

The Challenges of Filling Cases to the International Criminal Court

DOI: <https://doi.org/10.47175/rielsj.v5i1.897>

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ABSTRACT

The International Criminal Court is one of the pillars of the international criminal judicial system that was established according to the Rome Statute with the aim of prosecuting individuals accused of crimes of an international nature according to the jurisdictions that fall under its legal jurisdictional authority. However, the court faces obstacles and problems with regard to submitting and referring cases to the court. The researchers attempt to shed light on some of these problems. The researchers found that the problems are divided into four main categories related to the referrals from signatory states, referrals from non-signatory states, referrals from the United Nations Security Council, and referrals from the Prosecutor of the Court. The researchers presented a number of solutions and suggestions that aim to develop the work of the court and increase its effectiveness to achieve the ultimate goal of achieving justice and protecting victims.

KEYWORDS

International Criminal court; filling a case; rome statute; referral; veto, non- signatory country.

INTRODUCTION

The International Criminal Court (henceforth, ICC) stands as a fundamental institution in the realm of international law, found with the main mission of questioning and prosecuting individuals for the severe offenses and crimes of international concern (Schabas, 2011). Established by the Rome Statute (henceforth, RS) in 1998, the ICC represents the united commitment of the international community to bring perpetrators of genocide against humanity, war crimes, and the crime of aggression to justice (Schabas, 2017). This research paper tries to study and shed light on the problems and challenges that face the ICC's judicial system concerning the pursuit of international criminal justice.

LITERATURE REVIEW

After World War II, the pioneering movements including Tokyo and the Nuremberg trials had motivated the international efforts to establish a permanent ICC or tribunal (Bassiouni, 2014). The RS in 1998 marks the historic moment of the era of international justice which starts its journey on 2002 (Schabas, 2017). The main aim of this court is to hold accountability those who are responsible for committing and causing war crimes, genocide, aggression against humanity for the aim of, through the laws of the international criminal justice, fighting and ending impunity and preventing such crimes from happening again in other places in the world (Carlson, 2022: 4).

The Structure of the ICC

The institutional architecture of the ICC consists of important layers intended to ensure and warrant an effective functioning and achievement. They are as follows:

- i. The States Parties Assembly, which consists of the nations' representatives that have ratified the RS that has an essential role in the processes of decision-making (Oette and Trapp, 2018).
- ii. The Presidency that supervises and runs the administration of justice, while the responsibility of adjudicating cases is assigned to the Judicial Division (Nollkaemper, 2019).
- iii. The Prosecutor Office that plays a central role in starting investigations and presenting cases before the Court (Stahn, 2015).
- iv. The Registry that presents vital support functions that ultimately ease forward the general competence and effectiveness of the ICC (Cataldi and Nollkaemper, 2012).

RESEARCH METHODS

The Admissibility Criteria

The admissibility of the cases in front of the ICC should meet the requirements of the jurisdiction over the according to and under Article 17, which states:

"the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (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, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court.³³"

Therefore, the admissibility criteria for filing cases in front of the ICC is must meet the jurisdictional requirements of the ICC criteria as delineated and outlined by the RS as follows (Werle and Jessberger, 2014):

- i. Not to be presented, investigated or prosecuted by the state national jurisdiction,
- ii. It must be of adequate and sufficient severity to warrant the consideration of the Court laws and aims of establishment,
- iii. The crimes under the ICC's jurisdiction include four kinds: crimes against humanity, war crimes, genocide, and the crimes of aggression.

Any violation or not consideration for these above requirements will make the filed case out of the scope of ICC focus or attention, as they would be considered without actual demand for an international intervention.

The Filling a Case to the ICC

According to the RS, any investigation can be triggered or started by (Stahn, 2016):

- 1) A referral from the state parties of the RS,
- 2) A referral from the UN security Council,
- 3) The Prosecutor's proprio motu authority,
- 4) A referral from a non- signatory country to the RS but agrees to its jurisdiction.

The researchers will discuss the obstacles, difficulties and challenges that face each one of these processes of filling/making a referral a case in front of the ICC.

