

Prosecuting War Crimes and Crimes Against Humanity: Legal Challenges

Aditya Bakshi

Student, B.A. LL.B.

ABSTRACT

This research paper will revolve around the true meaning and evolution of war crimes and crimes against humanity around the globe alongside discussing various legal difficulties faced by international organisation like International Court of Justice in prosecuting war crimes more particularly the crimes against basic humanity committed by states. This research paper will also be analysing the enforceability and credibility of decisions of the International Court of Justice and discuss the need for reviewing the functioning of the justice delivery system of ICC with the help of case studies. In this research paper, the author will also be recognising the inherent internal and external gaps leading to the legal difficulties that obstruct in the way of delivering justice against the war crimes leading to violation of the fundamental human rights throughout globe and will also deeply study the procedural and structural limitations in the ICC and respective reforms that can be made for making the path of the organisation for delivering justice against such crimes, free from any kind of biasness or force.

Keywords: War crimes, International Court of Justice, Humanity, Limitations

HYPOTHESIS

The terms war crimes and crimes against humanity maybe discovered few decades back however, there presence can be traced back in the society much before that. The need for prosecution of offenders of war crimes and crimes against humanity was much needed and International Criminal Court have been playing a significant role since its establishment. However, the global politics makes us question the execution and credibility of the judgements passed by ICC.

METHODOLOGY

Doctrinal research was conducted for this study. The project has been done under different articles and papers. The main sources for this research paper are online articles by scholars along with the official websites of International Criminal Court.

INTRODUCTION

International Criminal law falls under the ambit of public international law and deals with international and transnational criminal wrongs committed amongst the member states against one another. These laws are designed with the sole purpose of ensuring that there is no violation of moral conduct. In other words, it is made to forbid any kind of behavior or conduct that is considered or generally viewed as very consequential atrocities.

The term War Crimes can be defined as crimes that are in serious violation of laws of war or International

Humanitarian Law that are usually committed towards the civilians majorly during armed conflicts wherein the offenders were convicted individually. Even though there was always certain behavior that was prohibited during conduct of any war, the concept of war crimes developed especially at the end of 19th century and gained focus during the early years of 20th century, when international humanitarian law, famously known as law of armed conflicts, was codified. It encompassed crimes such as concentration camps, ethnic cleansing, execution of prisoners, rape and bombardment of cities. By the start of World War I, States had accepted that certain violations of the laws of war—much of which had been codified in the Hague Conventions of 1899 and 1907—were crimes. The Geneva Convention of 1864 and subsequent Geneva Conventions, notably the four sessions of Geneva Convention conducted in the year 1949 and two additional protocols of 1977, have also played a major role in shaping the law of crimes that is to be complied with in war situations.

On the other hand, the term ‘crimes against humanity’ means atrocities caused to large number of people against basic humanity. This concept is said to be used for the first in the period of late eighteenth century and early nineteenth century, to describe atrocities associated with European colonism in Africa and was later in use in the year 1915 when declaration was issued by the Allied governments i.e., France, Great Britain, and Russia, condemning the mass killing of Armenians in the Ottoman empire. Since then, the concept of Crimes against humanity has evolved under the International Customary law and with the help of jurisdiction exercised by international courts such as the International Criminal Court (ICC). Although, the concept of crimes against humanity have not been codified under any of the treaties under the ambit of international law, the prohibition of crimes against humanity is regarded as a general norm under the International Law, for which no compassion and is absolutely pertinent to all nation-states. The 1998 Rome Statute is the document that reflects the latest consensus among the international community on the matter of Crimes against humanity. The Article 7 of this statute mentions about the crimes against humanity and provides for 15 forms of offences including that of kidnaping, rape, murder etc. This article also explains certain elements of the crime, that are, physical element, contextual element and mental element.¹

