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The International Criminal Court and the Principle of Due Process

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ABSTRACT

The author's objective is to examine the extent to which the ICC respects Due Process, the rule of law, rights of suspects and victim's reparations. The rights of an accused are linked to the right to a fair trial under International Human Rights Law and International Humanitarian Law and the enforcement of this right at the national, regional and international levels. The minimum guarantees exposed in this human right are discussed in the light of the process of arrest and surrender of persons to the Court. Questions discussed include: what effect does the infringement of these rights have on the arrest and surrender of a person to the Court and on the trial of the accused persons a whole and whether there are circumstances surrounding violations of the rights of the accused that would be so grave as to call for his or her acquittal, or mitigated sentence?

*The author tries to establish the fact that the ICC in its judicial organization and functioning to a greater extent respects the principle of due process. This can be viewed from its triggering mechanisms, temporal, territorial, subject matter and personal jurisdiction. The respect of due process by the ICC can also be viewed from its admissibility assessment which is mainly about the principle of complementarity. This article examines the principle of due process *vis a vis* the ICC. It also discusses the creation of the ICC and It's of the opinion that except for some loopholes, the International Criminal Court which is the only permanent international court established to investigate, prosecute and try individuals accused of committing the most serious crimes of international concern to a greater extent respects the important principle of due process. This article also exposes the fact that the International Criminal court has led to tremendous development in International criminal law.*

I. INTRODUCTION

The International Criminal Court (ICC) is the only permanent international court established to handle individual responsibility of the most serious crimes of concern to the international community as a whole. These crimes include; genocide, war crimes, crimes against humanity

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and aggression. The court investigates and where warranted tries individuals charged with the gravest crimes of concern to the international community. The court is participating in a global fight to end impunity of these crimes. The treaty establishing the International Criminal Court was adopted in Rome on 17 July 1998 when 120 States adopted the Statute of the International Criminal Court following a five-week long Diplomatic Conference of Plenipotentiaries⁴. It is called the Rome Statute of the International Criminal Court, 2002 (hereinafter referred to as the ICC Statute). The Court has jurisdiction over the most serious crimes of concern to the international community namely: genocide, crimes against humanity, war crimes and the crime of aggression⁵

However, the ICC's jurisdiction over the above crimes became effective after 1 July 2002 when the Rome Treaty entered into force upon the deposit of the sixtieth instrument of ratification. One of the most critical developments under the Rome Statute is that no one has immunity from prosecution including heads of State or Government, members of Parliaments, governments, commanders and superiors of military or civilian forces⁶. The International Court of Justice, the principal judicial organ of the United Nations, was designed to deal primarily with disputes between States. It has no jurisdiction over matters involving individual criminal responsibility. The principle *nullum crimen sine lege* is applicable here⁷. Another consequence of this principle is that only those penalties that had already been established for the offence at the time when it was committed can be imposed⁸. The principle *nullum crimen sine lege* is an important aspect of the principle of due process. The principle of due process which is a very important vis a vis the rule of law is being respected by the International Criminal Court. The author's aim is to expose the fact that the organigram and functioning of the ICC to a greater extent respects due process. The author's analysis is based mainly on the functioning, legal procedure and on the organization of the ICC.

II. HISTORICAL BACKGROUND OF THE INTERNATIONAL CRIMINAL COURT

The Treaty of Versailles of 28 June 1919, in its articles 228 and 229, Established the right of the Allied Powers to try and punish individuals responsible for "violations of the laws and

⁴ Cakmak and Cenap "A brief history of International Criminal Law and the International Criminal Court" Oxford University Press August 2017. P30

⁵ Articles 5, 6, and 7, ICC Statute.

⁶ Article 28, Rome Statute

⁷The maxim states that there can be no crime committed, and no punishment meted out, without a violation of penal law as it existed at the time of its drafting.

⁸This maxim finds expression in the Charter of the United Nations in Article 34 (1), which states that "*Only States may be parties in cases before the Court,*" and in Article 22 (1) of the ICC Statute that; "*A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.*"

customs of war.” The German government therefore had the duty to hand over all persons accused, in order to permit them to be brought before an allied military tribunal. Article 227 indicted those guilty of “international morality and the sanctity of treaties.” The Allied Powers agreed to establish a special tribunal composed of judges appointed by the United States, Great Britain, France, Italy and Japan to try the accused. In its decision, the tribunal will be guided by the highest motives of international policy, with a view of vindicating the solemn obligations of international undertakings and the validity of international morality⁹. The provisions of this article anticipated the category of “crimes against peace.” After the Second World War, Brownlie (1989.16) observes that a movement started up within the international community which clearly began to shape a deeper consciousness of the need to prosecute serious violations of the laws of war, with regard both to the traditional responsibility of states, and to the personal responsibility of individuals. The horrible crimes committed by the Nazis and the Japanese led to a quick conclusion of agreements among Allied Powers and to the subsequent establishment of the Nuremburg and Tokyo International Military Tribunals “for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities”. This provision is stated in Article 1 of the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, of 8 August 1945.

