

INTERNATIONAL CRIMINAL COURT (ICC) : REVISITING ITS COMPOSITION AND COGNIZANCE PROCEDURE

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1. Introduction

Armed conflicts and serious violations of human rights and humanitarian law continue to victimize millions of people throughout the world. In such a scenario, the reasons for an international criminal court are compelling. Today's conflicts are often rooted in the failure to repair yesterday's injury. Unless the injuries suffered by the victims and their families are redressed, wounds will fester and conflicts will erupt again in the future. Accountability is, therefore, an indispensable component of peace building. But while the hitherto dominant trend in international law favoured accountability i.e. responsibility of states, establishment of the ICC ushers in a new dimension of international possibility responsibility of individuals for commission of "most serious crimes of concern to the international community", namely genocide, crimes against humanity, war crimes and aggression. Liability of individuals for committing such heinous crimes and violations of human rights is not totally new in international law. More than half a century ago, it was accepted by the international community that,

"crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."¹

Accepted though it was as a maxim of jurisprudence, states were reluctant to put it into practice apprehending that criminal

1. International Military Tribunal at Nuremberg, Judgement, 1 October, 1946.

responsibility of individuals under international law might divulge state sovereignty and in a world of sovereign nation states, few were prepared to sacrifice sovereignty.² The establishment of the ICC is a clear mark to the fact that we live in a world of new interstate relations where state sovereignty is becoming increasingly restricted and eroded. Today, the international community, acting through the UN for example, is capable of imposing serious sanctions vis-a-vis a recalcitrant/ perpetrator state. But experience shows that very often this is not sufficient. The example of Yugoslavia is a glaring example to this. Sanctions imposed by the international community against that state have seriously affected the peace-loving common people of the state, it is the people and not President Slabodan Milosevic—accused of flagrant human rights violations, who had to suffer the heat and onslaught of NATO bombings. It is therefore, extremely essential that leaders be brought to justice. The ICC has been established to ensure such individual accountability.

Thus we find that, for crimes against peace, humanity and war crimes, states would have international responsibility and individual physical persons would bear criminal liability.³ The institution entrusted with the jurisdiction to attain this objective is the ICC. However, from the time of initial negotiations it was very widely believed that in order to be "independent, fair and effective judicial Institution" the ICC must meet the following seven benchmarks;⁴ (1) a jurisdictional regime free of any state consent requirement, (2) independence from the Security Council, (3) an ex-officio prosecutor, (4) qualified deference to state claims of jurisdiction (complimentarity) (5) authority over war-crimes whether committed in international or non-international conflicts,

2. More on this see J.G. Starke Introduction to International Law.

3. I.I. Lukashuk, A.B. Naumov, International Criminal Law, (in Russian), Moscow 1999, p. 96.

4. Human Rights Watch, Summary of the Key Provisions of the ICC Statute. <http://www.hrw.org/hrw/campaigns/icc/icc-statute.htm>

(6) clear legal obligation for state parties to comply with court requests for judicial co-operation; and (7) the highest standards of international justice respecting the rights of the accused and appropriate protection for witnesses. Only a thorough examination of the ICC statute might reveal how far these qualities have been reflected and accommodated there.

In my paper, I will focus, albeit briefly, on composition and trigger mechanism of the ICC, and examine the intricate relationship that the ICC is thought to possess with the Security Council of the UN. The study, therefore, will not deal with all the benchmarks of the courts composition and procedure.

2. Composition of the ICC

Under the Rome statute, the ICC has four organs : (1) the Presidency; (2) an Appeals division, a Trial Division and a Pre-Trial Division; (3) the office of the Prosecutor and (4) the Registry.⁵

The President together with the First and Second Vice Presidents, who are to be elected from amongst the judges, constitute the Presidency. The Presidency is responsible for the proper administration of the court and other functions conferred upon it in accordance with the statute.⁶ In discharging its responsibility, the Presidency "shall co-ordinate with and seek the concurrence" of the Prosecutor on all matters of mutual concern.⁷

The Prosecutor heads the office of the Prosecutor which acts independently as a separate organ of the Court and is responsible for receiving referrals from the State-party and the Security Council and any substantial information on crimes within the jurisdiction of the Court, for examining them and for conducting

5. Article 34, Rome Statute of the International Criminal Court, 17 July 1998, A/CONF. 183/9 (hereinafter referred to as Rome Statute).