Challenges Facing Filing Cases to the ICC

The researchers will discuss the difficulties and challenges that face each way of filing cases:

1) A Referral from the State Parties of the RS

The interpretation and the application of the Article (17) in any filed case are activated by the states parties and considered dispositive. However, such referrals face certain obstacles such as:

- i. The complementarity principle is a central component of the general functioning of the ICC as RS asserts it. This principle means that the Court is considered the last resort for filing the cases in front of the ICC. However, of the states' national legal system is unable or unwilling to investigate or prosecute the people or individuals who committed the kinds of crimes under the jurisdictional of the ICC the ICC handles such cases for the aim of achieving the functional unity or *complementarity* between the national and ICC legal systems. Law scholars point that the complementarity principle is of three kinds: legal, jurisdictional and executive (Werle and Jessberger, 2014).

Consequently, under the principle, the ICC claims that encourages and respects the states' national jurisdictions to prosecute and held liability to the people who committed such crimes as the ICC steps in only to ensure accountability when necessary.

- ii. The definition and determination whether the committed crimes are within or out the scope of both the national and/or the international scope. Some governments would argue that such actions are not crimes inside the state and at the same time it is considered a national crime or hypothetically vice versa. In other words, whether the committed action is motivated by a criminal act or a violation of the basic human interests of the society as a whole.
- iii. Governments, particularly those that are under dictatorships, definitely, would not show acceptance to persecute their leaders or citizens, as it would hold them accountable for their crimes against humanity, such as the case of Sudan under Al Bashir regime.
- iv. Even the democratic countries would claim the ability to persecute and hold trials to their citizens according to their national law. Such countries would argue that such international intervention would undermine the ability and the reputation of their legal systems.
- v. Super power countries, particularly the permanent countries of the Security Council; show no encouraging signs or actions, including the western democratic ones; to persecute their citizens or individuals or even admit their doing of illegal international actions or crimes as in the case of Iraq in 2003 attack under the leadership of the US and UK. As this war was started under the argument of mass destruction weapons in the possession of Iraq that later proved to be wrong or inaccurate.

For example, On August 2, 2002, President George W. Bush signed the American Servicemembers' Protection Act (ASPA) of 2002 on Aug 2nd, which restricts the US funds to the ICC and restricting the participation in any peacekeeping forces as forms of pressure to prevent any prosecution to US personnel.

- iv. Ultimately, such super powerful countries could be motivated to protect their allies from any actions in front of the ICC such as in the case of protecting Israel from any investigations and prosecutions by the US governments while at the same time the US governments motivate or strongly argue to prosecute and investigate other countries or governments, i.e., double standards.

2) A Referral from the UN Security Council

According to the RS, Article 13, one of the ways of making a referral to the ICC is through the United Nations Security Council (UNSC). However, such process faces many challenges such as:

- i. One of the important obstacles is the Veto power of the permanent super power states, which hinder decision-making, and reflects the geopolitical conflicts and the degree of the interests of these states, which ultimately block case referrals to the ICC. As a result, the long deliberations, discussions and negotiations inside the Security Council might delay or even hinder the proposed resolution. This ultimately paves the way of the accusation of bias, compromising objectivity, the degree of referrals fairness and double standards, which hinder the pursuit of achieving justice (Wright, 1994; Stahn, 2015).
- ii. Article 16 of the Rome Statute gives the United Nations Security Council the authority to defer any conducted investigations or prosecutions by the ICC for a renewable period of 12 months. This can be a challenge to the processes and procedures of the court itself.

For example, the US threatened to Veto any UN resolution to any extension of the peacemaking mission in Bosnia and Herzegovina without granting full immunity from the jurisdiction of the ICC.16 to its personnel. Accordingly, the UN agreed to defer for a year any processes of prosecution of persons who are participating in the authorized and established UN operations and to those who belong to countries not party to the RS. Article, 17. This was ultimately considered as misinterpretation, misapplication or misused to the Article 16 of the RS. This prevents any future prosecution(s) to any personnel participated in that war.