However, in 1948 the United Nations first recognized the need to establish an international criminal court to prosecute crimes such as genocide¹⁰. The question of the establishment of an international criminal court has been considered periodically. In December 1989, in response to a request by, Trinidad and Tobago, the General Assembly asked the International Law Commission to resume work on an international criminal court with jurisdiction to include drug trafficking. Then, in 1993, the conflict in the former Yugoslavia erupted, and war crimes, crimes against humanity and genocide in the guise of "ethnic cleansing" once again commanded international attention. In an effort to bring an end to this widespread human suffering, the UN Security Council, under resolution 827 of 25 May 1993, established the ad hoc International Criminal Tribunal for the Former Yugoslavia (ICTY), with jurisdiction for the “prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.” Later, in 1994, following the Rwandan genocide, which was a slaughter of an estimated 800.000 Tutsis by Hutus, the UN Security

⁹Kaul Han Peter “History of the ICC” Oxford University Press 4th December 2012 Pp 3

¹⁰Jenifer K. Elsea CRS Report RL31437, “International criminal court: overview and selected legal issues” January 2016 P17

Council, under resolution 955 of 8 November 1994, intervened and created the International Criminal Tribunal for Rwanda (ICTR) for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states, between 1 January 1994 and 31 December 1994. Finally, at its fifty-second session, the General Assembly decided to convene the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, which subsequently held in Rome, Italy, from 15 June to 17 July 1998, to finalize and adopt a convention on the establishment of an international criminal court. One of the primary objectives of the United Nations is securing universal respect for human rights and fundamental freedoms of individuals throughout the world.

III. AN OVERVIEW AND DEFINITION OF THE PRINCIPLE OF DUE PROCESS

Due process is the principle that no one can be deprived of life, liberty and property without fair legal procedure and safeguards. Basically, due process rights put restrictions on the government in order to protect rights of citizens. The principle is not against the government taking away life, liberty or property; the government can take away either of the three but not without fair legal process. It puts restrictions on the government in order to protect citizen's rights. The principle of due process came from the Magna Carta. The Magna Carta states "no free man shall be seized or imprisoned or stripped off his rights or possession or outlawed or exiled or deprived of his rights in any other way except by the lawful judgment of the courts or by the law of the land". Meaning the government cannot do any of the above stated by the Magna Carta without due legal procedure. Due process is found in the 5th and 14th amendment of the U.S constitution. Due process balances the law of the land and protection of the individual person. If the government deprives one of liberty, property or life without fair legal procedure, it constitutes a due process violation which therefore offends the rule of law. Due process can simply be described as law prescribed in harmony with the general powers of the legislature. Due process protects all citizens whether aliens without regard to any differences of race, religion, colour or nationality. This includes the rights to carry out an activity, lawful occupation, calling, expression for as long as it is not against the law. The principle of due process is against any kind of abuse and arbitrariness. It prevents undue encroachment against life, liberty and property of individuals. It secures the individual from the arbitrary exercise of power of the government, unrestrained by the established principle of private rights and distributive justice.

However, the two components of due process include; substantive and procedural due process. Substantive due process allows the court to protect certain fundamental rights from government interference. Substantive due process demarcates the line between the acts that courts hold to be subject to government regulation or legislation and the acts that courts place beyond the reach of governmental interference. It requires the intrinsic validity of the law in interfering with the rights of the person to his life, liberty or property. It serves as a restriction on the government's law and rule-making powers. For example, the publication of laws is a part of substantive due process; it is a rule that before a person may be bound by law, he must be officially and specifically informed of its content. Another example of substantive due process can be viewed in an employee's right not to be dismissed without just or authorized cause as provided by the law.

Procedural due process refers to the regular methods of procedure to be observed before an individual's life, liberty or property can be taken away. It simply means the procedure to be observed must be fair. It is a guarantee to obtain a fair trial in a court of justice according to the mode of proceedings in a particular case (an example of procedural due process is the principle of presumption of innocence). The fundamental elements of procedural due process include; notice, opportunity to be heard and the court or tribunal must have jurisdiction. In all, substantive due process refers to what shall be done while procedural due process concerns how it should be done.

