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International Criminal Court: Challenges and Problems

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Abstract:
The International Criminal Court was established by the Rome Statute which was adopted on 17th July, 1998 and entered into force on 1st July, 2002 as at 1st July, 2005, 99 States had ratified or acceded to the Statute. The Court is an independent, permanent judicial institution with jurisdiction over persons for the most serious crimes of international concern, namely, genocide, crimes against humanity and war crimes. The Statute recognizes that States have the primary responsibility for investigating and punishing these crimes. The Court is complementary to the efforts of States to investigate and prosecute international crimes. It may only exercise, its jurisdiction over cases where national systems do not conduct proceedings or where they are unwilling or genuinely unable to carry out such proceedings. By helping to ensure that the perpetrators of genocide, crimes against humanity, war crimes and aggression do not go unpunished, the Court is intended to contribute to the prevention of these serious international crimes. The International Criminal Court is intended to contribute to efforts to restore and maintain international peace and security and guarantee lasting respect for and enforcement of international justice. However, the Court cannot succeed alone. The work of the Court is a common endeavour, dependent on the support and cooperation of all States parties, as well as other States, international organizations and civil society. The ICC is not an international Court endowed with a super national competence in the strict sense of the word. The extent of voluntary renouncement of a portion of domestic jurisdiction on the part of the sovereign States involved and the slow process of auto-limitation on the part of concerned sovereign States of their own power will continue to remain as challenges to the International Criminal Court.

1. Introduction

The creation of the International Criminal Court is potential step towards a more just society, in giving real substance to the concept of ending impunity for worst crimes against mankind. International crimes may be referred to those crimes which are recognized by international community on account of the consideration that their prevention is essential for the protection of fundamental interests of the international community. It means that whether a crime is an international crime or not is decided by the States themselves after taking into account its nature and its relationship with the fundamental interests of the international community. The incidents of international crimes are required to be prevented as they disrupt or jeopardize the normal course of international relationship and threaten international peace and security.

A crime is an act punishable by law and law lays down certain rules and their violation is made punishable. International law also lays down certain rules and their infringement is a crime. In national systems such crimes are determined by Courts and the accused persons on proof of their crimes are punished. International law has also laid down certain rules, e.g. The Hague Rules for the conduct of war. These rules were violated with impunity during the First and Second World Wars. The Permanent Court of International Justice (PCIJ) was the first regular international judicial organ established in1921 and it was succeeded by the present International Court of Justice (ICJ) in 1946. But these Courts have no jurisdiction to try international crimes. In 1948 another crime, the crime of genocide, was created by the Genocide Convention. Thus, genocide also became an international crime. A number of conventions and treaties have since then created international crimes, but there was no Court to try the violation of such laws.

The Rome Treaty, ultimately, established a forum known as the International Criminal Court (ICC) in 1998. The Rome Statute was adopted on 17th July, 1998 and entered into force on 1st July, 2002 which was ratified or acceded to by 66 States.[1] The Court is an independent permanent judicial institution with jurisdiction over persons or States for the most serious crimes of international concern, namely: genocide, crimes against humanity, war crimes and aggression. There is some evidence that the existence of the Court has already added a new element to negotiations and initiatives in the pursuit of peace. Those who were present at the signing of the Rome

[1] Hans Peter Kaul, "The International Criminal Court: Current Challenges and Perspectives," Washington University Global Studies Law Review, Vol. 6 at 575.

Statute feel a particular sense of pride as the Court begins its work.[2] The Statute recognizes that States have the primary responsibility for investigating and punishing international crimes. The Court is complementary to the efforts of States to investigate and prosecute such crimes. International Criminal Court may only exercise its jurisdiction over cases where national systems do not conduct proceedings or where they are unwilling or genuinely unable to carry out such proceedings. By helping to ensure that the perpetrators of genocide, crimes against humanity, war crimes and aggression do not go unpunished, the Court is intended to contribute to the prevention of these serious international crimes. The International Criminal Court is intended to contribute to efforts to restore and maintain international peace and security and guarantee lasting respect for and the enforcement of international justice. The present paper attempts to focus on challenges and problems before International Criminal Court during the administration of criminal justice.

2. Origin of International Criminal Court

Traditionally, international law did not pay much attention to international crimes as individuals were treated as the objects of international law rather than its subjects. Neither rights nor duties were attributed to them by the rules of international law with the exception of 'piracy' which was indeed a recognized crime. Persons committing piracy could be given punishment by all States irrespective of their nationality. However, in modern international law, it has been a major concern of the international community to prevent the increasing incidence and seriousness of the series of crimes which have been taking place in many parts of the world. Individuals have been entrusted with a number of duties, the breach of which may held them responsible. The act for which an individual is responsible may also be attributed to a State where individual acted as an 'agent of the State' or 'on behalf of the State' or 'in the name of the State' or in a simple de facto relationship.[3] Thus, individuals as well as States may be responsible for the international crimes.

