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WAR CRIMES UNDER INTERNATIONAL CRIMINAL LAW- A STUDY

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ABSTRACT

The twentieth century has been a remarkable period of international "judicialization". International Courts and court-like institutions have sprouted in surprising to deal with the specific functional problems, like conflict over trade agreements or disagreements over the application of the Law of the Seas, and regional concerns such as individual human rights. The International Criminal Court[1] is different from nearly all of these institutions. It is one of the few devoted to the enforcement of international criminal law, holding individuals accountable for violations with the potential to imprison for life, person convicted of such crimes. There is much darkness in the world; genocide, racist ethnic cleansing, torture and mass production of terror are at commonplace. Those who perpetrate such cruelties: the ideological, the greedy, the enraged victims of some previous injustice, the loyal, the sadist are one who move stealthily in their self created domains. But there have been flashes and sparks that have momentarily lit up the landscape such as the development of International Criminal Law and establishment of the International Criminal Court.

KEYWORDS: *Criminal Law, Criminal Court, International Crimes, UN Security Council, Human Rights.*

INTRODUCTION

Numerous conflicts and killing of hundreds have resulted since the fall of the Berlin Wall in 1989. Reflections over the nature of abusive acts committed during violent conflicts have evolved over the years. The entire enterprise of holding war criminals individually responsible for their actions goes back to the Nuremberg and Tokyo trials after the World War II. Then, in 1993, the conflict in the former Yugoslavia erupted, and War Crimes, Crimes Against Humanity and Genocide in the guide of "ethnic cleaning" once again commanded international attention. In an effort to bring an end to this widespread human suffering, the UN Security Council established the ad hoc International Criminal Tribunal for the Former Yugoslavia, to hold individuals accountable for those atrocities and, so doing, deter similar crimes in the future. Although the Nuremberg model did not persist in time, the notions which formed its core, can be found in contemporary International Law. The 'common design' and 'superior responsibility' doctrines have become firmly established as modes for incurring individual responsibility.

The establishment of the International Criminal Court is a 130 Years long hard struggle to serve the cause of human rights dignity. The first proposal ever to establish such a court was made in 1872 by the then President of the International Committee of the Red Cross (ICRC). His opinion was to deal with the violations of the Convention. The idea of an International Criminal Court was presented for consideration by Trinidada and Tobago at the 44th Session of the General Assembly in 1989[1].

However, Prosecution and punishment of international crimes are the inescapable responsibilities of every country. After more than half a century's efforts,

the Rome Statute of the International Criminal Court was signed on 17th July 1998 at the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of the International Criminal Court. On 1st July 2003, this first permanent international criminal judicial organ in history was established at The Hague. This is an important Milestone in the development criminal Law and International Relationship. During 2002 internationalized courts continued to develop in four parts of the world: Cambodia, East Timer, Kosovo, Sierra Leone, in addition, wholly national trials of international crimes is taking place in Indonesia.

The Rome Statute recognizes specific roles for the United Nations and the Security Council. In addition, both the General Assembly and the Security Council regularly discussed issues and themes relevant to the mandate and activities of the Court. Effective cooperation with the United Nations is particularly important to the Court. The Relationship agreement, concluded on 4th October 2004 by the President of the Court and the Secretary-General of the United Nations on behalf of their respective institutions, affirms the independence of the Court while establishing a framework for cooperation.

Reality of differing convictions about justice is more accentuated in the international domain. The cumulative development of International Criminal Law from Nuremberg through the ad hoc Tribunals jurisprudence to the Rome Statute of the ICC demonstrates the importance accorded to finding a fair balance when holding individuals responsible for group crimes. International Criminal Law covers the so called 'Core Crimes', i.e. Genocide, Crimes Against Humanity, and War Crimes and also addresses the Crime of Aggression, which the International Criminal Court will exercise jurisdiction over only after the State parties agree on the crime's definitions and pre conditions[1]. However, as a systematic and comprehensive examination of the subject matter Statute. The crimes under the International Criminal Law are mostly of a systematic, large scale and collective character, while domestic criminal law mainly deals with less complex crimes that are normally committed by individuals who can easily be linked to the crime. The main purpose of complementary jurisdiction is to respect the sovereignty of every State. In the Rome Statute of the International Criminal Court, provision is made for his or her punishment; the international criminal statute builds on the firm ground of international customary law. There can be no doubt that both the codification and standardization of the mental elements, if carried out in a proper and consistent manager, would add to the process of consolidation of international criminal law and push international criminal law closer to becoming fully developed legal order[2].

