiction of the domestic court.

The ICC’s jurisdiction is to try individuals (not a country or an organization) for the four types of crimes. Only persons under the age of 18 when the offences are committed are immune and cannot be tried by the ICC. It means that even a head of state may be tried by the ICC.

### **By ratifying the Rome Statue, are we giving away our sovereignty to an external authority?**

The main argument against ratification is that by doing so, we are giving up our sovereignty to an external authority. It is true that by accepting it, we give to state parties the right to refer the commission of the said crimes in Malaysia or by Malaysian nationals

to ICC (but we may also do the same with respect to other state parties) and we give jurisdiction to the ICC to try Malaysian nationals.

The fact is that when a country becomes a state party to an international treaty, it will be bound by the terms and provisions of the treaty, which will somehow affect its sovereignty. That is inevitable. Moreover, it will involve all parties, not only Malaysia.

### **By accepting the Rome Statute, are the Rulers being subjected to the jurisdiction of the ICC?**

BHOnline 14 March 2019 reported that the Foreign Minister Datuk Saifuddin Abdullah, I believe on the advice of the Attorney General's Chambers, had said that *"Malaysia's decision to ratify the Rome Statute on March 4 was approved by the Cabinet after being satisfied that the position and immunity of the Yang di-Pertuan Agong remained protected."*

He said, *"... the government acknowledges the concerns of some parties that the Yang di-Pertuan Agong will be exposed to criminal prosecution at the International Criminal Court (ICC).*

*"He said that such an impression was wrong and made without a basic understanding of the law or constitution because we have a constitutional monarchy system in Malaysia, in accordance with Article 40 (1) of the Federal Constitution, the duties of the Yang di-Pertuan Agong are done on the advice of the Prime Minister or Cabinet.*

*"Article 40 (1A) stipulates that "In the exercise of his functions under this Constitution or federal law, where the Yang di-Pertuan Agong is to act in accordance with advice, on advice, or after considering advice, the Yang di-Pertuan Agong shall accept and act in accordance with such advice."*

*"The actions of the Yang di-Pertuan Agong are based on the advice of the Prime Minister or the Cabinet, therefore Malaysia's participation in the Rome Statute does not affect the position and immunity of the Yang di-Pertuan Agong.*

*"On Article 41 that the Yang di-Pertuan Agong is the Supreme Commander of the Federal Armed Forces, it does not give absolute power to the king to declare war. This Article should be read together with Article 40, the Yang di-Pertuan Agong to carry out his duties on the advice of the Prime Minister or The Cabinet," he said in a statement last night.*

*Based on the details of the Federal Constitution, Saifuddin said the Yang di-Pertuan Agong is not responsible for the four accused crimes as identified in Article 5 Rome Statutes, namely genocide, crimes against humanity, war crimes and crimes of aggression.*

*The legal responsibility for any declaration of war, he said, lies in the jurisdiction of the Prime Minister and Cabinet.*

*The Yang di-Pertuan Agong will not be affected personally after Malaysia becomes a party to the ICC," he said.*"<sup>ii</sup>

With respect, I disagree with the view that by ratifying the Rome Statute "*the position and immunity of the Yang di-Pertuan Agong remains protected.*" This is because the Rome Statute only recognizes the immunity of persons under the age of 18 years.

But, it is another thing to say that YDPA cannot be held accountable for what the government (Executive) does because he is a constitutional monarch. This concept is explained by the Foreign Minister correctly and I agree with him there, and I do not have to repeat it.

The mistake occurs because of confusion between immunity and responsibility. If the YDPA has immunity, even if he commits an offence, he cannot be prosecuted. However, if he cannot be held responsible for the commission of the offence, he cannot be prosecuted because, in law, he does not commit the offence. If he himself does so, he may be prosecuted. That is the difference.

It might be said that if the Rulers themselves commit the offences, they should be allowed to be tried by the ICC. But that is not the issue here. The issue is whether by accepting the Rome Statute "the position and immunity of the Yang di-Pertuan Agong is preserved" or not, not whether, if the Rulers commit the offences, they should be allowed to be tried by the ICC, or not.

I agree that declaration of war is within the jurisdiction of the Cabinet. However, those offences could be committed even without a declaration of war. War crimes is only one of the four types of crimes.