During the time of the League of Nations, only a few crimes such as slavery, counterfeiting, narcotic drugs, came to be recognized as international crimes by concluding multilateral treaties. The United Nations has taken a leading role in the field of crime prevention and the formulation of standards and norms of criminal justice, in line with the Charter's provisions laid down under Article 1 Para 3, that it should seek international cooperation in solving international problems of an economic, social, cultural or humanitarian nature. A series of crimes presently have been recognized under international law are:[4] genocide, piracy on the high seas, aircraft hijacking and the unlawful acts against the safety of civil aviation, traffic in women, children, narcotic drugs, counterfeiting currency, kidnapping of diplomatic personnel and other offices, taking of hostages, apartheid, slave trade, psychotropic substances, crimes in time of war.

Individuals committing the international crimes are prosecuted by the States where they are found or where the crime has been committed if extradited. In both the cases prosecution is carried on according to the national laws of the States. The system of the application of national laws by the domestic Courts to the offenders appears to be unsatisfactory for a number of reasons. The system may lead to different treatment to the offenders belonging to different States. Further, domestic judges may also be not impartial when the vital interests of their country are at stake especially when the offender belongs to a hostile or enemy State.

The lack of any permanent criminal Court led States to establish adhoc tribunals from time to time to prosecute offenders. After the Second World War, two International Military Tribunals were established at Nuremberg and Tokyo for the trial and punishment of war criminals from Germany and Japan respectively. The two War Crimes Tribunals though may have certain lacunae; they represented a watershed in the process towards an effective criminal law regime.[5] The most important contribution of these trials was shaking the foundation of State sovereignty as a shield against crimes in international law. Piercing the veil of State-entity, the Nuremberg Tribunal observed: "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."[6] Thus, the International Military Tribunal at Nuremberg was the first instance in modern international law where individuals were made accountable for international crimes. This principle of accountability of individuals evolved by the Tribunal was endorsed by the General Assembly of the United Nations in 1946.

The Security Council further set up two International Tribunals, one in the year 1993 for the prosecution of the persons responsible for serious violations of international humanitarian law in the territory of former Yugoslavia,[7] and other in 1994, for the prosecution of those persons who have responsible for serious violations of international humanitarian law and genocide in Rawanda and Rawandian citizens responsible for genocide in neighbouring States,[8] by deriving its authority from Chapter VII of the UN Charter. However, the system for the creation of the adhoc Criminal Tribunals suffers from a number of defects. It is not only time consuming, difficulties also arise as to the competence, appointment of the judges and prosecutors and as to the seat. It is to be noted that International Court of Justice does not have competence to decide the cases of individuals. Article 34 Para 1 lays down that 'only States may be parties in

2 O'Brien Patricia, "The International Criminal Court Ten Years after the Rome Statute – Successes Achieved and Challenges Ahead," Address in the Plenary II organized by the International Society for the Reform of Criminal Law, Dublin at 1-5 (12 July, 2008).

3 H.O. Agarwal, International Law and Human Rights, at 738 (2013).

4 Ibid.

5 Mc Cormack, "From Sun Tzu to the Sixth Committee: The Evolution of an International Law Regime," in Timothy Mc Cormack and Gerry J. Simpson (eds.), The Law of War Crimes – National and International Appraoches (1977) quoted in 23 Mel. UL Rev. at 635 (1999).

6 American Journal of International Law (AJIL), Vol. 41 at 221.

7 Security Council Resolution, 808 (1993), February 22, 1993.

8 Security Council Resolution, 955 (1994), November 8, 1994.

cases before the Court'. It is, therefore, desirable to establish a permanent International Criminal Court to administer criminal justice which would not be limited in its mandate to specific crimes or to a particular criminal.

The effort to the direction of creation of the International Court was made by the Committee of Jurists which drafted the Statute of Permanent Court of International Justice in 1920 and recommended for the establishment of an International Criminal Court to try crimes against 'international public order' and 'the universal law of nations' with power to define these crimes and the penalties therefore. Later, the League of Nations drafted a Convention for the establishment of International Criminal Court consists of five judges and five deputies of different nationalities to be elected by the Permanent Court of International Justice (PCIJ). Since the Convention did not come into force for want of ratification, the attempt to establish the Court could not materialized. The United Nations also felt the need of an International Criminal Court and made efforts in this direction in 1951 when a committee was established to examine the probability of creating a Criminal Chamber of the International Court of Justice (ICJ). It, however, did not succeed. Again in 1953, another proposal was made to establish an independent International Criminal Court, but this also did not materialize.

