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CHALLENGES FACED BY INTERNATIONAL CRIMINAL COURT AFTER ESTABLISHMENT AND HOW IT OVERCOMES THEM: AN ANALYTICAL STUDY

ABSTRACT

International criminal court is the world's paramount enduring intergovernmental body and a tribunal which is also called the court of last resort. The apex judicial body was formed in 1998 governed by Rome statute and came into force on 1st July 2002. ICC aims is to render those who are accountable to commit heinous crimes and to help deter such crimes from occurring in the future. It indulges in global endeavors to eliminate or end impunity by international criminal justice. The court prosecutes the individuals who are responsible to commit the crimes of genocide, crimes against humanity, war crimes, and crimes of aggression. However, since the establishment of the court they have endured various difficulties because of failing to win the support of major powers such as The United States, Russia, China and India. Even countries like Burundi and The Philippines withdrew from the Rome Statute of International Criminal Court and allegations were put by the USA on the legitimacy of ICC. This paper is oriented towards the challenge faced by ICC after establishment and steps taken to overcome them. However, ICC is very effective as it is the last hope of the victims of atrocities which provides them justice and fair trial and reestablish peace.

Keyword: International Criminal Court (ICC), Rome statute, Victim, Witnesses, Perpetrators.

1.1 INTRODUCTION

[I]n the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you . . . to do yours in our struggle to ensure that no ruler, no

States, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished.¹

-- Kofi Annan, Former United Nations Secretary-General

Over the past decades, nations have acknowledged the need for a proper system that enforces the law that will hold individuals liable for serious international crimes. Later in the year, 1998 International Criminal Court was established as a permanent body with jurisdiction to prosecute the criminals of genocide, crime against humanity, war crimes and crimes of aggression. On 17 July 1998, 120 States signed and 66 state parties ratified and adopted the Rome Statute which is known as The Rome Statute of the International Criminal Court through which ICC established. This is the first time in the history of mankind, the states voluntarily accepted the jurisdiction of a permanent criminal court for prosecuting the perpetrators of the atrocious crimes committed in their territories or by their nationals after the entry into force of Rome Statute on 1st July 2002.²

As we see in the timeline, the criminal court at the international level evolved with time. The Peter von Hagenbach trial in 1474 was considered to be the first war crime trial by 28 judges of allied towns who found him guilty and executed him. Then the Lieber Code used by Abraham Lincoln in the American civil war is about the set of rules to regulate the conduct of war. Both of them played significant roles in various ad hoc tribunals which were made after World War II to prosecute the perpetrators of war crimes and genocide like the Nuremberg Tribunal, Tokyo Tribunal, International Criminal Tribunal for the Former Yugoslavia, and International Criminal tribunal for Rwanda also in hybrid courts. However, the first proposal to establish a permanent criminal court was made in 1872 by Gustave Moynier of Switzerland who was one of the founders of the International Committee of the Red Cross, the purpose behind it to address violations of the 1864 Geneva Convention. Lately, in 1998, United Nation Conference of Plenipotentiaries on the

¹International Debate Education Association, *THE INTERNATIONAL CRIMINAL COURT Global Politics and the Quest for Justice* 25 (William Driscoll, Joseph Zompetti, et.al. (eds.) 2004).

²*International Criminal Court at a Glance*, Understanding the International Criminal Court (March 19, 2021), <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>.

Establishment of an International Criminal Court, 120 countries voted in favor and after the ratification by 66 states in 2000, the Statute came into force in 2002.