I can accept the argument that the YDPA (and also the Rulers, in respect of their own states) cannot be prosecuted at the ICC for the offences committed by the Executive (and also the military) on the ground that he is a constitutional monarch. In simple language, he cannot be prosecuted at the ICC because he does not commit the offence, not because of his immunity.

On the other hand, if he (or the Rulers) himself commits the offence or he directs his guards or police or military officers to do so, he may be prosecuted at the ICC. What it means is that the ICC does not recognize his (and he Rulers') immunity.

Therefore, the last sentence I quoted which says "*The Yang di-Pertuan Agong will not be affected personally after Malaysia becomes a party to the ICC*" is only correct regarding the offences committed by members of the administrative, executive or armed forces, not by or on the direction of the Rulers themselves.

**Is it necessary to amend the Constitution?**

I submit that the Constitution will have be amended for two reasons:

- (i). To give jurisdiction to the ICC; and
- (ii). Because it affects the position of the Rulers.

Regarding (i), it cannot be argued otherwise that, under the Federal Constitution, judicial power lies in the courts. Only the courts established by the Constitution and created by federal law have jurisdiction to try offences committed in Malaysia. Foreign courts have no jurisdiction over them.

By merely ratifying the Rome Statute, it does not give criminal jurisdiction over the offences committed in Malaysia, to the ICC. That is because, even though the ratification is approved by Parliament, the provision of the Constitution remains. As long as the Constitution is not amended to give the ICC jurisdiction over the offences committed in Malaysia, the ICC has no jurisdiction to try them, as the ICC is not a court established by the Constitution or under federal law as provided by the Constitution.

Regarding (ii), we have seen that if we ratify the Rome Statute, the ICC will have jurisdiction over the offences committed by the Rulers or on their direction. According to Article 181 (2) of the Federal Constitution:

*"No proceedings whatsoever shall be brought in any court against the Ruler of a State in his personal capacity except in the Special Court established under Part XV.*

This provision says that only the Special Court has jurisdiction over the Rulers. Hence, to give jurisdiction to the ICC to try the Rulers, Article 181 must be amended.

### **Must the consent of the Conference of Rulers be obtained?**

The BHOnline report says:

*"Commenting on the need to refer to the Conference of Rulers, Saifuddin said that that would be necessary if the government wants to amend the Federal Constitution involving nine matters stated in Article 159 (5) and Article 38 (4).*

*He said Malaysia's participation in the Rome Statute is not one of the nine matters, but the Cabinet decided to brief the Yang di-Pertuan Agong about the decision to accept the statute out of respect for the principle of Constitutional Monarchy.*

*"In addition, referring to Clause (1) of Article 80 of the Federal Constitution read with Article 39 and Clauses (1) and (2) of Article 74 of the Federal Constitution, matters concerning the signing and implementation of international instruments involving foreign affairs are within the powers of the executive of the Federal government."<sup>iii</sup>*

We have seen earlier that ratification of the Rome Statute would affect the position of the Rulers. Article 159 (5) of the Federal Constitution provides:

*(5) "A law making an amendment to Clause (4) of Article 10, any law passed thereunder, the provisions of Part III, Article 38, 63(4), 70, 71(1), 72(4), 152, or 153 or to this Clause shall not be passed without the consent of the Conference of Rulers."*

When I counted, I found eleven matters mentioned in Article 159(5). Never mind. The important thing is to look at the contents.

Article 38 (4) provides:

*'(4) No law directly affecting the privileges, position, honours or dignities of the Rulers shall be passed without the consent of the Conference of Rulers.'*

(Note that amending Article 38 is one thing. Amending a law referred to by Article 38 (4) is another. If we add what is stated by Article 38 (4), we have twelve matters!)

Articles 80 (1), 39 and 74 (1) and (2) cited by the Foreign Minister, with respect, do not assist the minister's argument. The provisions are about division of jurisdiction between the Federation and the States. That is not the issue here.

### **Weakness of ICC**

Pursuant to Article 13 (a), the ICC may exercise its authority if a state party refers the commission of the offences to the Prosecutor. But, Article 12 (a) imposes the condition that the country where the offences are committed or the offenders are its nationals, must be a state party as well. In other words, the ICC will not exercise its jurisdiction if the country where the offences are committed or the offenders are its nationals are not a state party. Thus, a rogue country may avoid the ICC jurisdiction by not becoming a state party to the Rome Statute.