The General Assembly after a long period i.e. on December 4, 1989 requested the International Law Commission to address the question of establishing an International Criminal Court.[9] Consequently, the Commission started the consideration of the question of establishing an International Criminal Court in 1990. The General Assembly in 1992 and again in 1993 requested the Commission to elaborate the Draft Statute for such a Court as a matter of priority.[10] In 1994 the International Law Commission adopted a Draft Statute for International Criminal Court (ICC) and recommended to the General Assembly the convening of an International Conference of Plenipotentiaries to study the Draft and to conclude a convention for the establishment of an International Criminal Court. The General Assembly, however, preferred to get the Draft Statute reviewed by an adhoc committee.[11] This Committee presented its report in September 1995. Then, the General Assembly decided to establish a Preparatory Committee on December, 1995, to discuss the major substantive and administrative issues arising out of the Draft Statute.[12] The Committee met in 1996 and in 1997 wherein it continued to prepare a widely acceptable consolidated text of a convention for such a Court.[13] Ultimately, a Diplomatic Conference convened in Rome adopted the Statute of the ICC on 17th July, 1998, after significant compromises and opposition by many States including India and the United States.

The Draft Statute of the International Criminal Court was to come into force after requisite ratification by 60 States under Article 126 of the Statute. After 66 ratifications by the States, the Statute has come into force from 1st July, 2002. Thus, the origin of the ICC is the culmination of four adhoc International Criminal Tribunals – the Nuremberg International Military Tribunal, the Tokyo International Military Tribunal, the Yugoslavia International Criminal Tribunal (YICT) and the Rawanda International Criminal Tribunal (RICT). The first two tribunals were established by the agreements of Allied Powers of the Second World War and later two were the creation of the UN Security Council exercising its authority under Chapter VII of the UN Charter. The International Criminal Court (ICC) has been established as a permanent institution and having the "power to exercise its jurisdiction over persons for the most serious crimes of International concern." This Court is 'complementary to national criminal jurisdiction'.[14] The Court has been established at the Hague in Netherlands.[15] The International Criminal Court may exercise its functions and powers on the territory of every State party and by special agreement on the territory of any other State.[16]

3. Rome Statute – Provisions

The adoption of the Rome Statute of the International Criminal Court (ICC) is reaffirmation of humanity's hope that the perpetrators of serious crimes must not go unpunished and through national level measures and international cooperation the effective prosecution of such perpetrators must be ensured. However, the greatest challenges lie in respect of the provisions relating to jurisdiction, admissibility and applicable law. The text of the Rome Statute finally adopted dispensed with the requirement of consent by the State of the nationality of the accused supported by a few States including the USA as a key condition for the Court's Jurisdiction. As a result of Article 12 of the Statute the Court may exercise its jurisdiction with respect to the crimes listed in the Statutes over nationals of a nonparty State or over crimes committed on the territory of a non-party even in' the absence of that States consent. This created a lot of controversy and a continuing challenge and the major States opposing the Statute like the USA, India and China rejected the Statute on the very first day of its adoption on the ground of the inconsistency of the Article 12 of the Rome Statute with Article 34 of the Vienna Convention on the law of treaties.

The jurisdiction exercised by the Court is mainly of the following nature: (i) Ration material i.e. Subject matter jurisdiction which refers to the crimes which the Court may prosecute: genocide, crime against humanity, war crimes and crime of aggression. (2) Ration temporis i.e. Temporal jurisdiction according to which the Court, being a prospective institution, cannot exercise jurisdiction aver crimes committed prior to the entry into force of the Rome Statute and (3) Ration personae i.e. Personal jurisdiction, the Court will have jurisdiction over nationals of a State party who are accused of a crime [as per Article 12 (2) (b)] and the Court can also prosecute

9 General Assembly Resolution 44/39, December 4, 1989.
10 General Assembly Resolution 47/33, November 25, 1992 and 48/31, December 9, 1983.
11 General Assembly Resolution 49/53, December 9, 1994.
12 General Assembly Resolution 50/46, December 11, 1995.
13 General Assembly Resolution 52/160, December 5, 1997.
14 Article 1, The Statute of International Criminal Court.
15 Ibid., Article 3.
16 Ibid., Article 4 (2).

national of non-party States that accept its jurisdiction on an adhoc basis by virtue of a declaration or pursuant to a decision of the Security Council.

