

STATE OBLIGATIONS UNDER INTERNATIONAL CRIMINAL LAW: PROGRESS, CHALLENGES, AND PROSPECTS

BY DEEPA KANSRA

INTRODUCTION

Human rights reflect the collective aspirations and commitments of the global community. Over the years, the human rights movement, zealously led by several players in addition to the state, has resulted in the acceptance of a variety of global and domestic obligations. In specific, the UN created human rights regime has endorsed a multidimensional approach towards the articulation and implementation of human rights obligations.

With several challenges being faced, the inability to prosecute for violations of human rights has been most critical and complex for international law. In this regard, international criminal law (ICL), a specialized branch of international law, is authentically determined to realize the objective of prevention and prosecution of crimes. ICL is potentially the medium that pushes states to seriously consider their conduct in relation to grave violations, commonly referred to as international crimes. Over the years, the mandate of States under ICL has expanded vigorously, encompassing efforts made even by non-state institutions and several other players.[i] The objective of international criminal law has also become clearer and more defined with the adoption of specific rules and the creation of specialized institutions.

Setting the pace for a stronger role to be played by international law, the International Law Commission in 1954 adopted a Draft Code of Offences against the Peace and Security of Mankind, which declared genocide, aggression, crimes against humanity, and war crimes as criminal under international law. Post World War II, several institutional mechanisms were created for the sake of the prosecution of individuals committing the said crimes.[ii] Justice was sought to be achieved through a variety of institutions like specialized Tribunals, Truth Commissions, Special Courts (Sierra Leone), Hybrid Chambers (Kosovo, East Timor). The creation of these institutions is said to have been supported by three political reasons;

1. Replacing private vengeance with the rule of law and thereby promoting long-term peace and stability
2. Creating a historical record as a means to educate future generations, and
3. Providing a sense of closure for the injured individuals and communities.[iii]

More specifically, the mandate of the specialized institutions has been to deal with impunity for grave violations. In terms of meaning, impunity signifies that those who deserve punishment for grave violations have escaped the rigours of the law.[iv] Even today, international criminal law

is progressing on a shared understanding that there shall be no impunity for international crimes. The permanent mark of ICL has been made with the International Criminal Court (ICC), created under the Rome Statute and committed to ending impunity for international crimes. The creation and working of this international forum has created obligations for states, both individually and collectively, to deal with impunity. The determination of the ICC is to ensure the 'administration of punitive justice... up to the international level'.^[v] Since the creation of the ICC, there are stronger and more visible implications for national systems. To illustrate on that point, in 2011, the Netherlands, Belgium, and Sloveni^[vi] urged the UN General Assembly (UN GA) to begin drafting a new multilateral Convention (State Cooperation Convention) which would facilitate cooperation amongst the States in the investigation of war crimes and crimes against humanity.

It is true that in the field of criminal prosecution, both international law and domestic law have evolved and faced obstacles. The fullest realization of the objectives set out by ICL is also hindered because of a variety of reasons;

1. The failure to define crimes under international law as crimes under national law
2. Inadequate definitions of crimes and principles of criminal responsibility
3. The political control over decisions to investigate, prosecute or extradite
4. Restrictions on the rights of victims with regard to the proceedings and to reparation
5. The recognition of amnesties and similar measures of impunity.^[vii]

The application of ICL also involves great trouble owing to the involvement of state officials in the commission or instigation of international crimes. The concern has been consistently raised by the International Law Commission since the 1950s, (Draft Code of Offences Against Peace and Security of Mankind 1950, 1954, 1996), that the official position of an individual who commits a crime against the peace and security of mankind, even if he acted as Head of State, does not relieve him of criminal responsibility. In other words, immunity is not enjoyed by Heads of State or government. In essence, the *duty to prosecute* individuals for the commission of international crimes, irrespective of official position, has developed as a fundamental principle of international criminal law. The rule affects both national law and international law.

THE DUTY TO PROSECUTE

Three identifiable issues necessarily must be discussed in the context of international criminal law;

1. The nature of the duty to prosecute
2. The relationship between domestic law and international criminal law
3. The political obstacles to ending impunity.

The objective of ending impunity for international crimes has led to the articulation of the duty to prosecute under ICL. The duty to prosecute emanates from treaty law, international customary law,

and *jus cogens* norms. For instance, Article 1 of the Statute for the Court on Sierra Leone states that there is hereby established a Special Court for Sierra Leone to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.[viii] In 2012, the International Court of Justice in *Belgium v. Senegal*[ix] established that it is the duty of states to investigate and prosecute crimes under international law. Observably, the exercise of universal jurisdiction has been effectuated by various states including France, Argentina, Germany, Netherlands, Norway, South Africa, Spain etc.[x]

The mandate for effective investigation and prosecution of grave violations has begun to reflect in the endeavours made by the UN and several states. The General Assembly in 2008 adopted a Resolution on the Promotion of the International Criminal Court[xi]. The Resolution states that "noting with concern the continuation in some parts of the world of persistent violations of international humanitarian law and international human rights law; and reaffirming that all states have the primary duty to investigate, prosecute, and punish those violations so as to prevent their recurrence and avoid the impunity of the perpetrators of those crimes, by taking measures whether at the national or the international level, including, as appropriate, referral to the International Criminal Court..."