EVOLUTION OF PROSECUTION OF WAR CRIMES AND CRIMES AGAINST HUMANITY

Nuremberg Trial

With the end of the World War II, the allied power started struggling with the question that how they hold their rival responsible for their wrongs. Allied forces were aware about the intensity and type of war crimes committed by the Axis Power especially in European and Pacific regions of the war and strongly believed that an action should be taken to serve justice so that an example is set for the future. The leaders of the allied power were also facing difficulty in finding a way to put the Axis Power leaders on trial as majority understood this particular action taken to punish Germany after the end of the First World War as contributing to Adolf Hitler’s power prior to World War II. The same was figured out in the Yalta Conference of 1945 wherein an outline of the trial was decided and later discussed more in the Potsdam Conference from July 17 to August 2, 1945, which finally led to rise of Allied Power leaders of that time, Harry Truman, Joseph Stalin and Winston Churchill coming to the conclusion that a trial of major war criminals i.e., the surviving Nazi leaders should occur soon after the war ends. The end of World war II came up with the news of Nazi atrocities, that led to the usage of the concept of crimes against humanity, after number of years of its existence. It was the very first time any military or political leader was being

¹ <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml>

charged with the Crimes against Humanity.

22 Nazi officers were put on trial in the German city of Nuremberg starting on November 20, 1945. Nuremberg was chosen expressly to hold the trial since it was a significant symbol for the Nazi Power for a considerable amount of time. The Nuremberg trials took place over 216 days, with judges from the four Allied Powers presided over through Chief Prosecutor Justice Robert Jackson. During that time, more than 100,000 German documents, over 25,000 photos, along with a significant amount of video evidence of Nazi atrocities were examined. At the conclusion of the trial, Twelve Nazi commanders were sentenced to death, three were handed with custody for life, and four received jail terms spanning 10 to 20 years. Of the 22 well-known Nazi leaders who were put on trial, out of which 3 were found to be innocent of the allegations brought against them. On October 16, 1946, the twelve Nazi leaders were executed. While, Hermann Goering, one of the chiefs in ranking Nazi was trying to commit suicide inside his cell prior to his execution was set to take place.

Tokyo War Crimes Trial:

The trials held in Nuremberg set up an example for prosecution of war criminals and offenders of crimes against humanity. Witnessing the Nuremberg trial, a similar kind of trial was ordered by General Douglas MacArthur, the then Supreme Commander of the Allied Powers on January 19, 1946. The International Military tribunal for the Far East (IMTFE) convened on April 29, 1946 to put leaders from the empire of Japan on trial with the joint charges of conspiracy to start and wage a war. Judges from the Allied Power countries along with some other judges outside of the Allied Power presided in this trial. The United States initiated the arrest of 28 Japanese leaders and their subsequent trial begun on May 3, 1946, with the charges of war crimes, Crimes committed against prisoners of war and crimes against humanity. By the end of trial in December 1948, there were disagreements upon the opinions of different justices presiding the trial. Some of the Judges believed that the entire trial had been defective and against the spirit of law due to the absence of Japanese emperor Hirohito from the trial as it was very earlier decided with the American President Truman at Potsdam that no testimony will be implicated towards the emperor. On the other hand, a justice from India, Justice Radhabinod Pal, had the opinion that all the undertrial Japanese leaders to be found not guilty, citing a long history of Western Imperialism in Asia. At the end, the presiding judges of the trial by majority came to the conclusion, finding 25 out of 28 Japanese leaders as guilty as the other 3 suffered mental breakdown and died during the trial. 7 of these convicted Japanese leaders were sentenced with death penalty and were executed by hanging and the remaining 18 were sentenced to imprisonment. Among those executed by hanging was also the General of Imperial Japanese Army Hideki Tojo, who took the responsibility to protect the Japanese Emperor and accepted the responsibility for the war during the trial. The Tokyo trial led to a series of trials taking place at different locations of the country against approximately 5,600 suspected war criminals.

International Criminal Court (ICC)

Tribunals such as the International Criminal Tribunal for the former Yugoslavia and Rwanda constituted in the era of 1990 post the end of the Cold war Era which led to the ultimate conclusion that liberty is unacceptable. Yet, most believed that an independent, permanent criminal court needed to be established because they were set up to try offences committed just during a particular war and within a certain time period. The Rome Statute, establishing the legal foundation for the permanent International Criminal Court, was ratified by 120 States on July 17, 1998, marking a significant milestone for the international community. On July 1, 2002, the Rome Statute came into effect following its approval by sixty nations. It was the first time in international history that victims had the right to participate in proceedings and request

reparations. In other words, it meant that the victims were not only allowed to give their testimony as witnesses but were also allowed to present their views and concerns at all stages of the proceedings.