The important challenge lies in the fact that the jurisdiction of the ICC is limited to the most serious crimes of concern to the international community as a whole: the crime of genocide, crime against humanity, war crimes and the crime of aggression.

As per Art. 6 of the Rome Statute genocide is any one of the number of acts aimed at the destruction of all or part of the certain groups of people. It is this intent that distinguishes and makes it difficult to prove genocide from other crimes against humanity. As per Article 7 of the Statute crime against humanity are distinguished from the ordinary crimes in three ways. Firstly, the acts constituting said crime such as murder, must have been committed as part of a widespread or systematic attack. Secondly, they must be knowingly directed against a civilian population and thirdly, they must have been committed pursuant to a State or organizational policy. Further as per Article 8 of Rome Statute war crimes are the crimes committed during armed conflict including acts such as torture, sexual violence, pillage, employing poisonous weapons and intentionally starving civilians. One can easily appreciate by imagining and through the experience on the recent past events proving or bringing evidence against such crimes.

Further Article 12, Paragraph 1 provides that a State which becomes a party to the Statute accepts the jurisdiction of the Court with respect to the crimes referred to in Article- this requires no additional declaration. But the efficacy of this provision comes under the challenges of the principle of complimentarity, the primacy of national jurisdiction, the rules of admissibility and the possibility of opting out for war crimes under Article 124. In other cases a challenge arises because the consent of the territorial State or the State of nationality of the accused which is not a party to the Statute is required for the exercise of jurisdiction by the Court. The Court may exercise its jurisdiction if one or more of the following State parties to this Statute have accepted the jurisdiction of the Court in accordance with Paragraph 3 of Article 12: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft: (b) The State of which the person accused of the crime is a national.

Thus these are some of the conditions or challenges under which the ICC has to work. However such regime of the alternative concern of the State of nationality of a accused or the territorial State is not applicable when a situation is referred to the Prosecutor by the Security Council acting under Chapter VII of the UN Charter.

Principle of Complementarity: A further challenges to the Court's jurisdiction comes from the principle of complementarity. Article 17 which deals with the issues of admissibility provide sufficient hints as to when the jurisdiction will not be exercised by the ICC under the principle of complimentarity. The jurisdiction of the ICC is limited to cases where national jurisdiction is unable to try perpetrators of crimes or when States are unwilling to do so.[17] The Rome Statute enumerates the criteria for determining the 'unwillingness' or 'inability' of the national jurisdiction to investigate or prosecute the perpetrators of crimes:

1. The proceedings were or being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility.
2. There has been an unjustified delay in proceedings which in circumstances is inconsistent with intent to bring the person concerned to justice.
3. The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which is inconsistent with intent to bring the person concerned to justice.

As regards the determination of 'inability', judges will need to consider whether due to total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings. Thus, the Rome Statute does not give any priority of jurisdiction to the ICC as against the national Courts where the matter referred to it meets the exceptions under Article 17.

Now the question arises, when the jurisdiction can be exercised by the ICC. As per article 13 of the Statute, the jurisdiction of the ICC can be generally exercised by State. Any State party which may refer to the Prosecutor situation in which one or more crimes within the jurisdiction of the ICC appear to have been committed. Further, power of referral may be exercised by the Security Council acting under Chapter VII of the UN Charter.

Since UN Security Council's responsibility for the maintenance of international peace and security is 'primary' and not exclusive, it is submitted that the power of referral could also have been given to the other organs of the United Nations which have competence under the charter to deal with these questions e.g. United Nation General Assembly. The provision relating to the deferral (after a Security Council resolution) of investigation or prosecution by the ICC is a challenge to the jurisdiction and smooth functioning of the ICC. Further, although the crime of aggression is included in the Statute, the ICC will only be able to exercise jurisdiction over it once a definition of aggression is adopted by a Review Conference. Article 15 recognizes the *proprio motu* power of the Prosecutor to refer a situation to the Court, but at the same time subject this exercise of power to the judicial scrutiny of Pre-Trial Chamber comprising of three judges. Article 124 of Rome Statute deals with Inherent Jurisdiction of the Court and states that on becoming party to the Statute, a State may declare that for a period of seven years after the entry into the force of this Statute for the State concerned, it doesn't accept the jurisdiction of the Court with respect to the category of war crimes referred to in Article 8 when a crime is alleged to have been committed by its national or on its territory. But a declaration under this provision by a State may be withdrawn at any time by the concerned State. In regard to admissibility of the case, under the Statute the ICC must satisfy as per Article 19 (1) that it has

[17] History / past experience reveals that some governments may be unwilling to call their own citizens to accountability due to various reasons. This may be either due to policy reasons or lack of the necessary legal system or law to comply or collapse of national institutions or lack of political will or unwillingness to turn over individuals who hold high positions of political or military authority

jurisdiction in any case brought before it. Article 17 enumerates four categories of inadmissible case: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned; (c) The person concerned has already been tried for conduct which is subject matter of the complaint, and a trial by the Court is not permitted under Article 20, Paragraph 3, (d) The case is not of sufficient gravity to justify further action by the Court.

