

"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"—ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH

LAW OPINION



# The true colours of the ICC

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THE International Criminal Court (ICC) was established, and is governed, by the Rome Statute 1998; which became effective from 1 July 2002. The Chapeau of this Statute provides that the objectives of the Court are, inter alia, protecting 'peace, security and well-being of the World', ending impunity for 'the most serious crimes of concern to the international community' and in turns preventing 'such crimes' and also guaranteeing 'international justice'; and these well-chosen words portrays the ICC as an entity that has the best interest of humanity at its core; which would explain the 114 State parties of the Rome Statute.

The ICC's jurisdiction, as per the Rome Statute, extends to the following crimes: 'the crime of genocide' Article 5(1)(a); 'Crimes against humanity' Article 5(1)(b); War crimes' Article 5(1)(c); and 'the crime of aggression' Article 5(1)(d). The Court 'may exercise its jurisdiction', according to Article 13, in three of the following circumstances:

First, a State party to the Rome Statute may refer a situation to the ICC's prosecutor Article 13(a). Three member states have opted for this option, namely Uganda, the Democratic Republic of Congo and the Central African Republic, to refer their own situations to the ICC.

Second the United Nations Security Council (UNSC) 'acting under chapter VII of the Charter of the United Nations' (UN) can refer a situation to the Prosecutor Article 13(b). The UNSC exercised this power twice when it referred, Darfur Sudan and Libya; despite the fact that these two countries have not ratified the Rome Statute. Sudan's representative to the UN, Elfaith Mohamed Ahmed Erwa, said that the

ICC's intervention 'in Darfur, but exposed the fact the ICC was intended for developing and weak countries and was a tool to exercise cultural superiority'. It seems that he was not very far from the truth; as amongst the UNSC's five permanent members, with the power to veto resolutions, Russia, China and the United States (U.S.) are not State Parties to the Rome Statute, and yet they get to decide whether the ICC should intervene in the territories of other States regardless of whether the state in question is a member or not.

Third the Prosecutor can take the initiative to initiate 'an investigation' Article 13© in accordance with Article 15, which authorizes the Prosecutor to take action Proprio motu if such crimes falls within the jurisdiction of the Court Article 15(1). The prosecutor invoked this power to initiate investigations in Kenya.

There is an old saying that 'action speaks louder than words'; and a closer look at the ICC's action reveals a sinister pattern i.e. all the ICC's intervention took place in African countries, without delay; even though intervention was possible elsewhere, where the Prosecutor has shown hesitation e.g. Francis A. Boyle, a professor of the University of Illinois College of Law in Champaign, USA, filed a complaint with the ICC 'against U.S. citizens George W. Bush, Richard Cheney, Donald Rumsfeld, George Tenet, Condoleezza Rice, and Alberto Gonzales... for their criminal policy and practice of "extraordinary rendition"; where he



pointed out that 100 human beings, consisting mainly of Muslims/Arabs/Asians and People of Colour', were on the receiving end of this cruel practice; he also raises doubts as to whether '100 White Judeo-Christian men' would have shared the same fate. Therefore the esteemed professor argued that such practice was "widespread" and "systematic" as required by Article 7(1); and also constitutes 'Crimes against Humanity' which violated, and fell within the scope of, 'Articles 5(1)(b), 7(1)(a) and 7(1)(e) to 7(1)(k)'. The fact that the US is not a State Party to the Rome Statute should not prevent the prosecution of US citizens, as argued by professor Boyle, because the crime in question has been committed in the territories of several state parties and Article 12(2) provides that 'In the case of

Article 13, Paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute...'. Moreover Professor Boyle argued that his complaint would satisfy the condition under Article 15(3), to constitute 'a reasonable basis to proceed with an investigation'. Therefore he requested, in his complaint, that the Prosecutor of the ICC to initiate an investigation, under Article 13(c), proprio motu, on the basis of the well informed complaint, as required by Article 15(1). Furthermore Professor Boyle added that 'President Obama and his Attorney General Eric Holder' made it known in 'public statements' that they would not 'open any criminal investigation of any of' the US citizens mentioned above, therefore there would be no issue contradictions with 'Article 1

(Complementarity) and Article 17' (issues of admissibility). As a result of this detailed complaint the Prosecutor is now examining this situation.