- iii. Some would argue the issues of clash between the IC jurisdiction from one hand and the national sovereignty from the other (Charney,1997). For example, the US starts, in the wake of non-signing of the RS, concluding bilateral immunity agreement that contain binding promises of not surrendering of any personnel to the ICC such as with Israel 2002, and with Afghanistan in 2003. http://www.ll.georgetown.edu/guides/article_98cfm (last visited Dec. 19, 2023).

As a result, such agreements, backed with political and economic sanctions, would force the countries to violate their obligation and limit the possibility of the individual surrender to the ICC under the: 1) diplomatic immunity according to international law, and/or 2) The international agreements with other countries.

- iv. The question about the non-signatory states that do not recognize the legitimacy of national court jurisdiction within their borders and territories (Charney,1997; Cassese, 2003).
- v. The other challenge that faces the UNSC and hinder the effective of the achievement of justice is the clear lack mechanisms of imposing the ICC court orders of warrants, arrests, prosecutions, investigations, final decisions, etc. towards the non-cooperative countries (Cassese, 2008; Mallinder, 2011).
- vi. The other prominent problem is the complimentary principle, which gives the priority to the national legal systems to prosecute criminals, which requires the ICC to interfere only in the cases of inability, insufficient, reluctance, or failure of the adequacy and effectiveness of these legal systems to achieve justice (Wolman, 2005, O'Connell, 2006).

3) The Prosecutor's Proprio Motu Authority

The prosecutor office of the ICC, as separated and independent organ of the structure of the court, has three tasks according to the RS. Article 13:

- 1) Receiving any referrals of any violations within the jurisdiction of the ICC,
- 2) Conducting any necessary examination and investigation of these referrals,
- 3) Prosecuting before the court.

According to the RS Articles, the prosecutor's proprio motu refers to his ability, without any external referrals, to start any investigation on their own motions. This means that the prosecutor has the ability to initiate the investigation after assessing the received investigation, conducting any preliminary examination, and if necessary, requesting authorization from the pre-trial chamber to start opening a formal investigation. Moreover, the prosecutor office should evaluate whether the alleged crimes are within the scope of the ICC jurisdiction.

The granted power to the prosecutor office helps to serve and grant justice to the victims. However, the prosecutor's office face many challenges and problems (Stahn, 2016):

- i. One of the problems of making referrals of the states is that it is either not signatory to the RS or it cannot sign this RS because of political, economic or diplomatic restrictions. This will ultimately hinder their ability to file cases for their own interests or against those countries that are not signatory this RS and accused of doing or committed to those crimes under the ICC jurisdiction.
- ii. The difficulties of gathering evidence and securing cooperation during the process of investigation.
- iii. The limited access the crime scenes and sites.
- iv. The degree of protecting the witnesses.
- v. The degree of cooperation and facilitation from the countries involved in the filed case(s).
- vi. The degree of geopolitical complexities that ultimately affect the process of collecting the needed evidence to build strong unbiased cases and at the same time protecting the rights of the victims.
- vii. The observed limited capacity of executing arrest warrants and the enforcement of the court sentences by the countries (Cryer et al., 2007).
- viii. The degree of political pressures, resource constraints, accessing conflict zones, and the relationships with other countries (Oette and Trapp, 2018).
- ix. The delicate and elusive balance between the degree of cooperation and the sensitivity considerations of independence with states that forces constant navigation.
- x. Some countries and governments accuse the ICC of targeting disproportionately certain (weak) countries in comparing with accusations/issues of bias (Sadat, 2018).
- xi. Some accuses the idea and claims of the court's universality and jurisdiction limitations as effective superpowers such as the United States, Russia, and China have not ratified the RS yet, which ultimately hinder effectiveness of the ICC in deterring crimes and achieving its official goals (Cryer et al., 2007).