An interested party not acting at the stage of investigation may challenge the admissibility of the case and / or jurisdiction of the Court prior to or at the commencement of a trial. Challenges to the admissibility of a case or challenges to the jurisdiction of the Court may be made by an accused or a person for whom a warrant of arrest or summons to appear have been issued or by a State which has jurisdiction in the case on the grounds that it is investigated or prosecuting the case or has investigated or prosecuted or by a State from which acceptance of jurisdiction is required.

Thus the provisions of the Rome Statute reflect a delicate balance between supporters of an effective in International Criminal Court and the necessary respect for the principle of State sovereignty. Aforementioned preconditions for the principle of complementarity, rules of admissibility and the possibility of opting out of ICC to such an extent that it will only be able to exercise jurisdiction over a minority of cases. It is also difficult to conceive how Article 12 creates obligation for non-party States because the Statute in no way imposes any obligations on such States to cooperate with the ICC in its investigation and prosecution of crimes within the jurisdiction of the Court Article 121 & 123 of the Statutes make provisions for amendments on the subject matter of jurisdiction and the nature of jurisdiction at a review conference, which can be called seven years after the Statute coming into force.

4. Challenges and Problems

The International Criminal Court is not an international Court endowed with a super national competence in the strict sense of the word. The extent and voluntary relinquishment of a portion of domestic jurisdiction on the part of the sovereign States involved and the slow process of auto-limitation on the part of concerned sovereign States of their own power will continue to remain as challenges to the ICC. As Court is facing many challenges in the pursuit of its mandate but continues to make progress. The Court has opened investigations in four situations i.e. Uganda, the Democratic Republic of Congo (DRC), the Central African Republic and Darfur – and has issued arrest warrants in respect of each of these. Developments in each of these situations have posed difficulties as the Court establishes its working methods, and as States and other institutions adjust to the new reality of a permanent International Criminal Court. Nevertheless, the Court, its States parties and other supporters are facing a number of challenges. Among these, the most critical is ensuring that the Court has the cooperation and support it needs, in particular, in relation to arrest and surrender. The Court has no means of executing the warrants it issues. This is a duty the States have taken upon themselves when becoming parties to the Rome Statute. The Court will continue to do its part to act fairly, impartially and independently.

The Court is dependent on the support and co-operation of States to ensure its credibility and effective functioning.[18] This encompasses financial and logistical assistance, the arrest and surrender of suspects and the protection of victims and witnesses. Considerable progress has been made in developing a permanent basis for constructive working relationships with two partners, the United Nations and European Union. The Court has entered into co-operation and assistance agreements with both organizations. Having agreed procedures and points of contact in place will help to achieve the best possible cooperation, and should provide an exemplary mode for States in their own dealings with the Court.[19] Thus, a major limitation is the fact that the Court is entirely dependent on effective criminal cooperation, on the support of State parties. As the Court generally have no executive powers and no police force of its own, it is totally dependent on full, effective and timely co-operation from States parties.

A very grave limitation on the factual side is the enormous difficulty of carrying out investigation and collecting evidence regarding mass crimes committed in regions which are thousands of kilometers away from Court, of difficult access, unstable and unsafe. Carrying out investigations in Uganda, the Democratic Republic of the Congo (DRC) the Central African Republic or with regard to Darfur entails logistical and technical difficulties, unprecedented problems which no other Prosecutor or Court is faced with. Another given reality is the notorious scarcity of financial and other resources available for investigation and other work of the Court.[20] The problem of ICC is also appeared in the enforceability of arrest warrant against the national of any State. In regard to Uganda, warrants of arrest concerning five members of the Lords Resistants' Army (LRA) were unsealed in October, 2005. The fact that the arrest warrants are not executed and that the five suspects are not yet in the custody of the ICC highlights the critical dependency of the ICC on effective cooperation. However, in regard to Democratic Republic of Congo, the transfer to the Hague of one suspect, Thomas Lubanga Dylio, is significant.[21] At the same time, it is obvious that there continue to be various problems and obstacles for the ICC. Indeed, even today the ICC is still an imperfect construction site for more justice.

