

SOME REFLECTIONS ON INTERNATIONAL CRIMINAL COURT

By

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Introduction

The establishment of International Criminal Court is the culmination of more than five century old human exercise towards imparting individual criminal responsibility of national persons who had perpetrated serious international crimes starting from the war crimes of *Peter Von Hagen* bach a high official of Charles the *Tenise Bargundy Duke* in 1474 A.D., who used state terrorism in Putting the populace of Briesach to abject surrender.¹ Following this, several international conventions adopted in the period 1884 to 1936 fairly established norms of individual criminal responsibility.² The Second World War has witnessed the commission of grave crimes which shook the conscience of humanity. Millions of women and children have been victims of unimaginable atrocities: millions were killed or disabled, millions were uprooted from their homes, young women were subjected to sexual violence *etc.* During the last fifty years there have been many instances of crimes against humanity and war crimes for which no individual have been held accountable. This led to the emergence of the concept of international criminal responsibility of the perpetrators of international crimes.³

International Criminal Court – A Historical Perspective

The credit of initiating studies to explore the possibilities of establishing a permanent International Criminal Court goes to the International Law Commission, which as far back as in 1948, made an attempt in this direction. However, no such Court could be established due to prevailing political climate, saturated with national rivalries and terrors. The commission of horrifying crimes against humanity in the form of genocide, ethnic cleansing and sexual violence against women in former Yugoslavia and Rwanda prompted the UN Security Council to set up an *ad hoc* war crimes Tribunal for former Yugoslavia in 1993 at the Hague and an *ad hoc* war crimes Tribunal for RWANDA in 1994 at Arusha, Tanzania. The establishment of these Tribunals have created a positive environment for the establishment of an International Criminal Court.⁴ State practice has recognised individual as subject of international law. Nuremberg and Tokyo Tribunals have, after the Second World War holocaust, raised the benchmark of personal responsibility of individuals – irrespective of the offices they had held – for the commission of ‘crimes against Peace’, ‘war crimes’ and crimes against humanity. The jurisprudence of international criminal responsibility has also been reinforced by the Genocide Convention 1948. Recognising the principle of personal responsibility of individuals, for the commission of crimes

1. *Edordo Greppi*, “The Evolution of Individual Criminal Responsibility under International Law”, in *IRRC*, September 1999, Vol. 51, P.533.

2. *Shaw*, *International Law* (1995), P.185.

3. See *G. Arun*, “International Criminal Court : Code for Mission of Justice”, *Indian Bar Review*, Vol. 28(2&3), 2001, P.74.

4. *Theodor Meron*, “War Crimes Law Comes of Age”, 92 *AJIL* (1998) P: 463.

against humanity *etc.*, the Convention envisages that, Competent State or International Tribunal (Article VI) has jurisdiction to try and punish rulers, public officials and private individuals (Article IV), who have committed or abetted or attempted Genocide.

The Statute of International Criminal Court - An Over View:

The International Criminal Court (ICC) jurisprudence, of International Criminal responsibility has universal perspective, jurisdiction, scope and reach in the context of serious crimes of international concern.⁵

The adoption of ICC Statute on 17th July 1998 at the UN Diplomatic Conference held at Rome is an historic event in the annals of International Law.⁶ The Convention which has been signed by 139 states and ratified by 55 states as of August 2001 has the objective of putting an end to impunity for the perpetrators of serious International crimes and vindicates the states obligation to exercise its jurisdiction over persons who have committed serious international crimes defined in the Statute.⁷ The Rome Statute of ICC provides a comprehensive framework of prosecuting, Investigating, holding trial of, convicting and punishing individuals the national person not the abstract entity personified by the State or Government or any office, who has committed crimes as enumerated in Articles 5-8 of the Statute.⁸

The important provisions of the Statute of ICC are as follows:

1. The ICC will be a permanent institution, having power to exercise jurisdiction over persons accused of serious crimes affecting international community and is complementary to national criminal jurisdiction (Article 1).
2. The Court shall have jurisdiction to try disputes involving crimes of most serious nature affecting international community such as: Genocide, crimes against humanity, war crimes and Aggression (Article 5).
3. The Court will exercise jurisdiction in regard to crimes referred in Article 5. If it appears to have been committed and the matter is referred to the prosecutor by the Security Council acting under Chapter VII of the Charter of UN (Article 13).
4. The Court may not admit a case in the following circumstances:
 - i. If the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the State is unwilling or unable to genuinely carry out the investigation or prosecution.
 - ii. If the case is investigated by a State which has jurisdiction over it and the state has decided not to prosecute the person concern, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute or the person concerned has already been tried for conduct which is the subject of the complaint and a trial by the Court is not permitted under Article 20, Paragraph 3 (Article 17).

5. See Note 2 above – Crimes of Terrorism and Drug Crimes have not been included in the list as “no generally accepted definition could be formed”.

6. 120 countries voted in favour, 7 including US, China and Israel voting against and 21 including India abstaining.

7. The first proposal for a permanent ICC was made by *Gustav Moynier* in 1872; See International Review of the Red Cross, No.322 March 1998, P.72.