(ICC) is regarded as one of the initial perpetual international court that was based on treaty while being established with the primary aim to terminate impunity specifically with regards to the offenders committing heinous crimes in the realm of international community. It is considered as a judicial institution with no independent police force, enforcement agency or prison facilities of its own.

It is not a United Nations organization and is having its seat at The Hague in the Netherlands. The founding treaty, Rome statute grants the ICC jurisdiction over four main forms of crimes, namely, Crime of Genocide, Crimes against Humanity, War crimes and Crime of aggression. The foundation of state cooperation in the ICC's works has been a key principle built in the Rome statute since the drafting stage as well. Part 9 of the Rome Statute expressly talks about the aspects of international cooperation and judicial assistance whereas Part 10 of the statute mentions the enforcement of sentences announced by the court. The state parties support the works of the court and try their best to incorporate the rules stipulated in the Rome Statute into their own judicial systems. Although the Court's expenses are funded primarily by the state parties, it also receives voluntary contributions from governments, international organizations, individuals, corporations and other entities.

Main procedure for initiating an investigation such that the Prosecutor can start the investigation on the basis of referral from two sources, namely from any State party or from the United Nations Security Council. An alternative method for initiating investigation is if the Prosecutor receives information from sources like individuals or organizations, subject to them falling within the jurisdiction of the Court.

The International Criminal Court (ICC) has had 22 cases in all till date in 9 different situations. Uganda, the Central African Republic, Mali and the Democratic Republic of Congo have referred situations that have occurred within the boundaries of their nations and in addition, the Security Council has referred the situation in Darfur, Sudan, and the situation in Libya – both non-States Parties. Although the International criminal Court have delivered very less judgements from the time of its existence, each of the one delivered have decided a significant question of law that seriously needed to be adjudicated upon.

LEGAL CHALLENGES FACED BY INTERNATIONAL CRIMINAL COURT (ICC)

State parties who signed the ICC treaty are legally required to assist the court at all times during the investigation, trial, and court-mandated procedures. State parties are required to support the procedures of the investigation, court proceedings, preliminary examinations, of International Criminal Court (ICC). This includes cooperating with the arrest, surrender, and identification of suspects for trial before the ICC; identifying, seizing, and freezing the assets of suspects; putting the ICC's protective measures for victims and witnesses into action; relocating witnesses who are intimidated or threatened; accepting acquittals, with interim release; along with imposing judgements by keeping the guilty under state prisons. However, despite ratifying with the treaty, the of one of the parties of the state with the ICC influenced by not only the regional politics but also that of global along with the diplomatic international relations and the irrelevant contemplations. Some of the crucial areas where the International Criminal Court has faced challenges are:

- **Implementing orders and arrest warrants**

The International Criminal Court is particularly concerned with noncompliance with orders and arrest warrants. Following the completion of their investigation, the ICC prosecutor issues summonses and arrest warrants for the individuals they believe to have committed the offence. Since the ICC does not hold trials

when the accused are absent, having the suspects present is essential to a fair trial. The United Nations Organisations and member nations' cooperation is crucial for the arrest of suspects; however, their lack of cooperation has caused a delay in the delivery of justice to the victims of criminal offences. Subsequently, with the establishment in the year 2002, the International Criminal Court proceeded to issue about thirty - six warrants however, out of which only twenty have been executed well. Where 17 persons were under the detention at the detention centre of ICC, the remaining 13 accused have not marked their presence in the court yet and continue to be at large. Some examples of the same are:

1. Arrest warrants issued against Omar al-Bashir –

In 2009 and 2010, the ICC delivered two warrants for prosecution of Omar al-Bashir, the former president of Sudan. He was deposed in 2019 after being charged with war crimes, crimes against humanity, and genocide; however, he remained at large for a considerable amount of time. The magnitude of the crimes that he is accused of committing is demonstrated by the UN statistics that state that during the Darfur conflict of 2003, nearly 300,000 civilians lost their lives along with 2.5 million were evacuated. Arrest warrants have no doubt reduced his travel in a number of countries that he can travel safely eliminating the fear of being arrested by the ICC but still there are ICC members, that are under the obligation to maintain cooperation along with working on the implementation of the arrest warrants with the court, but allowing Omar al-Bashir to travel in their country. Certain judges of ICC have referred to the Assembly of State Parties (ASP), a court oversight body made up of all state parties to the Rome statute, non-cooperation of states such as Chad, DRC, Djibouti, Jordan, Malawi, and Uganda in carrying out arrest warrant of the same. When the arrest warrant for Abdul al-Bashir was finally issued ten years later, the Sudanese government stated that he would be turned over to the International Criminal Court (ICC) shortly after, but this never occurred.