In 2013, a statement was made by the European Union at the United Nations General Assembly Thematic Debate on the Role of the international criminal justice in Reconciliation. The statement is expressed as follows, "we wish to reiterate our very strong support for international criminal justice, which is key to ending impunity, to assist with building peace and reconciliation, and to bringing justice to, and rehabilitation for, victims of mass atrocities... Those who commit the most serious crimes of international concern must know that they will be held accountable for their actions".[xii] In 2013, the United Nations High Commissioner for Human Rights stated that "again, despite the truly inspiring advances in combating impunity and ensuring accountability both at the international and national levels, including through transitional justice processes, there are still far too many people with command responsibility who escape justice for serious crimes and gross human rights violations. Hundreds of thousands of people have died in genocides in Rwanda and Bosnia and Herzegovina; the Palestinian territories are still occupied; massive violations have occurred in Iraq and Sri Lanka; and war crimes continue to be committed in numerous internal conflicts including those continuing in Afghanistan, the Democratic Republic of the Congo, Mali, Sudan and Syria. We must continue to nurture and strengthen the system designed to deal with such crimes and violations, and those who commit them. It is also critical that we in the international community do our utmost to prevent such situations from developing or deteriorating."[xiii]

In this regard, the permanent court (International criminal court), was also an outcome of the persistent efforts of the international community to have a criminal court of universal acceptance.[xiv] The principle of complementarity has always been fundamental to the acceptance of the mandate of the ICC by the international community. In essence, the principle allows States to investigate individuals within their jurisdiction who are "actual or potential targets

of ICC investigation".[xv] Complementarity establishes a relationship between the ICC and the States, wherein the former is to act when the State authorities fail to pursue prosecution of international crimes. The acceptance of the principle is evident from the Preamble of the Statute which deals with the duty of every State to exercise jurisdiction over those committing international crimes.

DOMESTIC LAW AND INTERNATIONAL CRIMES

The impact of ICL on domestic legal systems has been notable in the context of various legislative initiatives undertaken.

A survey was undertaken in this regard by Amnesty International to evaluate the level of incorporation of international criminal law rules into domestic penal law. The preliminary survey indicates that 164 (approximately 85 %) of the 193 UN member states have defined one or more of the four crimes under international law (war crimes, crimes against humanity, genocide, and torture) as crimes in their national law. However, not only have many states failed to define all of these crimes under international law as crimes under national law, but in many instances, the definitions are not consistent with the strictest requirements of international law.

In Canada, the Crimes against Humanity and War Crimes Act (2000) combines the two complementary approaches to incorporating international crimes into Canadian law. It refers to international law but also defines specific crimes at times. The three core crimes are defined by immediate reference to customary international law, conventional international law and general principles of law... While the Act relies partially on the Rome Statute and international law to define genocide and crimes against humanity, it does not define war crimes at all. Rather, it refers to war crimes as a concept; it assumes that international law and practice will serve as the paramount source of judicial guidance regarding these crimes.[xvi]

In Africa, the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes, and Crimes against Humanity and All Forms of Discrimination, 2006 is an important sub-regional instrument that mandates the prosecution of individuals for international crimes. (Article 12 states that official states shall not act as a shield for criminal liability). In 2003, Rwanda adopted Law 33 which outlaws the immunity of state officials for international crimes. Burundi in 2009 amended its Penal Code to include and punish international crimes such as genocide, crimes against humanity and war crimes. Kenya adopted the International Crimes Act in 2008. The Constitution of Kenya requires that the immunity of a state official should not prevail over Kenya's duty to prosecute arising from any ratified treaty outlawing immunity (Article 2 (5)) Uganda enacted the International Criminal Court Act, 2010 to give effect to the Rome Statute. The Criminal Code of Ethiopia (2005) prohibits and punishes international crimes and outlaws immunity.

In UK the International Criminal Court Act (2001) has been adopted with the objective "to give effect to the Statute of the International Criminal Court; to provide for offences under the law of England and Wales and Northern Ireland corresponding to offences within the jurisdiction of that Court; and for connected purposes". In brief, the Act provides for the procedure to be followed in cases wherein the ICC requests for the arrest and surrender of an individual. It also defines genocide, crimes against humanity and war crimes as crimes under the law of England.