The author's objective is to establish the fact that the ICC in its judicial organization and functioning to a greater extent respects the principle of due process. This can be viewed from its triggering mechanisms, temporal, territorial, subject matter and personal jurisdiction. The respect of due process by the ICC can also be viewed from its admissibility assessment which is mainly about the principle of complementarity.

IV. THE ICC VIS A VIS THE PRINCIPLE OF DUE PROCESS

The ICC to a greater extent respects the principle of due process through its institutions and functioning even though there exist some few obstructions such as the absence of an enforcement mechanism. The ICC is composed of four primary organs; the presidency, the judicial divisions and the office of the prosecutor¹¹. The assembly of state parties serves as the courts management, oversight and legislative body so therefore it's not an organ of the court. The assembly of state parties establishes the budget, elect's judges and prosecutors, amends laws and procedure and conducts other activities consistent with the Rome statute. Also separate

¹¹ Rosania Virginto aba-icc.org about the structure of the ICC (International Criminal Court Project) February 2019

from the court is the Trust Fund for Victims¹², which was created by the assembly of state parties to provide assistance and support to victims of Rome Statute crimes and their families and to help implement court-ordered reparations. The Trust Fund for Victim seeks to promote restorative justice, reconciliation and sustainable peace by attempting to address the direct harms of atrocity crimes.

Due process is aligned to the rights of the accused to fair trial; the Rome Statute includes provisions guaranteeing the rights of the accused as recognized by the international community under major human rights instruments, humanitarian, and/or customary international law. Article 67 of the Rome Statute enunciates the following rights of the accused as a part of the minimum guarantees: the right to be tried without undue delay to be present at trial; to conduct a defense and to counsel assigned and paid for by the Court; to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her; to have the assistance of an interpreter; and not to be compelled to testify or confess to guilt. Article 67 of the Rome Statute contains other guarantees to an accused, which one would not find in the standard international human rights treaties such as the right to remain silent ‘without such silence being a consideration in the determination of guilt or innocence,’ the right ‘to make an unsworn oral or written statement in his or her defense and the right ‘not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.’ Additionally, the Rome Statute provides for the right of the accused to a fair and public hearing; to be protected from more than one trial on the same charges and not to be found guilty of conduct which, at the time it took place, was not a crime within the court's jurisdiction. The Rome Statute is unequivocal on ensuring that the rights of an accused are upheld.

At the investigative stage, the Rome Statute has placed certain mechanisms to ensure that the integrity of the process is maintained. In this respect, Article 54 (1) (c) obliges the Prosecutor in the conduct of investigations ‘to fully respect the rights of persons arising under this Statute.’ Article 55 substantiates further on the rights of persons during an investigation¹³. These provisions are distinct in the field of international criminal law in that the Rome Statute codifying the rights that are available to individuals who may be the subject of pre-trial proceedings before the Court.

¹² Article 79 of the Rome Statute

¹³ Stapleton S, ‘Ensuring a Fair Trial in the International Criminal Court: Statutory interpretation and the impermissibility of derogation’ (1999) 31 *New York University Journal of International Law and Politics*, P535 and 592

However, the ICC Prosecutor must first determine whether the alleged crimes satisfy fundamental jurisdictional requirements of the Rome Statute, specifically temporal, territorial, subject matter, and personal jurisdiction. Temporal jurisdiction simply means the ICC can exercise jurisdiction over crimes committed after July 1, 2002 (the date that the Rome Statute went into force). If the alleged crimes occurred prior to this date, the case cannot move forward to the ICC. Territorial jurisdiction means the ICC can only exercise jurisdiction in the territory of State Parties, non-State Parties that consent to jurisdiction, or non-State Parties that are referred to the Court by the UN Security Council (Triggering mechanisms). If the alleged crimes occurred on a State that does not meet these requirements, the case cannot move forward at the ICC. Subject matter jurisdiction states an alleged crime must be either a war crime, a crime against humanity, or genocide, as defined in the Rome Statute. If the alleged crime does not fall within one of these definitions, the case cannot move forward at the ICC. Personal jurisdiction means the ICC can only investigate and prosecute “natural persons” who are over the age of 18. The ICC cannot investigate or prosecute governments, corporations, political parties, or rebel movements, but may investigate individuals who are members of groups. Also, the ICC can only exercise jurisdiction over nationals from a state within the Court’s jurisdiction (e.g., State Party; non-State Party that consents to jurisdiction or was referred by the UN Security Council). However, even when the temporal, territorial, subject matter, and personal jurisdictional requirements are satisfied, the Rome Statute limits the types of cases that “admissible” at the ICC. The ICC Prosecutor must determine whether another court (domestic) is properly investigating and prosecuting the alleged crimes¹⁴ and whether the alleged crimes are the gravest of crimes (this concept is called “gravity”). The principle of “complementarity” means the ICC “complements” other courts that have jurisdiction over the alleged crimes. The principle of complementarity can be viewed in the Kenyan case concerning Uhuru Kenyatha¹⁵. This principle makes the ICC a “court of last resort”. The ICC Prosecutor must determine if another court is “genuinely able and willing” to investigate and potentially prosecute the case, or already has. If another court is properly investigating or prosecuting the alleged crimes, the case cannot move forward to the ICC.