Various controversial issues have risen analyzing each of these crimes, for instance, genocidal act is inclusive of prevention of births within a group, whereas, imposing birth control as a means to control population or for health reasons doesn't fall within the preview of this crime. Drug trafficking and Terrorism are not included under the Crimes Against Humanity, as they were not considered as serious as crimes of Genocide or Crimes Against Humanity and were proposed to be resolved by way of treaty cooperation. The fight against terrorism is Multifaceted and includes measures imposed by the United Nation Security Council.

Terrorist's acts can be prosecuted in an International Court at present only if they amount to war Crimes or Crimes Against Humanity. Only one internationalized court, the Lebanon Tribunal has jurisdiction over terrorist's acts, but this is limited under the Lebanese tribunal itself and does not fall within the sphere of International Criminal Court[1]. There are two types of war Crimes as mentioned in the Rome Statute i.e. crimes at the time of International Conflict and at time of Internal Armed Conflict. Use of anti personnel land mines, use of nuclear weapons, and internal disturbances as riots within a State party are excluded from the definition of War Crimes. Suggestively, both use of anti personnel landmines which are controlled by treaty and use of nuclear weapons may be expressly provided under the banning methods of warfare[2].

The court must function in fair, independent and effective manner. The main goal of the court is to put an end to impunity for the perpetrators of these crimes and thereby contribute to be prevention of such crimes as stated in the Preamble of the Rome Statute. The main purpose and function of the court is to prosecute war criminals and others guilty of "enumerated" crimes[3] and also ensure proper implementation of the provisions of the Rome Statute. International Criminal Law must protect the highest interests of the international community i.e. peace, security and well being of the world. International Criminal law diverges from the traditional conception of international law because it only addresses itself to the individuals and not to the States. The establishment of the International Criminal Court challenges the Sovereignty and Impunity; it does reveal the continuing importance of state cooperation and compliance. The treaty overrides any immunity that may grant to presidential, parliamentary, or legislative officials in their domestic systems.

Perhaps what makes the Rome Statute significantly different from all predecessors, and in particular from the *ad hoc* tribunals is that for the first time victims of crimes and their families can access the Court to express their views and concerns and to claim reparation for the wrongs suffered. An International Criminal Court should exist in order to ensure protection of the dignity of the human person. This dignity is shared by every human person, regardless of his age, race, ethnic origin, status as a combatant or non-combatant, sex or stage in human life, from the unborn to the elderly. As each person shares the human dignity, each person, without exception, is entitled to the protection of the law. The statutes and the crimes which shall always be under the jurisdiction of the Court must reflect this equal dignity shared by all.

Those who are responsible for commission of the most heinous crimes which offend the conscience of the human family, must be made to accept their responsibility in accordance with the universal norms. It is indeed the right of the society to manifest, by means of law and juridical structures, those objective and eternal values which protect and order the human family and human dignity. Antonia Cassese remarked that, "The basic problem is the protection of the human dignity, which may sound like an empty slogan but it's a reality. The existence of the International Criminal Tribunals shows that the international community is given the right to respond to so many crimes committed in the world, namely a response that is not based on revenge, on simply execution or punishment, but on a proper trial. That is what the Americans rightly suggested in 1945 when the British were reluctant to set up a tribunal in the Nuremberg and thought it would be sufficient to execute some 10,000 senior German officers, and the Americans rightly said the proper response is to put them on the trial to see who is guilty, who is innocent and then to sentence the guilty people".

The International Criminal Court is destined to flesh out and bring into effect those peremptory norms of international law which safeguard such fundamental values as human dignity, the respect for life and limb of innocent persons, and the protection of ethnic, religious or racial groups[1]. Also, individuals come to play the central role that befits them: it is individuals who constitute the delinquents, the victims or the witnesses, respectively. Perpetrators and victims thus acquire their rightful place in the world community. 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 International Criminal Court is universal or at least potentially universal; in addition, it breaks the veil of the State personality, in that it reaches directly to the individuals, either as perpetrators, victims or witness. Furthermore, the State of the International Criminal Court has swept aside all the traditional immunities national and international, personal and functional that were intended to shield the State officials from outside scrutiny and prosecution. These officials are now openly subject to the most penetrating international exposure, that which takes place in an international court of law.

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 an international criminal tribunal has been constructed in this way, though existing international courts of human rights are similarly "subsidiary" to national courts. Prosecution and punishment of serious offences against human dignity are still entrusted to the national or the territorial State. Territoriality and nationality remain central concepts in the international community, although for all their merits they reflect old values: the competence of the prosecutor to investigate. The great majority of statute and includes the competence of the jurisdiction regarding genocide, crimes against humanity, war crimes and the crimes of aggression. For other crimes, they preferred some form of a consent regime. Either opting in or opting out, or consent on individual cases.