ICC is an intergovernmental body and international tribunal that headquarters at The Hague, the Netherlands, an independent organization not a part of the United Nations. ICC is the last resort for the victims of atrocity. That doesn't mean it is the substitute of the national criminal court. It intervenes when the state parties are unable or unwilling to perform an investigation and prosecute the perpetrators. The ICC's main goal is to end impunity and lead towards their prevention. The Presidency, the Registry, the Office of the Prosecutor (OTP) and the Judicial Division are the four organs of ICC. The criminal court is based on three general principles of criminal law i.e., firstly, *Nullem crimen sine lege* means an individual shall not be liable criminally, unless the act in question comprises, at the time of its occurrence, a criminal offense. Secondly, *Nulla poena sine lege* means an individual if found guilty by the court may, only in accordance with the Rome statute the punishment may be meted out. And lastly, *non-retroactivity ratione personae* mean no person shall be criminally liable for the act committed before the enforcement of the Rome Statute. But the statute excludes the individual under the age of eighteen years at the time of the alleged commission of a crime. ICC is not limited to ending impunity and punishing the convicted but also being responsible for reparation to victims when proceedings lead to a conviction of the accused. The court may direct such reparations to be paid through the Trust Fund for Victims. It embraces an exclusive system besides assisting victims and witnesses as well as the development of critical court facilities in the situation states and the expansion of welfare programs.³ In coping with the situations in the Central African Republic, Darfur, Democratic Republic of Congo, and Uganda, the judiciary has a lot of success. Despite the significant advancements, the courts also face a range of major obstacles. This involves topics such as state collaboration with courts and the protection and safety of investigators. Even though the defendant's right to process without unreasonable delay is therefore threatened by the victim's presence. There are many challenges before ICC, some of them are as follows.

1.2 AFTER ESTABLISHMENT, CHALLENGES FACED BY INTERNATIONAL CRIMINAL COURT.

³ GAOR, Rome Statute of the International Criminal Court of 1998 (amended 2010)

1.2.1 Protection for Victims and Witnesses:

The International Criminal Court which has been, in the 20th century, considered to be a necessity suddenly after its establishment, in the 21st century it starts getting criticism and face challenges. The question was raised by the oppositions on its efficiency, that it is not able to protect the victims as Article 68 (1) of Rome Statute states about the safeguard of the victims and witnesses that the court must take reasonable steps to ensure the protection of physical and mental well-being, reputation and privacy of sufferers and survivors. However, the Office of the Prosecutor (OTP) faces lots of difficulties, such as contacting potential witnesses without revealing their identity, finding a place where they can examine them safely and transporting them to safe locations without attracting publicity in extremely unpredictable and vulnerable situations in the cases of ongoing conflicts. There are many barriers to the introduction of a strong victim dimension into international criminal law.⁴

Maybe more significantly, there are fears that a considerable emphasis on victims will deprive the accused of their attention and could even negatively influence the due process and the right to a fair trial. It is already understood that the Defence Advisor appeals on the identification of certain suspects as victims. There is also a particular prosecution concern that gives victims too prominent a position, since they feel that the trial will be side-lined or even deprived by the agenda of the victims. Men and women, victims of sexual abuse, teenagers, handicapped people and elderly people may be victims. A victim can also be an individual who is harmed by a crime aimed at a person such as a family member of a killed person. For example, in Darfur OTP is not able to investigate the alleged crime by going there. They choose the difficult routes to reach the victims of atrocity and investigate the whole situation in adverse situations. The reason is due to their limited jurisdiction to investigate. During trials, problems with the protection of witnesses can arise. In the Thomas Lubango Trial, prosecution eyewitnesses were entitled to protection, they are affirmed with their pictures as well as their voice manipulated.⁵

1.2.2 Coping with Ongoing Criminal Activities:

⁴ Abdullahi Aress Mohamed, *The Role of the International Criminal Court in Enforcing Human Rights Law* (2014) (Unpublished LLM Dissertation, MOI University, School of Law).

⁵ *Id.*

State cooperation is essential for a successful witness protection relocation structure but it is not sufficient for effective protection of victims and witnesses. It has occurred that when inquiries into past crimes are underway, the persons underneath the investigation commit new crimes. It provides a need to address these offences. For example, there were claims that the LRA attacked Congolese villages in the DRC's Dingu Region on September 17, 2008. School children were kidnapped, looted, and killed in these incidents, as were people, including local chiefs. Given the repeated attacks, the Prosecuting attorney called upon the LRA head, Joseph Kony and his commanding officers to be arrested. These problems could be resolved by concentrating at the most burden bearers. For this aspect, the OTP had followed a Rome Statute-inspired strategy of concentrating its attention on the most heinous crimes and those most responsible for them. Through this strategy, the Prosecutor will maximize the effect of the available means at his disposal. Since it is unrealistic to charge all persons who have committed a violation in the Law at the international level, the OTP will only prosecute those who bear the greatest liability, leaving the rest to national courts. The Court's distance from the communities affected by international crimes is also likely to impair its political acceptability within those communities.⁶

