

INTERNATIONAL CRIMINAL COURT: AN INSTITUTION OF GLOBAL CONSENSUS

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The enormity of brutalities and atrocities committed on the multitude of innocent people by the perpetrators of war crimes and crimes against humanity during the Second World War impelled the international community to establish tribunals to bring the criminals to book. But the cold war and its attendant disturbing political situations dampened the enthusiasm for the same though the urge for punishing the enemies of humanity was very strong. The movement revived after the end of the cold war. Still, the proposal to establish an international court was plagued with daunting problems from the very start. Conflicts were to be resolved. Diverse views were to be reconciled. Differences in opinion and disparities in approaches were to be accommodated. The institution was to be independent, credible and acceptable. Still, notwithstanding the fulminations, the efforts culminated in the adoption of the Rome Statute on July 17, 1998 rejuvenating the spirit of freedom and justice in the minds of the victims.

The International Criminal Court is now fraught with many problems. Firstly, its jurisdiction is saddled with several questions. At present the court can initiate action on its own. It can initiate action on request of a state. It may assume jurisdiction over crimes committed on the territory of state parties regardless of the nationality of the offender. It can assume jurisdiction on reference by the Security Council.¹ Article 12 also perceives the possibility of a non-state party accepting the jurisdiction of the court for a particular cause on an *ad hoc* basis. However, the objection raised with reference to the erosion of sovereignty of member states cannot be lightly brushed aside. The Statute which created the ICC is a special treaty and hence amenable to Laws of Treaty. Article 34 of the Vienna Convention on the Law of Treaties categorically states: "a treaty does not create either obligations or rights for a third state without its consent". This provision clearly declares the inviolability of individual states sovereignty. The provision in the statute on ICC conferring the power on the Security Council to refer the case to the court may thus run counter to this principle enshrined in Article 34 of Vienna Treaty.

It is however to be noted that the power given to the Security Council to refer a crime to the Prosecutor under Chapter VII of the U.N. Charter could be justified on the ground that it is under an obligation to

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¹ Art. 13 lays down thus: The Court may exercise its jurisdiction with respect to a crime referred to in art. 5 in accordance with the provisions of this Statute if : (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 art. 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 art. 15.

promote and protect human rights.² Art. 16 of the Rome Statute may be seen in juxtaposition with Art. 11 of the UN Charter.

Art. 16 of Rome Statute lays down:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Art. 11 of UN Charter states:

1. The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.

Moreover the Genocide Convention 1948 also invests powers with the Security Council to take action against genocide - a crime against humanity.

In fact the Statute reflects the conflicts confronted by the international community with regard to the questions on sovereignty and independence of individual nations. It signifies the spirit of accommodation inasmuch as it excludes the jurisdiction of ICC if the domestic machinery is adequate to book the criminals. The principle of complementarity is thus rightly incorporated in the Statute. It requires that: "State's own courts get the first bite at the apple".³ In other words, it is only when the domestic system shows its inability or unwillingness to prosecute that the ICC may initiate prosecution.⁴ It is on satisfaction of the above condition that the investigation mechanism of ICC is triggered.

The jurisdiction of the ICC is further constricted by a process of limitation of the meaning of crimes.

² Art. 16 of the Rome Statute may be seen in juxtaposition with Art. 11 of the UN Charter. Art. 16 of Rome Statute lays down: No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions. Art. 11 of UN Charter states: 1. The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both. 2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Art. 35, paragraph 2, and, except as provided in Art. 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion. 3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security. 4. The powers of the General Assembly set forth in this Art.s shall not limit the general scope of Art. 10.

³ William A. Schabas, *An Introduction to the International Criminal Court* (2nd ed.) New York, Cambridge University Press 68 (2004).

⁴ Art.17 of Rome Statute

Now by a broad consensus ICC would investigate and bring to justice individuals,⁵ not countries, who commit the most serious crimes which are abhorrent to the international community as a whole and they are⁶: -

- (1) genocide,
- (2) crimes against humanity,
- (3) war crimes,
- (4) aggression.

The heinous nature of these crimes and their tendency to be on the increase make it necessary for the human race to fight them. There are other heinous crimes also, however, the political overtones they do have in our society make it difficult for the international community to include them in the list.⁷ According to critics, this again makes the establishment of international criminal court in the present form in vain.