The threat to cut off military aid, coercive action undertaken recently in the Security Council to get exemption for peace keepers are part of a multi pronged effort by the United States to undermine the international justice. Basing the history of the United States, it is appalling and shameful that India which stands for and Justice and peace would join hands with United States. India, known formerly for its policies of non alignment is the only country supporting and assisting the United States to pursue its interests thereby undermining the interests of humanity as a whole. India is making a grave mistake if it considers her national interests matcher with those of United States[9].

The main objection taken by India at the last stage of the conference was related to the non inclusion of terrorism and the first use of nuclear weapons in the list of crimes. The Indian delegate described terrorism as "the most condemnable form of international crime". It was further pointed that the statute treats the offenses such as murder as an international crime, but refuses to treat the first use of nuclear weapons as International

Crimes. It is ironic that India, which has tabled an amendment in Rome to include the use of Nuclear weapon as a crime, has signed an impunity agreement with the United States, which in its current strategic posture has stated that it will use nuclear weapons in the face of "surprising developments" even against non nuclear states. India's ratification of the International Criminal Court Treaty is a way of creating an international obligation for criminal acts committed by person within the country. It is therefore, a high time for India to ratify the Rome Statute. With the recent trend of globalization, India cannot afford to have a rigid approach to the concept of sovereignty and blindly cling to die hard nationalism. India's staunch opposition to the creation of any super national body, to which it may have to be accountable, is merely an absolutist version of sovereignty. Its time India realizes that such an approach is rapidly becoming an anachronism.

On 16 October 1998, Senator Augusto Ugarte Pinochet, the former President of Chile, was arrested in London pursuant to a request for his extradition to Spain to face charges for crimes against humanity which had occurred while he was head of state in Chile. This marked the first time a former head of state had been arrested in England on such charges, and it was followed by legal proceedings which confirmed that he was not entitled to claim immunity from the jurisdiction of the English courts for crimes which were governed by an applicable international convention. Seven months later, on 27 may 1999, President Slobodan Milosevic of the Federal Republic of Yugoslavia was indicted by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia for atrocities committed in Kosovo. This marked the first time that a serving head of state had ever been indicted by an international tribunal. These developments, taking place in a period of less than a year, indicated the extent to which the established international legal order was undergoing a transformation, and the emergence of a new system of 'international criminal law'[1].

IMPORTANCE OF THE STUDY

The purpose of the study is to analyze the concept of crimes under International Criminals Law, the issues related therein and the implementation of the provisions of Rome Statute inclusive of International Criminal Court's activism in the advancement of International Criminal Law. The purpose is to put forth a proposal for inclusion of expressed provisions of various other international crimes presently, deprived of ICC's domain. Further, to critically analyze these developments with a vision to offer a balances and informed assessment of its true significance in the forthcoming years.

OBJECT OF THE STUDY

Generally it must be mentioned that although the legal problems around on the domestic application of crimes defined in international law may be mostly identical or similar in case of the different kinds of core international crimes- i.e. genocide, crimes against humanity and war crimes- , the study mainly concentrates on war crimes, given the following factors:

(i) war crimes embody the essence of international crimes in terms of variability of individual crimes and the quantity of different kinds of war crimes;
(ii) international humanitarian law was the first set of rules leading to an adoption of international crimes;
(iii) the crime of genocide was in most cases word by word implemented into national legislation, therefore problems to its implementation and application would not be that representative;

The aim of the present study mainly concentrates on the legal problems in the field of criminal justice guarantees that may account for the relatively small number of domestic trials and that may come up once a domestic procedure takes place; then the study examines the possible answers to these problems.The overall aim of the study is, therefore, to examine the problems that usually occur or could emerge for national legislators and courts when implementing humanitarian law and trying war crimes cases and seeks to determine that effective application of the obligation to repress grave breaches goes much further than ratifying international treaties or simply adopting those crimes that the international community deems to be pursued.

METHODOLOGY

In this work, mainly doctrinal research has been adopted. Going by the words of S.N.Jain[1] doctrinal research is analyzing the existing statutory provisions, legal documents, decided case laws of various courts etc. The historical method has also been employed in this research work for tracing out the history and development of the concept of war crimes. Analytical method too is used wherever necessary.