1.2.3 The Distance Between the Court and the Investigation Situation:

The Court resides at The Hague, the Netherlands and the distance between the terrestrial areas of the Court from situations in which the Court is concerned poses significant challenges. Distance of the Court from internationally affected communities is also likely to impair their acceptance in the community. Evidence from other Humanitarian regimes suggests that the Court may resist and even react to international norms and practices if its attempts to force mandates into a heavy head-string and are not aligned with local political processes and preferences. The Court must make careful attempts to conduct successful investigations and prosecutions. The Court should make deliberate efforts to overcome these geographical limitations. The experience of ad hoc tribunals shows that international tribunals' credibility and efficacy with local communities are affected by their scope. For example, in Yugoslavia, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has been viewed as a remote and often focused tribunal without much significance to the region's reconciliation process. The ICTR has often been chastised for its distance from the sites of the crimes it adjudicates. In Rwandans' slight hearings about the ICTR,

⁶ *Id.*

the majority view the ICTR as an institution "inherently a Reign," "forfeiting any effect on Rwandan society's constraints." ⁷

1.2.4 The Difficulties of the State-International Criminal Court Cooperation:

International courts and tribunals depended heavily on state cooperation to succeed. The purpose of the ICC statute is to ensure that the criminal or heinous offences of concern to the global community as a whole is not left unpunished, that action at the state level with international cooperation enhances the effectiveness in prosecuting them. Besides that, when the court lacks an adequate enforcement mechanism, it must rely on the cooperation of state parties, non-governmental organizations (NGOs), international organizations and non-state parties to decide the cases. The assistance provided by the Rome Statute imposes on state parties a two-fold duty to cooperate with ICC under Articles 86 and 88 i.e., a general commitment to cooperate as well as an obligation to amend their domestic laws to allow cooperation with the court. As ICC lacks a force and territory to carry out its arrest warrants, this demonstrates that the court's achievement and progress are highly dependent on state cooperation.⁸ But some bodies which are presumed to cooperate with ICC questions its decision like the African Union (AU) and United Nations Security Council (UNSC) and the United States of America (USA), the fact is that the ICC has only investigated crimes and convict criminals in Africa has led to AU to claim that ICC has an anti-African bias and a colonial bent as a result of which it openly order its members not to comply with the ICC in the arrest of Sudan President Omar al-Bashir. The Rome Statute of the ICC creates a relationship between the UNSC and ICC, which raises concerns regarding political control over ICC and has intensified allegations of political biases against the African States. Instead of cooperating with ICC in investigations of Afghanistan and Palestine, USA first raise question on the legitimacy on ICC than their government to impose sanctions on ICC prosecutors Fatou Bensouda, Phakiso Mochochoko and other senior officials and warned to reject their visa if they are involved in ICC investigation or attempt to prosecute the US officials.⁹

⁷ *Id.*

⁸ Valerie Oosterveld, *The Cooperation of States with the International Criminal Court*, 25 *Fordham Int'l. Law. J.* 476 (2001).

⁹ Dire Tladi, *Complementarity and Cooperation in International Criminal Justice Assessing Initiatives to fill the Impunity Gap*, 227 *ISS* (2014).