6. Article 38, Rome Statute.

7. Article 38 (4), Rome Statute.

investigations and prosecutions before the court.⁸ The Prosecutor is elected by secret ballot by an absolute majority of the members of the Assembly of State parties and is assisted by one or more Deputy Prosecutors to carry out any of the acts required of the Prosecutor under the statute.

The Court will consist of 18 judges (article 37) with a possibility to increase the number to cater for the court's increased workload¹⁰ or decrease the number at a later period with reduction in the workload, but in no case the total number shall be less than 18.

3. Qualification, Nomination and Election of Judges

Under the Statute, judges are to be chosen from persons of high moral character, impartiality and integrity, who possesses the qualifications required in their respective countries for appointment to the highest judicial offices.¹¹ In addition, each candidate for election to the Court must have either established competence in criminal law and procedure as well as experience in criminal proceedings as a judge, prosecutor or advocate¹² or alternatively, competence in relevant areas of international law, such as human rights or international humanitarian law, and extensive experience in a professional legal capacity relevant to the judicial work of the court.¹³

The nomination and election procedures contained in Article 37 of the Statute are rather cumbersome. Under the Statute, candidates for election to the Court may be nominated by any state Party to the Statute but they are limited to nationals of a State Party.¹⁴ A State Party may choose to follow its own procedure for nominating

8. Article 42, Rome Statute.

9. Ibid.

10. Article 36(2), Rome Statute.

11. Article 39(4), Article 36 (3), Rome Statute.

12. Ibid, Article 36 (3) (b) (i), Rome Statute.

13. Ibid, Article 36 (3) (b) (ii), Rome Statute.

14. Article 36 (4), Rome Statute.

candidates for appointment to the highest judicial office. Or alternatively, a State may decide to follow the procedure used for nominating candidates through national groups for the International Court of Justice.¹⁵ Pursuant to the Statute, for the purposes of the election, two lists of candidates will be prepared corresponding to the two categories of qualifications mentioned in Articles 36 (3) (b) (ii) (iii). Elections would be conducted on the basis of two lists and that a majority of the judges for the Pre-trial and Trial chamber's would be drawn from the list of candidates who had criminal trial experience. At the first election, at least nine judges would be elected from such a list and five from a list of candidates with competence in international law. Subsequent elections would also be organized in such a way as to maintain the equivalent representation of the two categories. In all cases, the election of judges would be by secret ballot at a meeting of the Assembly of State Parties.¹⁶

4. Representation of Principal Legal Systems and Geographical Representation

Under the Statute, in the election of judges, State Parties have to take into account the need within the membership of the Court for the representation of the Principal legal systems of the world, equitable geographical representation and a fair representation of female and male judges. They will also have to take into account the need to include judges with legal expertise on specific issues, including but not limited to violence against women and children.¹⁷

It seems quite pertinent to compare this provision with similar provision of the Statute of the ICJ. The latter recognizes the consideration that in the body as a whole the representation of the main forms of civilization... should be assured.¹⁸ The accepted

15. Article 36 (4) (a) (i) and (ii), Rome Statute.

16. *Supra* note 3 at p. 105.

17. Article 36 (8) (a) and (b), Rome Statute.

18. Article 9, Statute of the International Court of Justice.

view, however, is that this element is already covered by the requirement that states take into account geographical representation as well as the principal legal systems of the world.

It is interesting to note that the statute mentions, the formula of equitable geographical representation, as opposed to equitable distribution—a notion followed in the Statute of the International Tribunal for the law of the sea (Article 2).¹⁹ The statute accepted the view that universality of the court in essence requires that its composition must reflect an equitable geographical representation. Whether this is really the case is yet to be seen.

5. Gender Balance and Legal Expertise on Specific Issues

In the process of selection of judges the ICC statute makes it incumbent upon the State parties to take into account the need for "a fair representation of female and male judges" and include "judges with legal expertise on specific issues, including but not limited to, violence against women or children"²⁰ The inclusion of both these considerations is novel and progressive in the statutes of international courts and tribunals.