The Prosecutor who wishes to investigate in accordance with Article 13 (3) is also subject to the conditions stated in Article 12 (a).

It is true that the ICC may acquire jurisdiction over a country which does not ratify the Rome Statute if the UN Security Council refers the commission of the offences committed in the country or by its nationals, to the Prosecutor.

However, in the case of Israel, with the United States having the veto power and its unwavering support for Israel, the resolution to refer Israel to the ICC is unlikely to be approved.

On the contrary, the country that the UN Security Council had referred to the ICC is Sudan whose population in the North and its government are, by majority, Muslims and the

offences are allegedly committed against the rebels in the South who are mainly Christians fighting for separation of the southern part of Sudan.

A few days ago, we read that the United States, a strong opponent of ICC, threatened to withdraw visas or not going to give visas to ICC investigators who want to investigate complaints of the commission of the offences by US citizens, in Afghanistan.

At the same time, when the ICC investigators are investigating the commission of the offences by Rodrigo Duterte, the Philippine President, on drug traffickers in his own country, he withdraws Philippine membership as a state party to the Rome Statute.

### **Should Malaysia ratify the Rome Statute?**

Whether Malaysia should ratify the Rome Statute or not is the policy matter for the Cabinet to decide. It is a political decision. To make that decision, the government will certainly take into account its policy in regard to international relations, its election promises, the pressure by the component parties and of great powers. (In this case, the last-mentioned factor does not seem to be an issue as the United States itself had not ratified the Rome Statute.) As a responsible government, it must consider national interests. I accept that the government has more information than us to take into account and to consider in making the decision. However, politicians being politicians, it is whether they think they will get more or less votes by doing so in the next general election, is the most important consideration.

Wisma Putra gave the following reasons why Malaysia should ratify the Rome Statute:

*"(1). Malaysia's participation will increase the country's status among the world community as a nation committed to upholding justice and defending international law.*

*(2). Malaysia's participation will symbolize the seriousness of the country in increasing unity together with the international community by bringing international criminal offenders to justice.*

*(3). Malaysia can now refer to the ICC under Article 13 (A) of the Rome Statute of international crimes committed by any party, if required.*

*(4). Malaysia can now speak more loudly against countries that carry out ethnic cleansing and war crimes at the Conference of the State Parties.*

*(5). Malaysia is now eligible to nominate its citizens as Judges, Prosecutors and Registrars and other posts in the Prosecutor's Office and ICC Registrar's Office."<sup>iii</sup>*

Regarding (1) and (2), while I do not say that it does not give any benefit, merely by being a party to the Rome Statute, would not place a small country like Malaysia in a high position in the international community. International politics only respects the strength and wealth of a country.

Regarding (3), it is true that we can refer a state party to the ICC, but other state parties may also do the same against us.

In addition, our neighboring countries such as Singapore, Thailand, Indonesia and Brunei Darussalam all do not ratify it. Philippines has withdrawn its membership as a state party. Why is Malaysia so eager to ratify it?

Regarding (4), no matter how loud a small country shouts, in international arena, no one cares about it.

Regarding (5), I do not want to comment.

I do not intend to say whether we should ratify the Rome Statute or not. I leave it to the readers to consider and decide for themselves. What I have done is to explain and give my opinion on the various issues involved, as best I can, to help them understand and make their own decisions.

It is hope that legal advisors to the government will also read it and if they agree with my arguments, they might want to revise their advice to the government. It does not matter if they don't, so long as they have better arguments. I too would like to see their arguments.

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<sup>i</sup> *“Keputusan Malaysia memeterai Statut Rome pada 4 Mac lalu dipersetujui Jemaah Menteri selepas berpuas hati bahawa kedudukan dan kekebalan Yang di-Pertuan Agong kekal terpelihara.”*

*Beliau berkata, “...kerajaan mengambil maklum mengenai kekhawatiran segelintir pihak bahawa Yang di-Pertuan Agong akan terdedah kepada pendakwaan jenayah di Mahkamah Jenayah Antarabangsa (ICC).*

