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The Most Effective Way of Enforcing International Criminal Law

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Abstract

The International Criminal Court (ICC or ICCt) is an intergovernmental organization and international tribunal that sits in The Hague, Netherlands. The ICC has jurisdiction to prosecute individuals for the international crimes of genocide, crimes against humanity, war crimes, and crimes of aggression. A crime is an act committed or omitted in violation of Public Law, but the most challenges before ICC about the Implementation and enforcing international criminal law.

This research will answer this question What is the most effective way of enforcing international criminal law?

This research studies the effectiveness of the international criminal law. It will study the role of the individual in the international criminal law. It will research the origin and effective set up of the international criminal court as a means to settle international crimes against humanity. It will discuss the drawbacks of the current system and suggest measures to make the international criminal law as an effective tool in the international criminal law.

Keywords: *Global Protection of Human Rights, ICC, international criminal law, crimes against humanity, war crimes.*

I. INTRODUCTION

A crime is an act committed or omitted in violation of Public Law, whicheither forbids or commandssuch an act. It is an elementary concept that criminal liability of individual does not arise against individual but against society as the crime is perpetuated against the society as a whole. Therefore, when an act is deemed to be a crime punishable under international law, it would be deemed to have been committed against the international community as a whole. Though criminal responsibility of an individual under international criminal law is varied, the basic concept of criminal law remains the same. Criminal law analysis of an offense proceeds from a basic distinction between the material element and the mental element.

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The age old principle is the individual responsibility of officials in armed conflicts. The earliest recorded one is the Art of War, wherein the author observed that the responsibility of acts committed by the officer rests with the commanders. A similar view is also held by Dutch scholar Hugo Grotius, where the author states that responsibility for the crime of a subject rests with the rulers, if they knew it and did not take actions to prevent it where they should have taken to prevent such omission or commission. There had been several other promulgations and enactments that stressed the need of analyzing the role of the commander during armed conflicts. Therefore it can be held that the general concept is that there exists individual responsibility in an armed conflict for violations of law.

One of the main concerns of the above contention is that it may be futile or impossible to punish an entire State for a crime committed on its behalf but it is effectively possible to punish individuals responsible for that crime. In addition, it may not be true that an individual might have not taken part in the actual commission of the crime but has the link to the act of the crime as a third party. The Nuremberg Tribunal, Tokyo Tribunal, International Criminal Tribunal of Rwanda (ICTR) and International Tribunal for Yugoslavia (ITY) have all affirmed that an individual may be punished as per the crimes he has committed as per the international law.

To keep a curb on the misconducts in international law, the international community created ad hoc tribunal as a medium to codify and develop the principles of international criminal law. The earliest tribunals were the ones of Nuremberg and Tokyo. These early tribunals have the disadvantage that they had limitations in the functioning. Firstly, both the tribunals were created in the aftermath of the World War and as such there were restriction in the participation from the international communities. The second phase of the ad hoc tribunals was the creation of the Rwanda and Yugoslavia tribunals by the Security Council. The main drawback of the ad hoc tribunals is that its activities are limited to specific geographic locations and they respond primarily to events in the past. In such a scenario, there felt a need for an international court that could do away with the drawbacks of the ad hoc tribunals and could also respond to the current state of affairs in international criminal law. As a result, the ICC can be seen as the first tribunal, in fact the only one, where all the member states jointly participated in its creation, by means of an international treaty.

This research studies the effectiveness of the international criminal law. It will study the role of the individual in the international criminal law. It will research the origin and effective set up of the international criminal court as a means to settle international crimes against humanity. It will discuss the drawbacks of the current system and suggest measures to make the international criminal law as an effective tool in the international criminal law.

II. The Role of Individual in International Criminal Law

Under International Criminal Law, the general principles of criminal law remain the same. For every crime warranting punishment it needs both *actus reus* and *mens rea*, both are needed to establish the crime. The physical element dealing with such offense has been specifically defined in statutes or conventions dealing with such offences. Such act may either be an act of commission or an act of omission. However, the act alone would not

make a person guilty. An act when committed in an accidental manner and where intent is absent, then the accused is presumed innocent even if such an act amount to a criminal act. This is due to the fact that, court related a man guilty of an offense against criminal law, to his guilty mind. In other words, a man is guilty of a criminal offense, if only he has a guilty mind.