The Courts' very first trial was intended to be that of the DRC militial leader, Thomas Lobanga. However, it was suffered a significant setback when the trial has been stayed on the basis that the Prosecutor made incorrect use of Article 54(3)(e) of the Rome Statute. The said Article allows the Prosecutor to receive information on confidential matters, which cannot be used as evidence during trial but

[18] Hans Peter Kaul, "Construction Site for More Justice: The International Criminal Court after Two Years," American Journal of International Law (AJIL), Vol. 99, April 2005 at 1-30.

[19] Ibid.

[20] Hans Peter Kaul, "The International Criminal Court: Current Challenges and Perspectives," Washington University Global Studies Law Review, Vol. 6 at 575.

[21] Supra note 18 at 3.

can be used as 'spring board' to generate new evidence. The Prosecutor in such circumstances was not always aware, prior to receive to materials, whether their potential use was solely for the purpose of generating new evidence or other purposes; and had taken the view that items received under their confidentiality agreements could later be used as evidence at trial. This approach failed to take due account of the Prosecutor's obligations of disclosure under Article 67 of the Rome Statute. The Trial Chamber ruled on 13th June that Prosecutor had failed to observe the restrictions of Article 54(3)(e), having used confidential agreements generally gather information unconnected with its lead potential. This has resulted in exculpatory evidence being in the possession of the Prosecutor, which cannot be revealed to the defendant as due process demands because of the confidentiality agreements many of which were made with UN agencies. A 'compromise' was suggested by the UN to allow the Judges to merely see, but not to record, the documents concerned. They could then compare relevant documents with narrative summaries of the evidence provided by the Prosecutor, which could be released to the defendant. The ICC Judges considered this proposal, to be an inadequate solution, summaries of the evidence being unacceptable substitutes for the disclosure of the evidence itself.[22]

The release of Lubanga as a result of the stay was ordered by the Trial Chamber, though this decision will not be implemented pending any appeals of both the substantive decision and the order for release. Continuing efforts are being made by the Court and the UN to resolve the issue of access to the disputed in a manner that respects the requirements of due process. The stay on the Lubanga trial may have adversely affected how the Court is perceived, offering new ammunition to its opponents. However, the Trial Chamber's ruling legitimizes the ICC in the long term by demonstrating that war crimes suspects can expect to receive a fair trial, with the full guarantees of due process, in the Hague. The presence of the ICC on the international landscape has once again highlighted the difficulties in balancing considerations of peace and justice. While no one would dispute that justice contributes, fundamentally, to the creation of lasting peace, tensions may occur between the pursuit of international justice and peace building initiatives on the ground.

The victim-oriented provisions within the Rome Statute[23] of the International Criminal Court (ICC) could be considered as a monumental achievement toward the realization of the goal of justice for victims of crime. The Rome Statute not only gives victims an opportunity to participate in criminal proceedings and recognizes their rights[24] but also provides for award of some form of separation for their sufferings.[25] The Statute also provides for the establishment of the Trust Fund for Victims[26] which has been hailed as a great innovation in the international criminal justice delivery system. The idea behind the establishment of this bold and innovative institution is to provide victims with help and compensation to enable them to rebuild lives often shattered by war. Although the Trust Fund was established in 2002,[27] it is active in field operations for the last four years. Despite its many activities and programmes for the benefit of victims of the crimes within the jurisdiction of the International Criminal Court, it still faces numerous challenges in its efforts to provide rehabilitation and assistance to such persons and their families. Given the significance with which the Rome Statute treats the Trust Fund for victims the issue of reparations and the role of Trust Fund were discussed as part of the stock-taking exercise at the ICC Review Conference held in Kampala in June 2010.[28]

The Trust Fund's activities have gone well with victim groups whose numbers have been benefited from them. According to these victim groups the Fund's activities have created 'hope, trust, confidence and a sense of belonging by the victims'.[29] But all this is bound to create an enormous challenge of managing the rising expectation of victims who hope to benefit from future reparations and the Fund's general assistance activities. But as the number of potential beneficiaries is very large and human resource at the disposal of the Trust Fund Limited, it remains to be seen how the Trust Fund overcomes the financial and other constraints.