1.2.5 The Complementary Challenge and the Capacity of Nation Building:

The ICC's authority "shall be complementary to national criminal jurisdiction", according to the Preamble and Article 1 of the Rome Statute. National courts continue to be the primary forum for mass atrocity prosecutions. Cases are only prosecutable in the ICC in special conditions specified in Article 17 of the Statute. As a result, the ICC is restricted in its ability to exercise jurisdiction without the permission of a sovereign nation that could perhaps itself exercise jurisdiction independently. Whenever a state decides to proceed, the ICC cannot try the case. As a result of the complementarity system, the ICC will only have authority if the national system of justice has failed or if a state has refused to act. The ICC doesn't at all bolster or breach the complementarity principle. In general, it claimed that under the Rome Statute's complementarity principle, there is little reason to be concerned about the weakening of national sovereignty. The ICC, though on the other hand, faces a serious risk of being inactive due to the fact that complementarity protects states from the ICC's jurisdiction. However, if a case is recommended to the ICC for investigation by the UNSC, the court's jurisdiction will be immediately ceased if the states with jurisdiction are ready and willing to begin the probe.¹⁰ These are the few challenges but they face a lot, not just these but they are also criticized on their credibility, legitimacy by the permanent members of the United Nations General Assembly even though they want it to be dissolved. The reason that is, ICC interferes and hampers the sovereignty of nations. In the span of years, it has only done four convictions as well as not concluded those cases which are prosecuted from 2005 this delay the justice to victims and justice delayed is considered as justice denied. These all show that maybe ICC has lost its purpose due to lack of force, limited jurisdiction and even being a powerless institution and independent body.

1.3 STEPS TAKEN BY INTERNATIONAL CRIMINAL COURT TO OVERCOME THE CHALLENGES IT FACED

It is not fair if we say that ICC never took any step to overcome these challenges. Difficulties are part of the journey. If it stands still, doing nothing then maybe it will be dissolved. ICC is a new institution that is in its learning stage and it might not be perfect but progressing. The theory of positive complementarity perceives the International Criminal Court (ICC) and national authorities

¹⁰ *Supra* note 3.

working together to prosecute crimes. To fight impunity, the ICC prosecutor has proposed a two-tiered approach. On the one hand, the court will pursue criminal charges against those who are most responsible for the crimes under investigation. On the other hand, where appropriate, the ICC would facilitate national trials for lower- ranking suspects. In certain cases, the use and admission of information and facts gathered by the ICC before national courts would be needed as a part of the positive complementarity administration's implementation. Uganda is a clear example of the early benefits of a successful complementary strategy. Their President Yoweri Museveni demanded that the International Criminal Court investigate and prosecute the Lord's Resistance Army for grave violations of international law in December 2003, and Chief prosecutor Moreno-Ocampo formally ordered a probe in the territory in January 2004.¹¹

Ms. Silvana Arbia, the Registrar of the ICC held a seminar on the rights of the victims and witnesses on November 24, 2010 at the court's seat in The Hague. The seminar was focused on four categories: Relocation arrangement, the mechanism of security under national jurisdiction, the process of security under international jurisdiction, and improving national capacity as well as participation handover. It was funded by the Republic of Finland. A panel moderated by a facilitator addressed each theme. The panels included protection experts from the International Criminal Court's Registry and Office of the Prosecutor, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the special Tribunal of Lebanon, as well as experts from national jurisdiction (Italy, Netherlands, United Kingdom, Northern Ireland, and Belgium etc.) The seminar's goal was to improve debates by allowing the various experts and states concerned to focus on and propose ideas as well as strategies and also to coordinate measures in the context of witnesses and victim's safety.¹²

There have been two initiatives proposed to increase complementarity to make it easier for states to exercise jurisdiction and boost international cooperation. The first is the International Law Commission's (ILC) investigation into crimes against humanity. The second is Belgium, Slovenia,

¹¹ Prevention and Complementarity in the International Criminal Court: A Positive Approach, (April 2, 2021) <https://www.corteidh.or.cr/tablas/r24177.pdf>.

¹² ICC Registrar hosted a seminar on protection of victims and witnesses (April 2, 2021) <https://www.icc-cpi.int/Pages/item.aspx?name=pr604>.

and the Netherlands' proposal for a convention on reciprocal legal aid for crimes under the Rome Statute (the BSN initiative). The core characteristic of both efforts is interstate cooperation.¹³

The ILC is a United Nations General Assembly subsidiary organ. It aims to foster international law's progressive growth and codification. Sean D Murphy, a member of the ILC, suggested that the commission research the issue of crimes against humanity during the sixty-fourth session of the commission in 2012. During the sixty-sixth session, on July 18 2014 ICL put the issue of crimes against humanity on its current work program and named Sean Murphy as the leading expert after a lengthy debate. Murphy plans for the commission to finish its work on the subject and introduce a complete collection of draught papers on first reading by the end of 2016, according to his proposed work schedule.¹⁴