SOURCES

For realizing this research study materials from both primary and secondary sources have been utilized.The Four Geneva Conventions and its Additional Protocols, Rome Statute, United Nations Charter, Relationship Agreement between the United Nations and The International Criminal Court, Ottawa Convention, International Convention for the Suppression of the Financing of Terrorism etc. are relied upon as primary sources.The secondary sources referred herein are

treatises, commentaries, text books, case comments, law journals, and case reports both national and international.

CONCLUSION

One of the weakest points of international law is its enforcement. As the ICRC regularly noted as a response to the argument that international humanitarian law was outdated, the problem is not with the rules of humanitarian law themselves, but with the will to comply with it and the will to enforce it. With international law containing rules that oblige individuals and their violations raising criminal responsibility, the corresponding fields of international law have developed quite substantively. International criminal jurisdiction was established through the setting of *ad hoc* international tribunals and the International Criminal Court, and now it is clear that violations of international crimes result in individual criminal responsibility. Provisions related to the obligation of states to punish such violations have also developed extensively and, despite the significant progress in international criminal jurisdiction, national courts shall remain the primary forum for such proceedings. It is such domestic proceedings that the present thesis seeks to examine.

In light of the development of international law after the Second World War and the statements of states and international organization, it seems there is a general commitment by the international community to repress war crimes. Although war crimes against humanity although not yet named as such had already previously been dealt with at the international level, and the Hagenbach-trial proved to be a success and well ahead of its time, attempts at setting up an international tribunal after the First World War failed. Building partially on previous experiences, several mechanism were established after the Second World War to serve this goal.

The mechanism to repress war crimes operate on two levels: on the international and national, developed to work as complementary system. The Nuremberg and Tokyo tribunals, the 1949 Geneva Conventions and their 1977 Additional Protocols.

The *ad hoc* tribunals and special and mixed courts and tribunals, as well as the establishment of the International Criminal Court have all supported this development.

A part of this progress in international criminal law is the adoption of individual criminal responsibility with the result that criminal accountability can be directly based on international law. In parallel to this development the list of war crimes under international law has evolved, increased and became more precise, and this development is still in progress. Although numerous writings have dealt with the question of collective responsibility especially after the Second World War, the notion of collective responsibility is difficult to apply in the case of war crimes, and, due to the acceptance of individual criminal responsibility, the concept seems pointless.

In addition, the enforcement of the rules of armed conflicts has become an even more cardinal question since reference to such rules in modern conflicts seems to serve a new military and political purpose, with the result that states are bound to demonstrate that eventual violations are individual acts, thereby denying an underlying state policy.

The Alien Tort Statute adopted in the United States is somewhat similar to the extra-territorial jurisdiction linked to war crimes in criminal cases. The Statute makes reparation claims for victims of serious international crimes available before US courts, irrespective of the place of the commission of the act or the nationality of the offender or the victim. Although these are civil law claims, they are often linked to war crimes due to the nature of the acts, and the procedures and arguments of the parties often set an interesting analogy with criminal proceeding related to war crimes.

Although the concept of universal jurisdiction was adopted in 1949 for grave breaches, its application started only much later. The number of proceedings based on universal jurisdiction is still relatively few, although the number is emerging. Even though by today the concept is not new, discussions around its exact meaning and contents and ways of application are still ongoing.

The international and national levels of accountability are therefore complementary elements, putting the primary responsibility to prosecute on states, and only in case of its failure or non- availability do the international tribunals and court step in. This sharing of responsibility is articulated in the system of the Geneva Conventions and Additional Protocols, and the complementarity principle of the International Criminal Court. This system does make sense, considering that in most cases domestic courts are in the best position to proceed, taking into account the restricted resources of international tribunals.

International law therefore has clearly set obligations relating to the repression of war crimes for more than fifty years. These obligations were at first quite general, but with the development of the law and the jurisprudence of international tribunals, they became more and more elaborate. Obligations now include specific

restrictions on defences, certain requirement on national procedures or on basis of jurisdiction. These developments all point to a certain restriction of state sovereignty. From this point on, states are no longer completely free to decide on the criminalization of certain acts but are bound to criminalize them and proceed accordingly, acting not on their own behalf but on that of the international community.

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7. *S.N.Jain, "Doctrinal and Nona-Doctrinal Legal Research in Legal Research and Methodology", edited by S.K. Varma, M.Afsal Wani (Second Edition, Indian Law Institute, New Delhi,2001) p.68. According to S.N. Jain, Doctrinal Research, of course, involves analysis of case law, arranging, ordering and systematizing legal propositions and study of legal institutions but it does more- it creates law and its major tools (but not only tool) to do so us through legal reasoning or rational deduction.*

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