The International Criminal Court does not have prison facilities of its own and have to rely on the co-operation of States parties. The ICC has also rely on their co-operation for the relocation and protection of witnesses. The readiness of States to open their prisons to prisoners sentenced by the ICC and their willingness to provide sanctuary to witnesses will be crucial to the success of the Court.[30]

As foreseen and planned by its founders, the Court is characterized by the structural weakness that it does not have the competencies and means to enforce its own decisions. It seems realistic to assume that 'Realpolitik' and State interest will continue, in the future, to be important obstacles to the effectiveness of the ICC. In the apparently eternal struggle between brute force and the rule of law, further disappointments and setbacks seem possible. Complementarity of jurisdiction entails that judicial proceedings before the ICC are only permissible if and when States which normally would have jurisdiction are either unwilling or genuinely unable to exercised their jurisdiction. The Rome Statute recognizes the primacy of national prosecutions, thereby, reaffirms State sovereignty.

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22 O'Brien Patricia, "The International Criminal Court Ten Years after the Rome Statute – Successes Achieved and Challenges Ahead," Address in the Plenary II organized by the International Society for the Reform of Criminal Law, Dublin at 1-5 (12 July, 2008).

23 Article 68 (Protection of the victims and witnesses and their participation in the proceedings), Article 75 (Reparations to victims), Article 79 (Trust Fund), For the Text of the Rome Statute, see Selected Basic Documents related to the International Criminal Court, ICC Publication, The Hague (2010).

24 Article 68, ICC Statute.

25 Article 75, ICC Statute.

26 Article 79, ICC Statute.

27 Establishment of a Fund for the Benefit of Victims of Crimes within the Jurisdiction of the Court, and of the families of such victims. For the Text see, Selected Basic Documents, Note 10, at 397. (9th September, 2002).

28 For further information on the topic, visit http://www.coalitionfortheicc.org.

29 See Discussion Paper, Note 107, Para 26.

30 Sivuyile Maqungo, "Trial and Error: Challenges Facing the International Criminal Court," African Security Review, Vol. 12, No. 3 at 130.

5. Concluding Observations

The establishment of the International Criminal Court was a historic development in efforts to hold accountable perpetrators of the most serious international crimes and to deter such crimes. The Court is making substantial progress in developing its capacity and exercising its core functions. The Rome Statute of the International Criminal Court has fostered the idea of the protection of victims of crimes and witnesses, their participation in the trial proceedings and their entitlement to get physical rehabilitation, psychological assistance and material support. The Trust Fund, which happens to be an integral part of the Court, is designed to provide assistance and rehabilitation to the most vulnerable victims of the crimes within the jurisdiction of the International Criminal Court and implement Court ordered separations awards arising from individual cases before the ICC.

As due to legal and other reasons the International Criminal Court prosecutes and tries only a limited number of perpetrators of crimes within its jurisdiction, its limited efforts towards the realization of the right to separations and rehabilitation of victims of such crimes need to be complemented by the similar efforts of the State parties to the Rome Statute. Considering that the ultimate object of the Rome Statute is to encourage States to strengthen their criminal justice system to bring the perpetrators of war crimes, crime against humanity and genocide to justice it would be prudent for States which for policy consideration do not accept the ICC regime, to do the needful. They should also move ahead further to put in place not only protective measures to victims and witnesses at serious risks, participating victims who are not witness and others who assist the Court but also a comprehensive compensatory and rehabilitative schemes for the benefit of victims of crimes.

Thus, to overcome major challenges and problems, it may be suggested that the ICC must continue to consolidate its ongoing development into an efficient and professional international organization and, at the same time into a functioning and credible International Court. It also remains essential that the ICC continues to show, through the way it conducts all its activities, that it is purely judicial, objective, neutral and non-political institution.

1. The Prosecutor and his office as the driving force of the ICC bear a special responsibility. The office of the Prosecutor is the engine, professional and effective investigations are the fuel for the entire Court. The Rome Statute and ICC Rules of Procedure and Evidence set up the legal framework for the work of the Office of the Prosecutor. The Prosecutor and his office are called upon to use this legal framework for, firstly, the sustained build-up of an organization which is as efficacious as possible, and secondly, the continued development of professional and efficient working methods, with clear goals and priorities, in particular with regard to investigations.
2. It is obvious that the Court cannot be successful without active and steadfast support from States parties, not only in word but also, more importantly, in concrete deed. States parties must draw appropriate conclusions from the well known fact that the Court has no executive powers, no police, no armed forces or other executive mechanisms. Consequently, States parties and the Court must in a foreseeable future develop a new system of best practices of effective criminal cooperation which should be direct, flexible, without unnecessary bureaucracy, with a fast flow of information and supportive measures.
3. The International Criminal Court must, as all Courts do, resolve difficult questions of interpretation and application of the law. The Statute and other relevant documents leave much for the Judges to decide.
4. The Court must overcome difficulties arising from the fact that it operates in situations of ongoing conflict. These difficulties relate to investigating alleged crimes and to ensuring the safety of witnesses and victims.
5. The ICC and the States parties must come into terms with the limits of the Court's capacity. It must be remembered that the main responsibility for prosecuting and sentencing war criminals remains with national Courts as long as they are able and willing to do so, effectively.
6. In keeping with the complementarity principle,[31] the States parties should discharge their overriding obligations to prosecute core crimes wherever possible, so as to minimize the burden on the ICC. Prosecution of criminal acts can be undertaken most effectively at the national level. To this end, the States parties, like Germany in 2002, should reform their national criminal justice systems to satisfy the material requirements of the Rome Statute.