In the BSN initiative the complementarity is being genuinely successful, nations must be able to collaborate realistically in delivering legal assistance and, if necessary, extradition of the offender, according to this declaration. The declaration goes on to say that an appropriate legal system is needed for this to occur, but that the existing framework does not 'address legal assistance and extradition in modern parlance and standards. The declaration refers its signatories to connect the dots by establishing a "legislative multilateral treaty on universal judicial assistance and extradition to fill such space." Extradition, mutual legal aid, taking of testimony, witness protection, searches and seizures. But, only a few of the areas are protected by the program. The BSN and ILC initiatives are valuable efforts to improve complementarity since they seek to establish mutual legal assistance instruments for serious crimes.¹⁵

In a recent decision on its jurisdiction over the alleged crime against humanity of deportation against Myanmar's government, the court affirmed its legitimacy. Pre-trial Chamber I found in that decision that the ICC has "impartial international identity" as a "legal-judicial-institutional entity" distinct from the authority bestowed on it by the states parties' acknowledgment. The court's involvement and collaboration with both states' parties and non-state parties of the International Criminal Court's authority at the most recent Assembly of States Parties highlighted

¹³ *Supra* note 7.

¹⁴ *Supra* note 7.

¹⁵ *Supra* note 7.

the crucial role the International Criminal Court would play in ensuring that victims of international crimes receive justice.¹⁶ Even if the ICC is not legitimate enough to handle the cases, the UNSC would have never transferred the case to them. This shows that even the permanent members somewhere want ICC to investigate and prosecute the perpetrators as well as end impunity.

1.4 CONCLUSION

International Criminal Court is the intergovernmental organization formed to end the impunity of the perpetrators and provide a fair trial and justice to the victims of atrocity. Therefore, contributing to the prevention of these grave crimes is a matter of great concern for the international community as a whole. In its earlier phase from its establishment in 2002, it faced many challenges mostly based on its jurisdiction and legitimacy. It took certain steps to overcome them which are not considered to be enough, it's like something is better than nothing. Following some suggestions are suggested which should be there in ICC for making it more powerful, strong and effective organization for international justice which are as follows:

1. ICC should increase its scope by adding terrorism in its elements of crimes. It punishes the individual who committed the crimes which are the most serious crimes to international concern and terrorism is one of them. If ICC successfully did that then it will draw attention of other nation which might become the member of State Party. This is one of the most important reason that ICC doesn't get support of major powers due to its limited scope. Amending the jurisdiction of ICC and including terrorism is the urgent concern.
2. ICC should get full cooperation of the States as well as non-State Parties while conducting investigation. The power should be given to ICC to examine and probe every place where ever the human right to life is violated by people in power.
3. The ICC should have tried the person who is accountable even if they are officials or head of the state but it should be without hampering the sovereignty of states which it can do before

¹⁶ In the Spotlight: The Legitimacy of the International Criminal Court (Visited on April 2, 2021)
<https://internationallaw.blog/2018/10/22/in-the-spotlight-the-ligitimacy-of-the-international-criminal-court/>.

issuing an arrest warrant it can request the states to impeached that person who is working in its official capacity and respect the decisions of the national courts of that State.

4. UNSC should fully support the ICC in the investigation and protection of victims on the top of it shall assist ICC in making its force which aid in the process of investigation as well as in collecting evidence. The national criminal courts are unable to work without the police forces and investigation bureau likewise ICC must need its forces for efficient working.
5. The ICC must ensure that each person who is accused should be tried despite his political power must be tried as an individual. The strong nations should avoid power politics, instead of national interest in these grave situations they should think about the interest of innocent lives who suffers from the atrocity and have faith in the work of ICC.
6. ICC should rather focus on punishment it may also concentrate on the protection of victims, witnesses as well as intermediaries. The International Criminal Court when investigates the situation in the Country it does it with the help of intermediaries who are employed by ICC itself who aid it in the process and it does it due to lack of resources. The intermediaries are people who knows the local language and easily access to local people without getting their attention they collect the evidences from victims and witnesses, so for the protection of these people ICC should signed the relocation agreement with the State Parties under its protection agenda, which seems to be the only way to safeguard intermediaries in the disputed countries.