

Department of Political Science

University of Lucknow

E-Content

The following lecture pertains to M.A. - Semester IV: Paper IV (a)- "*Contemporary Issues in International Law*", Unit IV. It is hoped that the interested students would benefit from this e-content.

International Criminal Court

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The present e-content on the International Criminal Court seeks to discuss, in brief, the need for establishing the ICC, its aims and objectives, and the process how it came into being.

One of the primary objectives of the United Nations is securing universal respect for human rights and fundamental freedoms of individuals throughout the world. The UN considers that the fight against impunity and the struggle for peace, justice and human rights in conflict situations in today's world are perhaps more important than any other issue. To that end, the establishment of a permanent International Criminal Court (ICC) is seen as a landmark event in the modern history of international human rights law and humanitarian law. The international community met in Rome, Italy, from 15 June to 17 July 1998 to finalize a draft statute that popularly came to be called as the 'Rome Statute' on the foundations of which the first permanent International Criminal Court was established.

Though the Court was established just a decade back, it has been 50 years since the United Nations first recognized the need to establish an international criminal court, to prosecute crimes such as genocide. In 1948, following the Nuremberg and Tokyo tribunals after the Second World War, the United Nations General Assembly first recognized the need for a permanent international court to deal with the kind of atrocities that had recently taken place. In resolution 260 of 9 December 1948, the General Assembly, "Recognizing that at all periods of history genocide has inflicted

great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required", adopted the Convention on the Prevention and Punishment of the Crime of Genocide. Article I of that convention characterizes genocide as "a crime under international law", and article VI provides that persons charged with genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction . . ." In the same resolution, the General Assembly also invited the International Law Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide . . ."

After having considerably deliberated that a permanent International Criminal Court was both necessary to punish culprits accused of gross human violations, as well as, to deter the prospective perpetrators of such a crimes, the General Assembly constituted a committee to prepare a draft for the proposed International Criminal Court. The Committee prepared the draft in 1951 and subsequently submitted its proposals. But owing to failure among its members in arriving at a definition of aggression, the proposal was put on hold and remained ignored for a long time.

The demand for a world criminal court once again gained momentum when during the 1970s, there were many instances of crimes against humanity and war crimes for which no individuals were held accountable. For instance, around 2 million people were massacred in Cambodia by the Khymer Rouge. Wide spread killings of unarmed civilians, including women and children, took place in many African countries, such as, El Salvador, Libera, Mozambique and in several other countries. Immense destruction of human lives and property were witnessed in African countries of Greater Lakes and Algeria.

Consequent upon widespread killings, massacres, tortures occurring in many parts of the world, there were renewed calls for a criminal court that could effectively put to an end the impunity of the dictators by holding them accountable for the rights' violations, as well as, to rescue the hapless population from their clutches.

The process was once again set into motion following the lead taken by Trinidad and Tobago in requesting the United Nations to make a move in this direction. The General Assembly instructed the International Law Commission to prepare a draft afresh which must also include drug trafficking in its ambit.

The eruption of bloody conflict in 1993 in the former Yugoslavia served as catalyst to the resumption of the task of the International Criminal Court. Genocide and massacres were once again witnessed in the garb of ethnic cleansing and this significantly drew the attention of the international community. To bring the tormentors to justice and protect the surviving victims, the Security Council established the Ad-hoc International Criminal Tribunal for the former Yugoslavia. The International Law Commission speedily got down to its work and in a short span of time, completed its work and submitted a draft proposal to the General Assembly in 1994.

In order to discuss the substantive issues of the draft proposal, an Ad Hoc Committee on the Establishment of an International Criminal Court was constituted which twice held its meetings in 1995. The General Assembly, after having scrutinized the report of the adhoc Committee, it set another committee, namely, the Preparatory Committee on the Establishment of an International Criminal Court. Its task was to prepare a widely acceptable draft on the ICC could addressing the principal issues and concerns. The draft so prepared was to be submitted to a diplomatic conference. The Preparatory Committee worked from 1996 to 1998, completing its work in April 1998.

The General Assembly, thereafter, at its 52nd session, decided to convene the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The Conference held in Rome, from 15th June to 17th July, 1998, resolved "to finalize and adopt a convention on the establishment of an international criminal court". The conference, attended by 120 member-states of the United Nations, adopted a treaty to establish a permanent international criminal court. This was a historic treaty as, for the first time, a permanent international criminal court was established. This treaty entered into force on 1 July 2002, sixty days after sixty States became parties to the Statute through ratification or accession.