Moreover, the alleged crimes must be the gravest of atrocity crimes. The ICC Prosecutor determines gravity by looking at the scale, nature, manner, and impact of the alleged crimes. Sudanese rebels Abdallah Banda, Abakaer Nourain and Saleh Mohammed Jerbo Jamus were

¹⁴ This concept is called “complementarity” article 17 of the Rome Statute.

¹⁵ The Prosecutor V. Mauthaura, Kenyatha and Ali ICC-01/09-02/11-274

charged by the ICC with the killing of twelve (12) African Union peacekeepers in 2007¹⁶. Despite the relatively small number of deaths, the Court found that the crime was an attack on the millions of civilians the peacekeepers were sent to protect and, therefore, met the gravity threshold. Even when the jurisdictional and admissibility requirements are met, the ICC Prosecutor has the discretion to determine whether moving a case forward at the ICC serves the “interests of justice.” The Prosecutor may decide not to move forward with an investigation or prosecution if she decides that there are substantial reasons to believe that this is not in the interests of justice. The Pre-Trial Chamber has to review this decision and even the *proprio motu* powers of the prosecutor so as not to give the later wide powers.

The ICC is the central actor in international Criminal Law and the ICC pursues its legal and philosophical legacy of its predecessors. It was established following intense negotiations and the ICC has jurisdiction over the crime of aggression. Aggression is a severe violation of the use of force against another state. The ICC had jurisdiction over the crime of aggression immediately after the ratification of the Kampala agreement. Concerning the institutional design of the ICC, just like the ICTY and ICTR, the ICC has universal aspirations. It is not only permanent, but it is also meant to be a court for the entire international community. Given its global potential, states wanted to keep the ICC under their control in negotiations in Rome. The institutional design of the ICC being treaty based has more features of a consensual system. The ICC is not *ipso facto* binding on all UN member states in principle, only on those states which have become a party to the statute. Some of the principles on which the court functions are territoriality and active nationality principle per article 12 of the Rome statute. According to those principles, the court can only prosecute crimes committed on a territory of a state that is a party to the Rome statute, crimes committed by a national of a state party and only the United Nation Security Council (UNSC) can extend the jurisdiction of the ICC beyond art 12.

As concerns trigger mechanisms, the question is how situations can be brought before the ICC (art 13 of the Rome statute). These three mechanisms include; state referral, UN Security Council referral, *proprio motu* action of the ICC prosecutor. The most traditional is the state referral mechanism (art 13(1)). The trigger mechanism of state referral was applied in a very creative manner as the ICC prosecutor in a way encouraged states to refer their own situations which can also be called self-referrals. The aspect of self-referral can be viewed in the case of Democratic Republic of Congo (DRC), Central African Republic, Uganda and Mali. The second trigger mechanism the UNSC referral (art 13(3)) which comes into play when the

¹⁶ The prosecutor V. Abdallah Banda, Abakaer Nouram and Jebro Jamus. ICC-CPI-20110316-PR641 (Dafur Sudan)

Security Council refers situations to the ICC. One important fundamental feature of the ICC which represents its consensual base is the principle of complementarity. The ICC is a compliment to domestic institutions and does not intend to replace it. Complementarity is thus a way to organize concurrent jurisdiction between the ICC and thus other criminal courts (domestic criminal courts). In this respect, states have the primary responsibility to investigate and prosecute international crimes. The idea of complementarity is laid down in art 17 of the Rome statute and as the ICC explains in the Katanga appeals decision of the 25th September 2009 para 98, it involves a 2-step analysis. The first step is to determine whether there have been domestic prosecutions, if not the court has automatic jurisdiction. The second step is if there are domestic investigations, in this second situation the court has to determine if there is domestic investigation (authority) that is if the domestic authority is unwilling or unable.

