Analysis of International Criminal Tribunal Regarding Violation of International Humanitarian Law

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Abstract
The prosecution of international crimes is primarily intended to occur at the domestic level, as envisioned by the 1948 Genocide Convention and reinforced by the principle of complementarity under the International Criminal Court (ICC) regime. National courts serve as the primary enforcers of international criminal law, often regarded as preferable to international prosecutions for political, sociological, and practical reasons. However, despite global commitments to preventing atrocities, domestic prosecutions remain sparse, necessitating the creation of international criminal tribunals to address impunity. This chapter examines the legal obligations associated with national prosecutions of international crimes and explores key legal challenges. It also traces the historical development of international criminal justice, highlighting the establishment of ad hoc tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), which emerged in response to ongoing atrocities. The discussion underscores the interplay between national and international efforts in ensuring accountability for war crimes and crimes against humanity.
Keywords: Crime, accountability, humanitarian law

Introduction

The crimes are primarily intended to be prosecuted at the domestic level. Although the 1948 Genocide Convention foresaw a possible international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction, the international criminal court regime, through its system of complementary,

sees national courts as the courts of first resort. This has been described as an indirect enforcement system whereby international criminal law is to be enforced through national systems. National prosecutions are not only the primary vehicle for the enforcement of international crimes, they are also often considered a preferable option in political, sociological, practical and legitimacy terms to international prosecutions. But, although the world vowed after the second world war never again to allow such atrocities to occur, they continue to be committed in many places around the world, yet domestic prosecutions are spare. Indeed, the international criminal courts and tribunals have been created to counter the impunity that tends to exist domestically. This chapter will address international obligations in this regard and some major legal issues that arise concerning national prosecutions of international crimes.[7]

The draft statute of an international criminal court was being considered in the International Law Commission, events compelled the creation of a court on an ad hoc basis in order to address the atrocities being committed in the former Yugoslavia. In late 1992, as war raged in Bosnia, a Commission of Experts established by the Security Council identified a range of war crimes and crimes against humanity that had been committed and that were continuing. It urged the establishment of an international criminal tribunal, an idea that had originally been recommended by Lord Owen and Cyrus Vance. The proposal was endorsed by the General Assembly in a December 1992 resolution. The rapporteurs appointed under the Moscow Human Dimension Mechanism of the Conference on Security and Co-operation in Europe, Hans Carrell, GrohHallstead Thune and Helmut Turk, took the initiative to prepare a draft statute. Several governments also submitted draft proposals or otherwise commented upon the creation of a tribunal.[1]

Legal Background of International Criminal Tribunals

On 9 December 1948, one day before the adoption of the universal declaration of human rights, the UN General Assembly adopted a resolution mandating the international law commission to enact a draft statute of an international criminal court. Nearly 50 years later, the statute of international criminal court, the first permanent international criminal tribunal was adopted on 17 July 1998 by UN Diplomatic Conference on the establishment of an international criminal court. Following 60th ratification of the statute in April 2002, the statute and the court came into operation on 1stJuly 2002. Its judges were inaugurated on 11 March 2003.[8]

The last few years has brought a number of remarkable developments in the field of international criminal law. In the summer of 1991, the international law commission adopted an expanded draft code of crimes against the peace and security of mankind that extended far beyond the scope of the initial draft code, first adopted in 1951, indicating that the time was

ripe for the international community to develop broad and coherent norms in this field. More spectacularly in May1993, UN security council took decisive action to create the international criminal tribunals for the former Yugoslavia, and in November 1994, established the international criminal tribunal for Rwanda. The statute for these ad hoc tribunals imposed individual criminal responsibility essentially for the most serious violations of international human rights and humanitarian law that were committed in those countries on a systematic and massive scale during recent arm conflict. In 1994, the ILC adopted a draft statute for a permanent international criminal court. On 11 December 1995, the general assembly created a Preparatory Committee on the establishment of a permanent international criminal court to draft texts with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries. In July 1996, the international law commission introduce a radical revisions to the 1991 draft code. All these developments signal the international community increasing interest in the establishment of an effective system of international criminal law. In the contemporary post-cold war climate, there appear to be greater opportunities for closer political cooperation in this regard, as increasing international attention is focus on the need to suppress, punish and deter the individual from committing or ordering to be committed crimes under international law. The aim of the present enquiry is to identify and evaluate prospects for the emergence of unified system of international criminal law, characterize by broad and coherent material coverage, as well as fear and effective institutional implementation.