Israel, although not a State Party to the Rome Statute, is notorious for violating human rights of the Palestinians. However it is important to note that, because of ICC's temporal Jurisdiction, under Article 11(1), and the non-retroactivity principle, under Article 24(1), we shall limit ourselves to crimes committed after 1 July 2002. One example of such atrocities was the crimes committed during the armed conflict, by the Israeli force, in the Gaza strip during 2008-2009. Daniel Benoliel and Ronen Perry in an article called 'Israel, Palestine, and the ICC' argued that after 'Palestinian National Authority' filed a complaint with the Prosecutor 'Under Article 12(3), which empowers non-members to accept the Court's jurisdiction', which presumably led the current Prosecutor to examine ways to bring 'Israeli commanders' to justice for their actions. Moreover, they argued that if the prosecutor embarked on such an endeavour then he bears the responsibility of deciding whether Palestinian Authority or the Gaza strip is a state. It could be argued that the stateless status of Palestine would make it easier for the Prosecutor to avoid prosecution of Israeli citizens. Daniel Benoliel and Ronen Perry also pointed out that UNSC could refer Israel to the ICC; however the US, being a de facto ally of Israel, would most certainly veto such a resolution.

Another incident by Israeli commandos could potentially bring them within the scope of the Rome Statute for their attack 'on the Freedom Flotilla' which was 'a Turkish-backed aid convoy' that tried to deliver 'humanitarian supplies to Gaza', as argued by an international lawyer Alfred Lambremont Webre, under Article 12(2)(a) which provides that the Court may exercise jurisdiction where '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'. The Flag State of the vessel was Comoros Islands which is a State Party of the Rome Statute, therefore the prosecutor ought to start an investigation under Article 12(2)(a); nevertheless the Prosecutor still seems reluctant.

In fine, the Prosecutor's procrastination with regards to US and Israel and the over enthusiastic interventions in Africa shows that the sugar-coated words in the preamble are nothing more than rhetoric, and also proves Thucydides right when he narrated in his book 'History of the Peloponnesian war' that '[W]hen these matters are discussed by practical people, the standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept'. Now the ICC seems to be a tool that allows the strong to do as they like and judges only the weak; therefore it is high time that State Parties ought to rethink their allegiance to the Rome Statute that produced a biased entity, which maintains this double standard, and aim to render it enfeebled.

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LAW VISION

## Floor crossing and expanding horizon of MPs



OLI MD. ABDULLAH CHOWDHURY

WHILE parliamentary committee on constitutional amendment has started working on possible change in the constitution, the issue of anti-floor crossing necessarily came forward. Newspaper report (The Daily Star /April 1, 2011) cited discussion in the meeting of parliamentary special committee on constitutional amendment about possible amendments in the anti-floor crossing provision of the constitution. This provision has not only restricted role of MP as legislator, but limits significantly the scope of MPs to think beyond party dimension. Amendments of the relevant article might contribute in flourishing parliamentary democracy and create scope for MPs to think beyond party interest.

Crossing the floor

In general, crossing the floor is the term used to describe a Member of Parliament's decision to leave one political party to join another. However, there is slight change in usage of the term and it is most

often used to describe members of the government party or parties who defect and vote with the opposition against some piece of government-sponsored legislation.

Article 70 of the constitution

"A person elected as a member of Parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he resigns from that party or votes in Parliament against that party"- said in the Article 70(1) of the constitution.

It was in 1972 when the provision of "anti-floor crossing" was first introduced in the constitution. Later, further amendments were made in order to tighten the grip. Even if a member of the parliament does not attend the session or abstain from the voting, it is also considered a violation of the clause. In order to tighten the nod further, new amendments were made. Forming group within a parliamentary party is discouraged and joining another political party would result in the loss of membership in the parliament.

Suggested amendments

On the one hand, there is a proposal

in front of the committee for the restoration of the original article 70 of the 1972 constitution. On the other hand, some members of the parliamentary special committee on constitutional amendment are in favour of allowing MPs with unfettered freedom to perform except on some specific issues. If it is possible, then there would be scope for MPs to play a wider role in the parliament.

Possible advantages

If we look at the example of Britain, former British Prime Minister Tony Blair who suffered his first voting defeat in the parliament when as many as 49 MPs from his own party voted against a bill to extend the tenure of the detention of suspected terrorists in November 9, 2005. As soon as the government attempted to introduce the bill in the parliament, civil liberty groups campaigned against the law and lobbied with the MPs. Despite having the overwhelming majority in the parliament, Blair did not manage the bill to pass through. MPs crossed the floor and voted against the proposed draconian law.

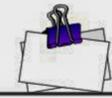
It would be very ambitious for us, if we expect a radical change in the role of legislators in Bangladesh with some amendments in the constitution. If there is a scope created, MPs might come forward in the future to cast their vote in the greater interest of the country. In order to get maximum benefit from the parliamentary form of democracy, the current restriction imposed upon lawmakers through article 70 of the constitution needs to be relaxed.