4) A Referral from a Non- Signatory Country

The argument that only countries that are party to the RS is allowed to make a referral to the ICC; however, according to Article (12), it clearly gives the opportunity to other non-signatory countries to make a referral as long as they admit the court's jurisdiction. However, certain problems and challenges face such process:

- i. Cassese (2003) indicates to the issues of retroactivity, which raises the problem of acceptance the referral of non-signatory states as some would say that such crimes are not within the jurisdiction of the ICC. In other words, the ICC rules states that only recognized states have the rights to make referrals to the ICC and present cases. This

- forbids states such as the Palestinian State from making any referral to the ICC as it lacks the full necessary legal personality to join treaties or Statutes.
- ii. The other challenge is whether the filled cases are within the jurisdiction of the ICC or only for the aim of damaging the reputation of the states or governments. This will make the court in the middle of wider political conflicts rather than achieving justice. In other words, whether the committed action is a recognized crime by the ICC or not, or even the action occurred on the territory of the state or against one of its citizens from a state is non-signatory to the RS.
 - iii. The weak small countries or those that are under occupation or under political or economic pressure are usually unable to demand the ICC to protect them against the more powerful dominant countries as in the cases of the Palestinian people against the Israeli actions and crimes or Iraq under the American occupation, i.e., fear of retaliation (Murphy, 2007).
 - iv. Furthermore, if the non-signatory state refuses to cooperate, it will be difficult to declare jurisdiction over the committed crimes on its territory (RS of ICC). In other words, concerning the practical challenges, the non-signatory states lack of cooperation in the matters of investigation, gathering evidence, bringing suspect, arresting warrants, prosecution, enforcing ICC decisions, etc. which is basic and necessary for the work of the ICC (Orentlicher, 2003; Scheinin, M., 2007; Cryer et al., 2007).
 - v. Another issue is that state referral demands a strong political that might be missed from the side of the non-signatory states that could strongly be reluctant concerning its sovereignty and the autonomy of its national legal systems due to the lack of confidence of the ICC or due to political implications (Broomhall, 2004; Arts and Popelier, 2005; Woods, 2010).
 - vi. In addition to the belief that diplomatic channels or political negotiations rather than international legal trials could resolve certain issues (Posner and de Figueiredo, 2005; Wouters and Ryngaert: 2005).
 - vii. Jalloh (2007) observes that non-signatory states might face geopolitical pressures from the states that are either powerful allies or adversaries which affect the degree of feasibility of referrals to the ICC. For instance, the countries might align with regional bodies already related with, asserting the effectiveness and validity of regional conflict resolutions which add another geopolitical complexity.
 - viii. Regional organizations themselves may resist the referral of cases to the ICC, asserting regional mechanisms for conflict resolution. Non-signatory states may align with regional bodies, creating additional layers of complexity (Arts and Popelier, 2005).
 - ix. In contrast to the signatory states, the non-signatory states usually face legal barriers such as national laws or constitutional limitations that might impede the referral and the legal processes of the ICC (Sadat, 2007:55).
 - x. Certain non-signatory states might argue that the absence of wide international consensus on the principles and the aims of referring weakens the legitimacy of the ICC jurisdiction and the validity and authenticity of its decisions (Bassiouni, 1996).
 - xi. Certain issues, such as the political and diplomatic dynamics and complexity whether regional and international in addition to the local ideological and cultural sensitivities such as the accusations of double standards, bias, targeting certain countries rather than others, represent a hinder to the level of involvement and engagement of the countries with the credibility ICC proceedings and legality (Evans and Sahnoun, 2002; Ihonvbere, (2002); Cassese, 2008).

CONCLUSION

From the above survey, it seems that the obstacles, problems and challenges face the ICC can be categorized to four main directions:

The first is related to the referral(s) submitted by the state parties of the RS. The problems and challenges can be summarized as follows: the complementarity principle, the very definition of the crimes, the degree of cooperativeness and acceptance of filling cases to the ICC, the claims of the effectiveness of the local national laws to handle such crimes whether from democratic states or those under dictatorships.

The second is related to the referrals submitted by the UNSC such as The mis-use of veto power which is basically politically motivated, the long deliberations, discussions and negotiations inside the Security Council, the argumentation of the clash between the IC jurisdiction and the national sovereignty, the countries' obligation and agreements with other countries, the diplomatic immunity according to international law, the lack of clear mechanisms of imposing the ICC court orders of warrants, arrests, prosecutions, investigations, final decisions, etc. towards the non-cooperative countries in addition to the complimentary principle. In a nutshell, disengaging the court from the authority of the UN Security Council, which will allow it the freedom to work in a flexible, free, fair, impartial and objective manner to achieve its goals.