2. Arrest warrants issued against Simone Gbagbo-

Simone Gbagbo, regarded as the former first lady, was the subject of an arrest order issued by the International Criminal Court in 2012. As a major contributor as an offender of murder, rape, along with other sexual violence, as well as various inhumane acts carried out throughout the 2010–11 post-election unrest, she was charged with crimes against humanity. Simone Gbagbo was taken into custody by the Ivorian government in 2014 but they declined in bringing her to the International Criminal Court. She was prosecuted there further, was held guilty by the Ivorian trial in 2015 for undermining state security and thereby sentenced to twenty years of imprisonment. Ivory Coast was obligated to turn her over to the ICC so that she might face trial since the ICC's appellate chamber believed that the charges, she was found guilty of in Ivory Coast were different from the charges the ICC had against her. However, the trial was never able begin as the Ivorian government disregarded the ICC's order.

3. Arrest warrants issued against Saif al-Islam Gaddafi-

The International Criminal Court issued an arrest warrant for Saif al-Islam Gaddafi, the son of Muammar Gaddafi, the former leader of Libya. He has not been put on trial despite being accused of committing atrocities throughout the country's ten-year struggle because of the Libyan government's lack of cooperation with the ICC.²

² Uma, S. (2021) *State Cooperation and Challenges to International Criminal Justice, The wire: The Wire News India, Latest News, news from India, politics, External Affairs, science, economics, gender and culture*. Available at: <https://thewire.in/law/state-cooperation-and-the-challenge-to-international-criminal-justice> (Accessed: 10 April 2024).

- **Withdrawals from the International Criminal Court Statute**

Another major challenge faced by the ICC is that the states withdrawing themselves from Rome Statute. During the course of time, International Criminal Court dreadfully needs collective global support, the opposite trend of withdrawals from the ICC statute weakens the established mechanism for state cooperations. The first of such instances was that of the United States in 2002, when the administration governed under the then President George W. Bush unsigned the statute by conveying the particular information that there was no underlying intention of the United States to ratify the statute and thus they will not be legally obligated for the same. This was led by Russian government deciding to withdraw the Rome statute in 2016 after being triggered by the ICC Prosecutor's report of preliminary investigations including the Russian forces alleged crimes committed in Ukraine and Crimea. In the very same year, South Africa, Burundi and Gambia conveyed to the secretary general of UN their intention to withdraw from the statute. The three governments were spurred to action by an African Union decision from 2015 that criticised the International Criminal Court's prejudice against Africa and offered heads of state immunity from prosecution. However, later on South Africa and Gambia decided to reverse their decision to withdraw from the statute, wherein the former was forced to revoke the same due to order passed by the HC. On other hand, Burundi continued with its intent to withdraw from the statute.

The main motivation for withdrawal was the authorisation by ICC to the prosecutor in order to look into the matters of heinous crimes that include murder, rape, kidnapping etc. After being a state party for 13 years, Burundi finally withdrew in the year 2017. The relationship between International Criminal Court and the African Union is a chequered one. The highest number of state parties to the ICC statute are from the African regions. Also, the highest number of cases in the ICC have also been from the African region. The relationship between the two have become full of tensions in past few years due to repeated calls from the ICC for implementing its arrest warrants against the Sudanese President Omar al-Bashir.