*“Katanya, tanggapan sedemikian adalah salah dan dibuat tanpa kefahaman asas dalam perundangan atau perlembagaan kerana sistem Raja Berperlembagaan di Malaysia mengikut Perkara 40 (1) Perlembagaan Persekutuan menyatakan tugas Yang di-Pertuan Agong dilaksanakan atas nasihat Perdana Menteri atau Jemaah Menteri.*

*“Artikel 40 (1A) menyatakan ‘pada menjalankan fungsinya di bawah Perlembagaan ini atau undang-undang persekutuan, jika Yang di-Pertuan Agong dikehendaki bertindak mengikut nasihat, atas nasihat atau selepas menimbangkan nasihat, Yang di-Pertuan Agong hendaklah menerima dan bertindak mengikut nasihat itu.*

"Segala tindakan Yang di-Pertuan Agong adalah berasaskan nasihat Perdana Menteri atau Jemaah Menteri, justeru penyertaan Malaysia ke Statut Rome tidak menjejaskan kedudukan dan kekebalan Yang di-Pertuan Agong.

"Mengenai Perkara 41 bahawa Yang di-Pertuan Agong adalah Pemerintah Tertinggi Angkatan Tentera Persekutuan, ia tidak memberi kuasa mutlak kepada baginda untuk mengisytiharkan perang. Perkara ini perlu dibaca bersekali dengan Perkara 40, iaitu Yang di-Pertuan Agong menjalankan tugas atas nasihat Perdana Menteri atau Jemaah Menteri," katanya dalam kenyataan, malam tadi.

Bersandarkan perincian mengikut Perlembagaan Persekutuan, Saifuddin berkata, Yang di-Pertuan Agong tidak bertanggungjawab terhadap empat jenayah terkutuk seperti dikenal pasti dalam dalam Artikel 5 Statut Rome, iaitu genosid, jenayah terhadap kemanusiaan, jenayah perang dan jenayah pencerobohan.

Tanggungjawab undang-undang untuk sebarang pengisytiharan perang, katanya, terletak pada bidang kuasa Perdana Menteri dan Jemaah Menteri.

Yang di-Pertuan Agong tidak akan menerima kesan secara peribadi selepas Malaysia menjadi negara pihak kepada ICC," katanya."

ii "Mengulas keperluan merujuk Majlis Raja-Raja, Saifuddin berkata, langkah itu perlu dilaksanakan jika kerajaan ingin melakukan pindaan terhadap Perlembagaan Persekutuan membabitkan sembilan perkara, selaras Perkara 159(5) dan Perkara 38(4).

Katanya, penyertaan Malaysia ke Statut Rome bagaimanapun tidak termasuk dalam sembilan perkara terbabit, namun Jemaah Menteri mengambil keputusan untuk menyembah maklum kepada Yang di-Pertuan Agong mengenai keputusan menyertai statut berkenaan sebagai menghormati prinsip Raja Berperlembagaan.

"Selain itu, merujuk kepada Fasal (1) Perkara 80 Perlembagaan Persekutuan yang dibaca bersama Perkara 39 dengan Fasal (1) dan (2) Perkara 74 Perlembagaan Persekutuan, perkara mengenai menandatangani dan pelaksanaan Instrumen antarabangsa yang membabitkan hal ehwal luar negara termaktub mengikut kuasa eksekutif Kerajaan Persekutuan."

iii "(1). Penyertaan Malaysia akan meningkatkan lagi martabad negara di kalangan masyarakat dunia sebagai sebuah negara yang komited dalam menegakkan keadilan dan mempertahankan undang-undang antarabangsa.

(2). Penyertaan Malaysia akan melambangkan kesungguhan negara dalam meningkatkan perpaduan bersama-sama masyarakat antarabangsa dengan membawa pelaku-pelaku jenayah antarabangsa ke muka pengadilan.

(3). Malaysia kini boleh mendakwa kepada ICC di bawah Artikel 13(A) Statut Rom mengenai jenayah-jenayah antarabangsa yang dilakukan oleh mana-mana pihak, jika diperlukan.

(4). Malaysia kini boleh bersuara lebih lantang menentang negara-negara yang melakukan penghapusan etnik dan jenayah perang di Persidangan Tahunan Negara-Negara Pihak.

(5). Malaysia kini layak mencalonkan rakyatnya sebagai Hakim, Pendakwa dan Pendaftar serta jawatan-jawatan lain di Pejabat Pendakwa dan Pejabat Pendaftar ICC."