The statute as a matter of fact evades any situation of 'quotas' in respect to composition of the judges. While maintaining a fair representation of female and male judges', it makes it a necessity to select the judges on the basis of merit.

6. Office of the Prosecutor

An effective international court requires not only a prosecution who is independent and able to access necessary information, but an international framework which ensures that he is able to make vital decisions without undue pressure or restraint. Under the

19. See, Medard R. Rwelamira, Composition and Administration of the Court. In : Roy S. Lee (ed) The International Criminal Court. The Making of the Rome Statute, Kluwer, 1999, p. 166.

20. Article 36 (8) (a) (iii), Rome Statute.

statute, the office of the Prosecutor acts independently as a separate organ of the court.²¹ and will be elected by an absolute majority of the members of the Assembly of State Parties.²²

The office of the Prosecutor is also given operational independence. The Prosecutor has full authority over the management and administration of the office including staff facilities and other resources.²³ The statute provides for the appointment of one or more full-time Deputy Prosecutors.²⁴ Both the Prosecutor and Deputy Prosecutor are to be persons of high moral character, competent and with extensive practical experience in the prosecution and trial of criminal cases.²⁵

7. 1. Initiating An Investigation

The Initiating mechanism of the ICC which comprised one of the most contentious points of discussion among the negotiating parties, provides a compromise solution which on the one hand, makes the ICC a potentially viable organ for international criminal justice, and on the other, imposes certain restrictions on independent functioning of the court by putting it at a peculiar dependency relation with the Security council of the UN.

Pursuant to the Statute, the ICC Prosecutor can investigate allegations of crimes not only upon referral from the Security council and state parties, but also on information from victims, non-governmental organizations or any other reliable source.²⁶

7.2. Role of the Security Council

Article 13(b) of the Statute provides that the ICC may exercise its jurisdiction with respect to a crime referred to in Article 5 of the

21. Article 42, Rome Statute.

22. Article 42 (4), Rome Statute.

23. Article 42 (2), Rome Statute.

24. Ibid.

25. Article 42 (3), Rome Statute.

26. Article 15, Rome Statute.

statute if "a situation in which one or more of such crimes appear to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations." That the Security Council can legitimately trigger an investigation by referring a situation to the Prosecutor does not give rise to any doubt ever since the 1995 decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Tadic case*.²⁷

7.3. Deferral of Proceedings by the Security Council

Article 16 of the Statute stipulates that investigations on prosecutions triggered by whatever means and administered by the prosecutor can be stopped or prevented if the council adopts a resolution under chapter VII of the UN charter making a request to that effect. The suspension or prevention of such proceedings will also be limited to a renewable 12 month period.

The reference to the 12-month time-limit might raise the possibility of a conflict if, for instance, a council resolution requests an indefinite duration or a duration in excess of 12 months. In those circumstances, the primacy of UN Charter obligations would appear to require States Parties to give effect to decisions of the Security Council pursuant to Articles 25 of the Charter over conflicting rights and obligations under the Statute. Article 103 of the Charter of the United Nations provides that, in the event of a conflict between the obligations of the members of the UN under the charter and their obligations under any other international agreement, their obligations under the charter prevail. While the Court, as a non-party to the charter, would not be bound to refrain from proceeding after the expiry of 12 month period, states parties to the Statute might, depending on the terms of the Security Council Resolution, be prevented by the provisions of the charter from other triggering proceedings before the Court or rendering co-operation to the Court under the Statute.

27. *The Prosecutor V. Dusko Tadic*, opinion and Judgement I No. IT-94-1-T (Feb. 3, 1995), reported in IL.M. 32 (1996) at paras. 28-48.

7.4. Prosecutor's Ex-officio Powers for Triggering Jurisdiction

The ex-officio provisions are arguably the most important of those that give the victim and survivors a role in the ICC process, by enabling them to trigger investigations. It is believed that the *proprio motu* role of the Prosecutor is a key feature of an independent and effective criminal court.²⁸ This necessitated to cloth the Prosecutor with ex-officio powers for triggering the jurisdiction of the Court.