Conclusion

Many of the analysts have identified continuous boycott of the parliament by opposition as one of the prime weaknesses of our parliamentary democracy. Even if a member of the opposition wants to join in the parliament ignoring party decision, it involves risk of losing the seat. Let alone members of the opposition, lawmakers from the government party are bound to follow party whips or risk losing the seat in the parliament. MPs should be at least provided an opportunity to play a wider role in the parliament through necessary amendments in the constitution.

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LAW EVENT



## Access to justice in CHT

BEFORE 1 July 2008, there were no formal courts to dispense disputes at Chittagong Hill Tracts. At that time, mainly the Carbaree Head and circle chief customarily disposed of local disputes. Other disputes were settled by Deputy Commissioner (DC) of the concerned district except family matters. If any body aggrieved, he had an opportunity to file appeal before Chittagong District Judge Court. That system created great harassment for the hilly inhabitants to get justice and most of the time they were deprived access to justice.

To confer the opportunity of taking justice from formal court specially from Civil, Criminal and Women and Children Repression (Prevention) Tribunal for the indigenous community Bangladesh Legal Aid and Services Trust (BLAST) filed a writ petition along with three inhabitants from three hilly districts namely Advocate Protikar Chakma, Nikhil Mitra Chakma and Rajanikanta Tongchongga before the High Court Division of Supreme Court of Bangladesh in 2006. On 24 February 2008 after the completion of hearing Justice ABM Khairul Huq and Justice Abdul Awal's divisional bench directed to that time Non-party Care Taker Govt. to set up Civil, Criminal Courts and Women and Children Repression (Prevention) Tribunal at Chittagong Hill Tracts.

Though three years have been passed after the establishment of Judge Court at CHT, dissatisfaction still exists with the life of indigenous community. Lack of infrastructural facilities and regular staff is a great setback in way of running day-to-day function of the courts. Moreover, immediate order for proper and adequate transfer of records from Chittagong Deputy Commissioner's Office is necessary. Lack of knowledge about regular court procedure among lawyers due to long inaccessibility also make barrier to the process of justice smooth.

After almost three years of establishment of Judge Court at Chittagong Hill Tracts BLAST arranged a workshop on "Functioning of District Courts and Access to Justice in Chittagong Hill Tracts: Formulation of Next Strategy" on 2nd of April 2011 at CIRDP auditorium. Chief justice ABM Khairul Haque was addressing the workshop as chief guest.

According to a study carried out by the Bangladesh Legal Aid and Services Trust (BLAST), 165 civil appeals, 1307 criminal cases and 28 cases under Women and Children Repression (Prevention) Act are pending in Rangamati courts and 1,150 cases with the courts and tri-

also recommended the Supreme Court, Bar Council, National Legal Aid Serving Authority, NGOs and other concerned to run hill tracts judge courts swiftly and to establish access to justice in that area. Among them considering appointment of 1<sup>st</sup> Class Magistrate in Bandarban, considering appointments of judges from within the local community including *Adivasis*, ensuring regular inspections of courts in the three Hill Districts, sending resolutions of meetings of District Legal Aid Committees regularly to NLSAO, to enable speedier responses are the main recommended tasks. National Legal Aid Services Authority should work more closely with legal aid



bunals in Bandarban and Khagrachari as of December 31, 2010.

Appellate division Judge Muzammel Hossain and Surendra Kumar Sinha was special guest, Supreme Court lawyers Shahdeen Malik, ZI Khan Panna, Additional Attorney General MK Rahman, Barrister Sara Hossain, Khagrachari Session Judge M Mokhtar Ahmed, Rangamati Joint District Judge Badrul Islam, women's rights activist Donai Prue Nally, and Hill Tracts Bar Association leaders were present at the workshop. The workshop was presided over by BLAST Trustee Board Member Samsul Bari.

The participants of this workshop and research of BLAST recommend many tasks to Government. They

organizations and with women's rights organizations. Their main job should be to take up outreach programmes, involving women's rights and community based organisations, providing assistance to indigent under-trial prisoners. At this situation Government initiative may be taken into account to undertake consultations on the judicial system within the Hill Districts.

Now by considering and implementing these recommendations within very short time each concerned body can ensure right to get justice for the indigenous peoples of Chittagong Hill Tracts.

The event was covered by Md. Raisul Islam Sourav, a student of Law, Northern University Bangladesh.