The third is related to the role of ICC Prosecutor office, which can be summarized as follows: the difficulties of gathering evidence and securing cooperation of the countries, geopolitical complexities and sensitivities, the capacity of executing arrest warrants and court sentences, the claims of targeting disproportionately weak countries, the skeptical of the court's universality and jurisdiction limitations.

The fourth is related the submitted referral(s) from a non-signatory country to the RS. Such problems and obstacles can be summarized as follows: they are not signed to the RS., the argumentation of the definition of the crimes and the jurisdiction of the ICC, the accusation of the hidden aims of the filled cases, i.e., for political reasons rather than achieving justice, the argumentation whether the committed actions are crimes or not, determining the place or territory of the committed crimes, the geopolitical pressures towards the weak countries that hinder or forbid the filling process, the degree of the cooperativeness and willingness of the countries, the belief of the effectiveness of the ICC to achieve justice or solve problems, the signed agreements with other countries or within regional organizations, the degree of cooperation in the processes of the ICC, the clash between the rules of the ICC and the national laws, etc.

Recommendations for Future Prospects

No doubt that the ICC represents an important juncture of the international legal system that represent a highly development of the human efforts to reach an international peaceful stable state to achieve justice and protect the victims. However, the ICC is strongly required to take quick and decisive steps to achieve the necessary reforms and meet the ongoing developments and challenges of the world crimes that certainly have worldwide influence.

The ICC must address the issues of the calls to the reformation of the same rules of the RS such as setting clear definitions of the crimes that lies under its jurisdiction to avoid any argumentation whether any crime(s) is within its scope or not. Furthermore, the ICC must adapt and set legal rules to include new crimes of international nature, yet they are of great impact on people, governments and international peace and stability such as environmental crimes, drug-trade, human trafficking, cybercrimes, etc. This kind of reform will eventually prevent any argumentation of whether the committed crimes themselves lie within or out of the jurisdiction of the ICC.

Moreover, the ICC must modify any shortcomings of the articles of the RS that might prevent or hinder filing cases such as permitting any one whether individuals, organizations, governments to file cases as long as it achieves justice and protect the victims.

As the ICC is not an alternative or a substitute for the national local courts or legal systems, the court should encourage, help and motivate governments to take strong steps to strength and enhance their legal systems to exercise and prosecute the criminals and hold them responsible for their actions to make the ICC the last resort of the national community, i.e., enhancing the affectivity of the complimentary principle.

The ICC must encourage both signatory and non-signatory states to set legal, administrative and executive legislations within their local national laws to oblige these countries to give the ICC the legal priority over the local national legal systems and above the regional international political agreements and show full cooperation with the ICC. Furthermore, the ICC must engage in deep and long negotiations with non-signatory states, and national and regional organizations to encourage them to sign the RS to include more countries.

The ICC must take steps to enhance the effectiveness and the efficiency of its procedures, laws, etc. such as tackling the selectivity issues, strengthening the degree of cooperation processes and mechanisms with other states, the degree of enforcing the court warrants and sentences and the ways and methods of protecting victims, witnesses, and those who cooperate with the court whether individuals, governments, organizations or countries. These kinds of reforms will enhance the reputation, neutrality and integrity of the court and prevent any accusations of bias, targeting the weak countries,

The court must set clear boundaries that puts her out of the geopolitical complexities and pressure that might make her a tool for serving the aims of superpowers. Moreover, the ICC must encourage the democratic countries and the Security Council courtiers to set rules to prevent the usage or at least the misuse of the Veto for the aim of preventing filing cases to the ICC court. Furthermore, the court must insist to be free from the political agenda of the complex relations of the UNSC states and achieve the separation from their scope and authority specially the Veto exercising to achieve its aims and mission.

Whether such reforms are achieved or not, the ICC stays a cornerstone and a remarkable pillar of the international justice system, and might the last hope for achieving justice for the victims whose countries cannot bring perpetrators into justice and hold them accountable for their crimes. Furthermore, many think that the journey of the ICC is a long ongoing one that requires and needs more learning collaboration and adaptation to enhance and improve its competence, ability, impact, and methods to continue as a powerful motivator for others to join.

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