Relation between International Criminal Tribunal and International Humanitarian Law

International humanitarian law has played a decisive role in this development, as both the laws and customs of war and the rules for the protection of victims fall within its material scope. Indeed, an initial proposal to reach agreement on the establishment of an international criminal court was formulated in the nineteenth century with a view to prosecuting violations of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, which was adopted in 1864. In 1907 the states codified the laws and customs of war applicable to war on land in the Hague Convention No. IV and its annexed Regulations. The Convention provides that the obligations set down in its rules are binding on the states parties, but at the end of the First World War the peace treaty signed at Versailles in 19191 established that Kaiser William II of Germany, whom it publicly arraigned for a supreme offence against international morality and the sanctity of treaties, and those who had carried out his orders were personally responsible. It thus recognized the right of the Allied and

associategovernments to establish military tribunals for the purpose of prosecuting persons accused of having committed war crimes.[2]

The situation continued to evolve. During the Second World War various Allied governments expressed the desire to investigate, try and punish war criminals. The Moscow Declaration, adopted in October 1943, set the stage for the 1945 London Agreement to which was appended the Charter of the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis (the Nuremberg Tribunal). The adoption of the Charters of the Nuremberg and Tokyo Tribunals gave significant impetus to the codification of international humanitarian law: for the first time treaty-based rules defined a series of criminal offences for which individuals could be held accountable, and at the same time courts were instituted that took effective action and set out a series of universally recognized principles.[3]

The development of international humanitarian law has been accompanied by the formulation of principles and the adoption of multilateral treaties intended to be universal and applicable to war crimes. The rules set down in the statutes of international criminal courts and the work the courts have done and are doing within the scope of their respective mandates reflect that development and at the same time highlight the direct relationship between the object and purpose of international humanitarian law and the establishment of the tribunals. Their jurisprudence, although not an independent law-making process, is a particularly useful additional means of determining the existence of a rule of law, its meaning and its scope.[4]

Jurisdiction of International Criminal Tribunal

Many of the principles of international humanitarian law highlighted in the jurisprudence of the ICTY and the ICTR, interpreting the rules contained in their Statutes in the light of developments in that branch of positive law, and many provisions of the multilateral treaties adopted with a view to limiting violence were taken into account when the conference convened in Rome in 1998 under the auspices of the United Nations adopted the Statute of the International Criminal Court (Rome Statute). The Court was given the power to exercise its jurisdiction over persons whose conduct was a crime under the Court's jurisdiction at the time it occurred; the official capacity of a person does not exempt that person from responsibility; and, while the Rome Statute establishes the responsibility of commanders and other superiors, it also provides that, in principle, the fact that the crime was committed pursuant to an order of a government or of a superior does not relieve the person concerned of responsibility. The Rome Statute, reflecting developments in customary law highlighted by the Statutes and jurisprudence of the ICTY and the ICTR, defines four categories of war crimes, two in respect of international armed conflicts and two in respect of conflicts not international in character. However, the Elements of Crimes

adopted by the Assembly of States Parties to assist in the interpretation and application of the Court's jurisdiction specify that there is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international, nor is there a requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international; there is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict because a war crime must occur in the context of such a conflict and be associated with it.[5]

The International Law Commission (ILC) was charged by the General Assembly with the preparation of the new draft statute. Although the chances of success were not very high, a series of events between 1989 and 1992 cleared the way for the Commission's efforts: the creation by the Security Council of international criminal tribunals for the former Yugoslavia and Rwanda thus provided, for the first time since World War II, for the investigation and trial at the international level of individuals for violations of international humanitarian law. In 1994 the ILC, in the course of its work on the Draft Code of Crimes against Peace and Security of Mankind,presented the draft Statute of the International Criminal Court (ICC) to the General Assembly. The ILC's proposal was based on international precedents, such as the Nuremberg and Tokyo tribunals, the 1951 and 1953 draft statutes, the 1980 draft Statute for the Creationof an International Criminal Jurisdiction to enforce the Apartheid Convention, and the statutes for the Tribunals for Yugoslavia and Rwanda.[6]

Conclusion

To conclude it is stated that as a prelude to the establishment of a permanent international criminal tribunal, the creation of this ad hoc Tribunal is both a test and a challenge that should not be allowed to fail. Any such failure or discrediting of the ICTFY will encourage rather than deter future violators of international humanitarian law. Establishing an ad hoc international criminal tribunal to try the authors of war crimes in the former Yugoslavia symbolizes the United Nations' dedication to the rule of law and the international legal order. Now, the world community must face the challenge of vesting that tribunal with the political support, resources, and other means necessary to bring justice to bear on those who transgress international humanitarian law. Until a clear-cut value-judgement is made to establish a permanent system of international criminal justice free from interferences and manipulations by those who are engaged in the political processes, the world community will be condemned to compromise justice and undermine the moral-ethical foundation of international relations.

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