CONCLUSION

In 1998, the challenge of *impunity* was sought to be checked by the creation of the International Criminal Court. Since then, ICL has grown tremendously to create both a sense of security and discomfort for the global community. With several states incorporating the *mandate of prosecution* within domestic law, several others have challenged the very existence and functioning of the ICC. For instance, the United States has refused to support the ICC and alleged to use any force necessary to secure its officers/personnel from the ICC. India has referred to ICC as an institution in conflict with the bounds of sovereignty.[xvii]

Despite the obstacles present, ICL is certainly progressive and capable of establishing a firm ground for dealing with impunity. The Statute of the ICC is an advanced document since it aims to address the fundamental concerns over the prosecution of gender-related crimes, the role of victims during trial before the ICC, the provision for compensation and reparation. As evident from the recent and initial judgments of the ICC, international criminal law is rightfully setting the pace for the collective and efficient sharing of responsibilities amongst the global and domestic institutions of justice[xviii].

REFERENCE

[i] Reference can be made to the Syria Justice and Accountability Centre, set up by an US based non-governmental organization in 2012 with the mandate for collecting, processing, analyzing crucial information of violations of humanitarian law and human rights in Syria. The objective of the centre is to identify patterns of events, capture a historical record of victim's experiences in view of a broad range of future accountability and transitional justice processes. See Website of the SJAC at <https://syriaaccountability.org/>

[ii] During the last fifteen years, international courts have advanced international criminal justice in regional contexts and within the narrow jurisdictional mandates of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and war crimes courts in Bosnia- Herzegovina, Kosovo, and Timor. While those tribunals were evolving, the international community embraced the idea of a permanent criminal court that in most respects would obviate the need for the time- consuming and costly creation of specialized international or hybrid (part national, part international) courts for individual atrocity situations as they erupt anywhere in the world. See David Scheffer, Ashley Cox, "The Constitutionality of the Rome Statute of the International Criminal Court", Vol. 98 No.3 *The Journal of Criminal Law and Criminology* 983-1068, 989 (2008); Yuval Shany, "Assessing the Effectiveness of International Courts: A Goal Based Approach" VOL. 106: 225 *The American Journal of International Law*, 225-270 (2012).

- [iii] Jenia Iontechva Turner, Defense Perspectives on Law and Politics in International Criminal Trials, Vol 48:3 *Virginia Journal of International Law* 530-594, 536 (2008).
- [iv] George P. Fletcher, Jens David Ohlin, "Reclaiming Fundamental Principles of Criminal Law in the Darfur Case" 3 *Journal of International Criminal Justice* 539-561, 540 (2005).
- [v] Marlies Glasius, *The International Criminal Court: A Global Civil Society Initiative*, 2 Routledge New York (2006).
- [vi] See Amnesty International, "Strengthening this Essential Tool of International Justice" 19 (October 2012) <https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/ior530202012en?CMD=VEROBJ&MLKOB=32120785151>
- [vii] Amnesty International, "Universal Jurisdiction: A Preliminary Survey of Legislation Around the World", Amnesty International Publications, United Kingdom 11 (October 2011). <https://www.amnesty.org/fr/library/asset/IOR53/004/2011/en/d997366e-65bf-4d80-9022-fcb8fe284c9d/ior530042011en.pdf>
- [viii] <https://www.icrc.org/ihl.nsf/WebART/605-%201?OpenDocument>
- [ix] <https://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=144&code=bs&p3=5>
- [x] See Hiram Abtahi & Steven Arrigg Koh, "The Emerging Enforcement Practice of the International Criminal Court", Vol. 45 *Cornell International Law Journal* 1-23, 4 (2012).
- [xi] General Assembly- AG/RES. 2364 (XXXVIII-O/08), Available at https://www.oas.org/dil/AGRES_2364.pdf
- [xii] EU Statement available at https://www.eu-un.europa.eu/articles/en/article_13382_en.htm
- [xiii] Opening Statement by Ms. Navi Pillay United Nations High Commissioner for Human Rights at the 22nd session of the Human Rights Council, (2013). Available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13031&LangID=>
- [xiv] Lydia Apori Nkansah, "International Criminal Justice in Africa: Some Emerging Dynamics", Vol. 4 No. 2 *Journal of Politics and Law* 74-84, 74 (September 2011).
- [xv] David Sceffeffer, Ashley Cox, "The Constitutionality of the Rome Statute of the International Criminal Court", Vol. 98 No.3 *The Journal of Criminal Law and Criminology* 983-1068, 997 (2008).
- [xvi] Morten Bergsmo, Mads Harlem and Nobuo Hayashi (editors), *Importing Core International Crimes into National Law*, Torkel Opsahl Academic EPublisher 15 (2010).
- [xvii] See Vahida Nainar, Saumya Uma (Eds.), *Combating Impunity: A Compilation of Articles on the ICC and its Relevence to India*, Women's Reserach Action Group (April 2003); Saumya Uma, *ICC and India: Responses to Queries Raised by Parliamentarians*, Women's Research and Action Group in Association with People's Watch, Tamil Nadu (2006).
- [xviii] See Kai Ambos, "The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues" Vol. 12 No.2 *International Criminal Law Review* (2012); Alexander Greenawalt, "Justice without Politics: Prosecutorial Discretion and the International Criminal Court" Vol. 39 *NYU Journal of International Law and Politics* (2007).