Furthermore, the rights of suspects¹⁷ and accused persons¹⁸ are protected to the highest standard in the treaty. It contains all of the guarantees enshrined in international instruments and in certain respects goes beyond. The statute seeks to maintain a balance adequate protection for victims without infringing upon the rights of the accused and is quite successful in this respect. The provisions on evidence¹⁹, which allow for exceptional measures such as in camera hearings and recorded testimony so far as they do not impinge upon the rights of the accused, are examples. Such special measures shall be taken by the Court where the victim is a child or victim of sexual violence, unless the Court decides otherwise. In addition to provisions relating specifically to the rights of the accused, the statute obliges the prosecutor to investigate not only incriminating but also exonerating evidence, as well as to make such evidence available to the defense. Moreover, the Pre- Trial Chamber has an important role protecting the rights of the accused and checking the Prosecutor's authority. First, in those situations where there is a unique opportunity to take testimony or collect evidence which might not be available subsequently at trial, the prosecutor must inform the Pre-Trial Chamber (article 56)²⁰. If on the Prosecutor's request, the judges believe that measures are necessary to protect the rights of the accused, it may, among other steps, appoint an expert or a judge to supervise the proceeding. If the Pre-Trial Chamber believes the Prosecutor's failure to request such measures is unjustified, the Chamber take measures on its own. The Pre-Trial Chamber must hold a hearing before trial and confirm the charges against an accused, on the basis that there is sufficient evidence to establish

¹⁷ Article 55 Rome statute

¹⁸ Article 67 Rome statute

¹⁹ Articles 68(2) and 69 Rome Statute

²⁰ Stapleton S, 'Ensuring a Fair Trial in the International Criminal Court: Statutory interpretation and the impermissibility of derogation' (1999) 31 *New York University Journal of International Law and Politics*, P535 and 592.

substantial grounds that the accused committed the crime (article 61 Rome statute). However, the accused has the right to attend and be represented. Trial is in the Presence of the Accused and the statute does not allow for trials in absentia²¹. The statute permits trials to proceed without the presence of the accused only if he or she is disruptive, in which case measures must be taken to allow them to observe the trial. The statute does however allow for the confirmation of charges in the absence of the suspect, and requires the presence of legal counsel for the suspect²². To a large extent the ICC statute succeeds in making appropriate provision for victims of Rome Statute crimes. In a major step forward for victims of atrocities, the court has broad powers to order convicted persons to make reparations to victims²³. Those reparations can take financial or symbolic form. Individual victims are entitled to participate directly or indirectly during court proceedings. Victim participation is an innovative aspect of the ICC which has contributed to the development of International Criminal Law. The provision on the ex officio powers of the Prosecutor (Article 15) expressly recognizes the legitimate potential role for victims as initiators of ICC investigation. In addition, the Rome Statute states "the protection of victims and witnesses" deals not only with the Court's duty to take appropriate protective measures, and the establishment of the Victim and Witness Unit, but also the right of victims to present their views at various stages of the criminal proceedings where their personal interests are directly affected.

V. RECOMMENDATIONS AND CONCLUSION

It should be noted that during the first decade of the ICC operation, the ICC has encountered numerous challenges. One major challenge the ICC faces is the lack of an enforcement power. The ICC does not have its own police force and due to this it is dependent on State Corporation to execute its arrest warrants and also to be granted territorial access to undertake its investigation of crime scenes and also to interview witnesses. This makes execution and enforcement of its decisions very slow. Another challenge faced by the ICC is higher expectations from member states and financial constraints. The fact that the ICC does not have its own police force and it relying on member states for the extradition of suspects makes it very challenging for the court to carry out its work and attain its objectives. One major setback and loophole of the ICC is that it cannot act unilaterally because; It does not have its own police force or independent enforcement powers, it cannot enter or obtain evidence in sovereign

²¹ Article 63 Rome Statute

²² Stahn C, 'Complementarity, Amnesties and Alternative Forms of Justice: Some interpretive guidelines for the International Criminal Court' (2005) *Journal of International Criminal Justice*, 695 – 716 hereinafter Stahn, Pp 695 and 699

²³ Article 73 Rome Statute

countries without the country's permission. As a result, the ICC and its organs (e.g. the OTP) depends on the "cooperation and assistance" of countries in order to facilitate investigations and prosecutions. Cooperation and assistance may include: Allowing access to documents and other evidence; Tasking domestic personnel to assist OTP personnel, helping locate witnesses and victims; and assisting in the identification of crime sites.

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