The message emerging from the establishment of ICC seems to be that the international community does not want the criminals against humanity to go scot-free. If the individual nations are ready to take action against the criminals on their own in their respective jurisdictions it is well and good. If not, they may have to be willing to agree for international institutions to serve the purpose. Though the statute as it now stands may help the latter to object to the establishment of such an institution, that objection may not hold water for long inasmuch as international instruments such as the UN Charter, Genocide Conventions etc might help the supporters of ICC to argue that the UN has the required mandate.

In future, states opposed to ICC may try to exclude its jurisdiction on other pleas like complementarity. It is felt that nations with developed legal systems like India could, with an amount of success, take this line of argument. A comparison between the working of both the systems would support this claim. For example the offence of rape might be examined. According to Article 7(1)g(1) of ICC Statute which deals with crime against humanity *viz.* rape, the elements constituting this crime are elaborated thus :

1. The perpetrator invaded⁸ the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.⁹
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

⁵ According to Art. 25 of the Statute the jurisdiction is limited only to natural persons and Art. 26 excludes jurisdiction over persons under eighteen.

⁶ Art. 5 of the Rome Statute.

⁷ Such crimes are referred as "treaty crimes" because they have been proscribed in variety of multilateral conventions dealing with these issues.

⁸ The concept of 'invasion' is intended to be broad enough to be gender-neutral.

⁹ It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.

4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

A perusal of S375 IPC and the case law thereon will indicate that it compares well with what is spelt out above making it possible for India to claim complementarity.

A comparison of Article 31 dealing with grounds for excluding criminal responsibility and Chapter IV dealing with general exceptions under IPC will leave no one in doubt that the criminal system which has been evolved and is working in the courts is highly developed as a just system. The element of *mens rea* and *actus reus* in Article 30 could be found relevant for the Indian law as well.

As per the Rome Statute, the prosecutor cannot only investigate allegations of applicable crimes upon referral from the UN Security Council or state parties but also upon information from victim, non-governmental organization or any other reliable source. This aspect is lauded by human right activists since it empowers the victim or survivors to initiate action. In this connection it may be worthwhile to look at the practice of the Indian Supreme Court. Its human rights record is exceptional. It has not allowed itself to be bound by moribund concepts and practices in affording protection to the victims of human rights violations. It has already developed what is called 'epistolary jurisdiction' under which letters are taken up and treated as petitions.

In short, countries like India could avoid ICC for sometime. But it may still be relevant in the coming years. The institution of International Criminal Court in the present form represents the culmination of the imaginative efforts of the framers of the Statute to create a hybrid of the continental and common law systems of trial. The predominance of the prosecutor in the matter of collection of evidence, initiation or dropping of investigation, entering into agreement with parties for obtaining documentary evidence etc. remind one of the all powerful prosecutor of the inquisitorial system. However, the rules of procedure despite the continental overtones in certain respects seem to reflect the liberal approach of the common law system.

Yet larger issues like sovereignty, self-determination, independence of nations etc. have to be reconciled.¹⁰ The sovereignty conscious states are not comfortable with the reach of ICC. They fear serious implications for national sovereignty, individual rights and security. Their worry is that subjecting themselves to ICC jurisdiction may not be conducive to peacekeeping and coalition operations. It may be dragged into frivolous and vexatious litigations, which would seriously hamper peace initiatives. US has had to make agreements like "Article 98(2) Bilateral Immunity Agreement" in order to escape the reach of ICC.

It cannot be denied that concepts of sovereignty, self-determination, independence etc. are the values, which sustain international cooperation. They are the very ideals on which international organizations exist. But there has to be balancing of these ideas if one has to have any machinery to safeguard common interests of humanity. This has to be done in a spirit of accommodation inspired by the desire to protect human species from total annihilation. Establishment of the ICC in the teeth of opposition and its continued existence signifies the human urge for justice. Even the higher ideals of sovereignty and self-determination cannot withstand the human urge ignited by a desire for peace. World peace may be a reality only through collective measures. ICC, therefore, has come to stay. It is for the ICC to justify its existence by good work. It would have its sway so long as the humans are driven by the desire of survival on this planet.

¹⁰ For example, a perusal of Security Council Resolution 1540 gives a feeling that the Security Council is taking on legislative authority, which threatens the very sovereignty of states.