Another example of State parties withdrawing is that of The Philippines. The Philippines had ratified in the year 2011 to the ICC Statute. However, in March, 2018, post the announcement of a preliminary investigation into the atrocities committed throughout the "war on drugs" campaign by the prosecutor of ICC, it withdrew from the statute. This move was perceived as an attempt to shield President Duterte, who was the campaign's main architect, from an ICC investigation. However, in March 2021, the withdrawal from the ICC statute was challenged in the Supreme Court of The Philippines, In their ruling, the entire bench of judges stated that, even though the country had left the ICC, the International Criminal Court could still prosecute government officials for crimes they are accused of committing before the withdrawal, and that they must work with the ICC in this regard.³

- **Blatant opposition to the ICC**

One of the greatest obstacles the International Criminal Court faces, in addition to the previously listed challenges, is clear opposition. Israel has blatantly disregarded an ICC probe into the Palestine crisis that was carried out in 2021. Palestinians now have the opportunity to file accusations regarding crimes committed by Israeli troops in the occupied Palestinian area, which includes Gaza and the West Bank, including East Jerusalem, according to the International Criminal Court's investigation. The International

³ Uma, S. (2021) *State Cooperation and Challenges to International Criminal Justice, The wire: The Wire News India, Latest News, news from India, politics, External Affairs, science, economics, gender and culture*. Available at: <https://thewire.in/law/state-cooperation-and-the-challenge-to-international-criminal-justice> (Accessed: 10 April 2024).

Criminal Court's decision to launch an investigation was described as "absurd and undiluted anti-Semitism" by the Israeli government, which also allegedly declared clearly that it wasn't going to cooperate with them. A similar act of defiance occurred when the ICC prosecutor filed a non-cooperation charge against the Kenyan government in 2013 due to their failure in bringing Uhur Muigai Kenyatta, Kenya's former deputy prime minister, to testify about crimes against humanity. In spite of being a signatory to the ICC Statute, the Kenyan government disregarded its investigation's demands for cooperation and substantial evidence, so breaching its state party obligations.

These blatant opposition to the International Criminal Court is classic examples of state parties trying to shield alleged perpetrators from the crimes they have committed and is subsequently leading to undermining the spirit of justice globally.

CONCLUSION & POSSIBLE SOLUTIONS TO THE LEGAL CHALLENGED FACED BY ICC

Lastly to conclude, the 20th century witnessed the two biggest wars in the global history i.e., World War I and World War II, that eventually led to mass destruction of human life and violation of basic human rights to a great extent. By the end of World War II, the basic spirit of humanity was tampered to such a extent that it led to the Allied Power nations initiating Nuremberg and Tokyo Trials to prosecute those who have committed war crimes, Genocide and Crimes against Humanity and set up a future example for states globally.

This further led to establishment of The International Criminal Court under the Rome Statute by the end of the 20th century with the effort to hold perpetrators of grave atrocities accountable. So far, the ICC have faced challenges like Non-compliance with the arrest warrants, withdrawal from the statute and harsh opposition from the member states but the following steps can be taken to ensure that offenders of Crimes against Humanity, War Crimes, Genocide and Crimes against aggression, that fall under the jurisdiction of the International Criminal Court are prosecuted;

Withdrawal from the state of Rome became a major concern with regard to an attempt to undermine the spirit of rule of law. A common concern for almost all the state parties withdrawing from the statute is regarded as an issue to the humanity. The International Criminal Court should address this demand and share their views regarding the same with the State parties. Apart from this the International Criminal Court needs to ensure that the proper investigations are being conducted in other countries apart from the African countries so that the opinion made by the African Union in their 2015 resolution about the ICC being biased changes. At the same time, it is important that the International Criminal Court understands that it will not be swayed when it investigates the wrongdoings of certain militants of powerful countries to ensure the integrity along with reliability, credibility.

There is strong potential for domestic and regional prosecution of crimes by the ICC, universal or otherwise, to demonstrate that the norms and mechanisms of the International Criminal Court are "coming home". For example, the conviction of Hissène Habré helped in ending Sovereign immunity and impunity, thereby complying with the primary aim for which the International Criminal Court is primary established. One of the important issues to be addressed upon by the ICC is that of non-cooperation of state parties with the ICC. Necessitating the Assembly of State Parties (ASP) to examine their responses to the same can play an important role in improving the current day situation of the ICC. Newer strategies, which includes combining legal, non-legal, and political responses, should be investigated in addition to employing diplomatic channels, persuasion strategy, state cooperation incentives, sanctions, and judicial findings.