To sum up, in all regions of the world, the States parties should take full advantage of the opportunities to promote the universal character of the ICC and to bring about a substantial increase in the number of States joining the Court. Further, carefully coordinated diplomatic and political initiatives are necessary, as is continued cooperation with non-governmental organizations. As far as possible, the Court should itself exhaust its possibilities to achieve universal acceptance.[32] On the whole, the establishment of the ICC has made a good start. At the same time, encouraging progress in nearly all areas cannot disguise the Court's unfinished character that the ICC is still a kind of 'construction site for more justice', both literally and figuratively. More efforts are necessary across the board, not only by the new institution and its staff, but also by all the States parties that established the Court. The ICC is not an international Court endowed with a super national competence in the strict sense of the word. The extent and speed of the voluntary relinquishment of a portion of domestic jurisdiction on the part of the sovereign States involved and the slow process of auto limitation on the part of concerned sovereign States of their own power will continue to remain as challenges to the International Criminal Court.

[31] Article 17, ICC Statute.

[32] Supra note 18 at 7.

6. References

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2. O'Brien Patricia, "The International Criminal Court Ten Years after the Rome Statute – Successes Achieved and Challenges Ahead," Address in the Plenary II organized by the International Society for the Reform of Criminal Law, Dublin at 1-5 (12 July, 2008).
3. H.O. Agarwal, International Law and Human Rights, at 738 (2013).
4. Ibid.
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6. American Journal of International Law (AJIL), Vol. 41 at 221.
7. Security Council Resolution, 808 (1993), February 22, 1993.
8. Security Council Resolution, 955 (1994), November 8, 1994.
9. General Assembly Resolution 44/39, December 4, 1989.
10. General Assembly Resolution 47/33, November 25, 1992 and 48/31, December 9, 1983.
11. General Assembly Resolution 49/53, December 9, 1994.
12. General Assembly Resolution 50/46, December 11, 1995.
13. General Assembly Resolution 52/160, December 5, 1997.
14. Article 1, The Statute of International Criminal Court.
15. Ibid., Article 3.
16. Ibid., Article 4 (2).
17. History / past experience reveals that some governments may be unwilling to call their own citizens to accountability due to various reasons. This may be either due to policy reasons or lack of the necessary legal system or law to comply or collapse of national institutions or lack of political will or unwillingness to turn over individuals who hold high positions of political or military authority
18. Hans Peter Kaul, "Construction Site for More Justice: The International Criminal Court after Two Years," American Journal of International Law (AJIL), Vol. 99, April 2005 at 1-30.
19. Ibid.
20. Hans Peter Kaul, "The International Criminal Court: Current Challenges and Perspectives," Washington University Global Studies Law Review, Vol. 6 at 575.
21. Supra note 18 at 3.
22. O'Brien Patricia, "The International Criminal Court Ten Years after the Rome Statute – Successes Achieved and Challenges Ahead," Address in the Plenary II organized by the International Society for the Reform of Criminal Law, Dublin at 1-5 (12 July, 2008).
23. Article 68 (Protection of the victims and witnesses and their participation in the proceedings), Article 75 (Reparations to victims), Article 79 (Trust Fund), For the Text of the Rome Statute, see Selected Basic Documents related to the International Criminal Court, ICC Publication, The Hague (2010).
24. Article 68, ICC Statute.
25. Article 75, ICC Statute.
26. Article 79, ICC Statute.
27. Establishment of a Fund for the Benefit of Victims of Crimes within the Jurisdiction of the Court, and of the families of such victims. For the Text see, Selected Basic Documents, Note 10, at 397. (9th September, 2002).
28. For further information on the topic, visit http://www.coalitionfortheicc.org.
29. See Discussion Paper, Note 107, Para 26.
30. Sivuyile Maqungo, "Trial and Error: Challenges Facing the International Criminal Court," African Security Review, Vol. 12, No. 3 at 130.
31. Article 17, ICC Statute.
32. Supra note 18 at 7.