If the prosecutor himself decides that the case should not proceed, he must go back and inform the source of the original information. If the decision is that there is a reasonable basis to proceed with an investigation, this is then subject to pre-trial judicial approval. This judicial review mechanism is not, however, an opportunity for state or individual suspects to challenge admissibility. Ex-officio powers of the Prosecutor may be exercised only upon consideration of factors that include inter alia "interests of justice"²⁹ A decision based on the interests of justice does not in any case become effective until the pre-trial chamber confirms it. Investigative powers of the prosecutor are also quite limited placing them, basically, on the good-intentions of the state authorities concerned.

Thus, the ICC Statute has achieved a delicate balance between the search for international justice which will punish individual perpetrators committing serious crimes on the one hand, and the need for maintenance of international peace and security as set out in the UN Charter.

8. Conclusion

An evaluation of the composition and trigger mechanism of the ICC must take into account the fact that it is not without reasons that it took the General Assembly of the UN 50 years to break the

28. Article 15 (1), Rome Statute.

29. Supra note 4.

impasse on creating a criminal court.³⁰ The subject-matter of the ICC is the prosecution and enforcement of the law which are carefully guarded sovereign prerogatives. Unless states are prepared to concede some of their power, ICC would be left with the possibility of exercising its competence only in areas which are clearly beyond national jurisdiction (for example in the International SeaBed Area).

Additionally, the ICC subject-matter relates to individual criminal responsibility for the most serious crimes, and is therefore of great concern to persons who may directly or indirectly be involved in making or executing decisions pertaining to military or paramilitary actions. High officials, both civil and military, therefore, have a particular interest in this matter, though their views and concerns may be very different. All these factors have made the ICC issue very complex and sensitive. States are likely to always take extra precautions to ensure that their national jurisdiction is not impaired by recognizing the jurisdiction, though complimentary of the ICC.

Notwithstanding these impeding factors, the ICC Statute represents enormous progress and also opens up new opportunities.³¹

First, the principle of complementarity makes it possible for the court to fill gaps in situations where national courts are either unable or unwilling to exercise jurisdiction, and at the same time stimulates national courts to exercise their jurisdiction.

Second, the provision for the court's automatic jurisdiction is a welcome departure from the traditional arrangement and represents an important breakthrough in the development of international courts and tribunals.

30. In the late 1940s, three important human rights projects were before the UN General Assembly for consideration : a universal declaration of human rights, a convention to prevent genocide and an international criminal court. Both the Universal Declaration of Human Rights and the Genocide Convention were adopted in 1948.

31. More on this see Roy S. Lee (ed) *The International Criminal Court. The Making of the Rome Statute*, Kluwer Law International, 1999, Chapter Eight, Sections II, IV and V, Chapter Ten, Introduction, *intra*.

Third, the definition of crimes contained in the Statute reflects contemporary and progressive development of international law. The inclusion of sexual offenses and gender-related crimes is an important development. Non-state actors may also be brought to the ICC to be accountable for international crimes. This affirmation of the criminality of non-state actors, it is expected, will furnish a useful deterrent to those who hitherto thought themselves beyond the reach of international law.

Fourth, the Statute's international criminal justice system represents the successful product of harmonization of the distinctive principles, rules and procedures derived from the major legal systems of the contemporary world. This justice system addresses all the major concerns and maintains a delicate balance of the different interests.

Fifth, the creation of the office of the independent prosecutor and the carefully balanced and regulated role of the prosecutor are important innovations and breakthroughs in the fight against impunity and in the enforcement of the law.³²

Sixth, the statute offers a delicate balance between the search for justice through prosecution and punishment by the court on the one hand, and the responsibility given by the UN charter to the Security Council for the maintenance of peace and security on the other.

In September 1999, Bangladesh became the 3rd signatory of the ICC statute from asian region. Bangladesh itself was a victim of genocide during its Liberation War in 1971. It is therefore, only natural that Bangladesh has a particular interest in the establishment of a permanent international court to ensure that such heinous crimes are not committed in future and perpetrators brought to justice. Bangladesh played an active role in the making of the ICC and it is hoped that it would continue to play this role in the functioning of the court in the near future.

32. More on this see Christopher C. Joyner (ed) *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights*. Proceedings of the Siracuse Conference, 17-21 September, 1998.