8. Article 1 of the Statute of ICC.

5. The statute shall apply equally to all persons without any distinctions based on official capacity. Immunities or special procedural rules which may attach to the official capacity, whether under national or international, shall not bar the Court from exercising its jurisdiction over such a person (Article 27).
6. A unique feature of the Rome statute of the ICC is that it does not provide for any reservation (Article 120).

The Statute of International Criminal Court (ICC) – An Appraisal

The International Criminal Court (ICC)⁹ can exercise its jurisdiction over persons for the most general crimes or international crimes as referred to in the Statute and shall be complementary to national criminal jurisdiction.¹⁰ The objective of determining individual criminal responsibility could be achieved with the active international co-operation of States¹¹, which are otherwise completely sovereign subjects of international law in the true sense of the term. The Statute of ICC has provided a broader sweep in defining the individual criminal responsibility and at the same time it has not effected the responsibility of States under International Law.¹² The individual criminal responsibility has been further crystallized by the Statute of ICC in Article 27, which renders the official capacity of the criminal irrelevant. No exception has been accorded to military Commanders.

Though the establishment of ICC is a laudable effort and a step forward in tackling the growing incidents of individual criminal acts, disturbing the world peace and security, there are several issues to which the Court has yet to address effectively to make it a real and meaningful body.

The mechanism envisaged in the statute of International Criminal Court to trigger the jurisdiction of the Court, inevitably raises several issues which need to be resolved effectively. For instance, where crimes such as genocide, crimes against humanity, or war crimes covered by the Statute have been committed, they raise several questions of far-reaching importance, such as, when would the Court have jurisdiction to try persons alleged to be responsible for these crimes? Who has the *locus standi* to invoke the jurisdiction of the Court? Should Security Council be authorised to exclusively invoke the jurisdiction of the Court? Should the General Assembly of the United Nations have *locus standi* to trigger the jurisdiction of the Court? Should States also have *locus standi* to invoke the jurisdiction of the Court? Should inter-governmental organisations and the non-governmental organisations (NGO's) also have the *locus standi* to invoke the jurisdiction of the Court? Should individuals be empowered to trigger the jurisdiction of the Court? All these issues are to be addressed more specifically and effectively.

The jurisprudence of the ICC is yet to materially emerge by incorporating the current development of Human Rights and Humanitarian laws in substantial measure. The ICC has to assimilate Human Rights standards, peace and security of mankind that remain the major concern of UN could be the basis of international criminal law evolution.¹⁴ The effectiveness of the ICC

9. See Article 17 of the Rome Statute of ICC : If ICC shall admit a case, if the state is unwilling or unable generally to carry out the investigation and prosecution.

10. See Rome Statute of ICC : Part I provides for comprehensive International co-operation in the matter of arrest/surrender of persons collection/presentation of evidence and eventual forfeiture of properties.

11. See Article 25(4) of the Statute of ICC.

12. See Article 27(1) of the State of ICC.

13. See Article 13 of the Statute of ICC.

14. N. Sanajoba, "ICC and Individual Criminal Responsibility in 21st Century", paper presented at the International Conference on 'International Law in the New Millennium : Problems and Challenges Ahead', Souvenir, Vol.II, 4-7 October, 2001, P.660.

system would depend on such function including the level of international ways. The historical role that the ICC could play in all regions of the world is significant. The relevance of the ICC in the 21st century is no longer disputable.

Yet another important question that surfaces in the working of the Court is the political viability and legal possibility of inherent powers of the Court to try an individual criminal independently of any consent from States concerned. Picking up a Criminal from a State can never be an automatic process. It obviously requires other procedures of legal assistance and co-operation of the State concerned. To be viable, the International Criminal Court needs to be complimentary to national judicial system and must be resorted to only when national judicial system fails. Only when the International Criminal Court becomes complimentary to national Courts and does not act as a supranational Court, the International Criminal Court will become more acceptable.

As per the terms of statute, the legal capacity to refer a case situation to International Criminal Court is endowed upon Security Council. This obviously enhances further the powers of the Permanent Members by enabling them to decide to refer a situation to International Criminal Court where it is called for and not referring a situation when it really is needed. Such undemocratic linkage between international criminal Court and the Security Council renders international criminal Court only a surrogate to dominant political processes and

the existing inequalities. The power of the Security Council to refer any matter to the international criminal Court or withdrawn any matter to the international criminal Court is a clear manifestation of the perpetuation of inequalities.

Further, the present scope of the jurisdiction of the International Criminal Court covers only the classical crimes like genocide, war crimes and crimes against humanity. It does not include contemporary crimes such as International terrorism or drug trafficking. The proposal of India to include these two crimes was not accepted though, however, the final act of resolution mentioned that this proposal should be considered subsequently. Another glaring omission in the Statute of the Court is the failure to include the use of Nuclear weapons within the definition of a crime under the Statute.

International Criminal Law is focussed at bringing the perpetrators of international crimes to justice and also to bring justice to the victims. This goal would be accomplished only if the individuals, inter-governmental and non-governmental organisations have the power to ignite the jurisdiction of the International Criminal Court. Its institutional importance lies in denying impunity to those responsible for serious violations of international humanitarian law, in fostering real deterrence of major violations and in providing an effective criminal jurisdiction when state prosecutorial or judicial systems fail to investigate and prosecute in conformity with standards stated in the Statute.