The absence of an international criminal court had long been felt. It was considered as the missing link in the international legal system. Although there is another world court—the 'International Court of Justice' (ICJ or World Court) at The Hague, it is a civil tribunal that hears disputes between countries, not individuals. Without an international criminal court for dealing with individual responsibility as an enforcement mechanism, acts of genocide and egregious violations of human rights generally went unpunished. But now with the establishment of the ICC as a criminal tribunal, it will prosecute individuals. The two ad hoc war crimes tribunals for the former Yugoslavia and Rwanda are similar to the ICC but have limited geographical scope while the ICC will be global in its reach. The ICC, as a permanent court, will also avoid the delay and start-up costs of creating country specific tribunals from scratch each time the need arises.

The Court is mandated to try egregious violators of human rights involved in such heinous crimes as, genocide, war crimes, crimes against humanity and the crime of aggression. However, crimes committed prior to 1st July, 2002 (the day the Rome Statute came into effect), would not form the subject of investigation by the ICC.

The Court is based on the principle that the use of force must be curtailed as much as possible, both in international and internal relations; and that whenever individuals resort to violence that is contrary to some fundamental legal standards of the world community, they must be held to account.

It is worth emphasizing that the International Criminal Court is more advanced than the European and the Inter-American human rights courts. Unlike those two courts, which are regional in character, the ICC is universal (or at least potentially universal); in addition, it breaks the veil of State personality, in that it reaches directly to individuals, either as perpetrators, victims or witnesses. Furthermore, the Statute of the ICC has swept aside all the traditional immunities (both national and international, personal and functional) that were intended to shield State officials from outside scrutiny and prosecution. It marks the demise of the notion of command responsibility (whereby the supreme military or civilian authorities of a State may be held criminally liable for crimes perpetrated by their subordinates, if they failed to prevent or repress those crimes). The

guilty officials would henceforth be openly subject to the most direct and penetrating international exposure by being put on trial under the ICC. It is indeed this innovative step that has scared so many States and made them unwilling to ratify the court's statute.

Another significant and novel feature of the Court is that it was conceived as an instrument for harmonizing national and international criminal justice. This is the first time that an international criminal tribunal has been constructed in this way although existing international courts of human rights are subsidiary to national courts. It is true that the prosecution and punishment of serious offences against human dignity are still entrusted to the national or the territorial State, the establishment of the International Criminal Court provides that when territorial and national mechanisms fail to secure justice, it is the international community as a whole that must act - through a central judicial body, the ICC. The Court is not a substitute for active and efficient national criminal courts. On the contrary, it is intended to constitute a powerful incentive to national courts to institute proceedings against alleged criminals. The ICC only steps in when those national courts prove unwilling or unable to act.

The role and position assigned to victims under the Rome Statute is another important innovation of the ICC. Victims of crimes will be able to participate in the proceedings before the Court through legal representatives, and to seek reparation. In addition, a Trust Fund for victims has been established. The ICC, thus, marks a significant step towards the realization of a new vision of the world community. It shows that economic self-interest, nationalism and the unilateral formulation of one's own interests - or of one's own way of interpreting and promoting compliance with international standards - are no longer the defining characteristics of international dealings in the world community.

Though an unprecedented organization, the International Criminal Court has suffered vehement opposition from several countries, the principal one being the United States. China, India and Russia. Many Arab and Asian countries have neither signed nor ratified the treaty. At the Rome Conference, China, Iraq, Israel, Libya, Qatar, the USA

and Yemen voted against the establishment of the ICC. China, Iraq and the USA were opposed to a supranational body having the authority to prosecute their citizens. The differences at Rome remain unresolved and the fundamental positions of most countries, especially the USA, unchanged.

In sharp contrast, the European Union as a bloc has perhaps been the strongest proponent of the ICC. Its member states played a crucial role in ensuring that the final outcome of the Rome Conference was an effective and credible court. It has injected a considerable amount of financial resources into supporting the establishment of the ICC. In June 2001, the Council of the European Union adopted a Common Position on the ICC. The document bound each member state to ratify the Rome Statute which led to a relatively swift ratification by member states and this consequently contributed to its early entry into force.

The ICC has a long way to go before it reaches its goal. The success of this new international institution will depend on the support and cooperation of other institutions and, most significantly, of States themselves, the very entities it is destined on occasion to supplant.