Under International law to accuse a person of criminal activities it is not only necessary to prove the physical element of the offense but also the mental element of the offense. Provisions requiring the presence and the importance of the mental element can be seen in various statutes and conventions like Rome Statute and Genocide Convention. The concept of mental element is further divided into 'knowledge' and 'intent'. According to the Rome Statute, 'intent' is defined as:

"…a person has intent where:

a) In relation to conduct, that person means to engage in conduct;

b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of event."

Knowledge is explained as:

"For the purpose of this Article, knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events."

Therefore, it can be seen that with regard to criminal law, the international community has abided by the general principles of law recognized by the civilized nations and indeed has held the international trials as per these principles.

The International Military Tribunals came as a giant leap forward in the field of international criminal law and was a defining movement in the world history and jurisprudence setting new benchmarks for the countries. The Nuremberg Tribunal can be seen as the first effort to set up an international criminal court, which saw the London Agreement giving the power to set up the Tribunal. This Tribunal tried crimes on the basis of principles which emphasized individual criminal responsibilities and the general principles of law. The Tribunal affirmed the individual responsibility as:

Crimes against international law are committed by men, not abstract enemies, and only by punishing individuals who commit such crime can the provisions of international law be enforced..

Nuremberg Military Tribunal was the first international step towards an international criminal court and it was able to consolidate its position in the field of international criminal law. Since then there has been many ad hoc international criminal tribunals that functioned effectively. In the wake of two conflicts in 1990, the United Nations reinitiated the idea of international criminal tribunal and this resulted in the formation of the Tribunals ICTY and

CTR. The atrocities in Yugoslavia drew a uniform cry from the international community to brining these large scale violations committed against the civilian under international law to an end.

The stirring judicial trend of individual criminal responsibility set up by the Nuremberg Tribunal and the subsequent similar tribunals was further evolved as it was adopted in the Rome Statute which forms the basis of ICC. The Rome Statute evoked the usage of individual criminal responsibility by stating:

"A person who commits a crime within the jurisdiction of the court shall be individually responsible and liable for punishment in accordance with this statute."

But while dealing with large scale criminal atrocities most of the accused may not be actual perpetrators in crime. The criminal judicial system has over the years approached the dilemma with a two prolonged attack whereby the Court may either consider the planners and organizers as principal offenders or try others as abettors who aid or abet principal offenders. The ICTY cautioned the adopting of the path stating that describing such persons only as abettors or aiders might understate the degree of their criminal responsibility. But the criminal justice system has overcome the particular hurdle by charging the accused on multiple counts which include charge as principal offenders and as accessory. Further, the Court in *Tadic* held that the awareness of the requisite elements of crime committed by the principal would suffice to classify as crime. The ICTY in *Furundzija*, held that:

"If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime and is guilty as an aider and abettor."

The ICTR in *Akayesu* held that complicity required a 'positive act like an act of commission, while to aid or abet in a crime would mean that there was a failure to act or to refrain from the act. But a dilemma faced by the prosecution while dealing with such acts is that the accused could plead ignorance of the consequences of his act, which in itself could be either be purely economically driven or pale in comparison to the totality of the actions. The ICTY in the *Celebici*(also known as *Delalic* case) held that the individuals could be held responsible for their participation in the commission of criminal offenses if any of the several capacities was in clear conformities with general principles of criminal law. In some cases where the accused had the legal duty to intervene, mere presence would however, constitute a form of complicity. In *Furundzija*, the Tribunal observed that an approving spectator who has held in such respect by the other perpetrators and his presence encouraged them in their conduct, in the current a situation such a spectator could be found guilty as an accomplice to crimes against humanity.

Many international crimes are committed by a large number of people acting in a union in most cases. Such crimes are committed at the instigation of a superior authority or at his command started the instigation of the people as an external force. The ICTR with respect to instigation held that even where incitement failed to produce the result expected by the perpetrator, the unsuccessful acts of the incitement could be punished. The ICTY observed

that direct contribution did not require the participation in the physical presence or assistance. This appears to have been well accepted in Nuremberg war crimes trials. This gave birth to the concept of superior or command responsibility. Under the command responsibility theory, the commander ought to have known of the crimes, in other words it's the superior or command responsibility. Although, according to the fact that it would be unacceptable to condemn a commander merely because one of his soldiers committed a crime. In *US v Yamashita*, it was held that where there were widespread vicious revengeful acts and where the commander failed to take any preventive steps to discover and control such criminal acts, the actions of such commander would hold him responsible for the crime for the lawless acts of his subordinate officers.

The ICTY established the three part test for criminal liability in pursuant to Art 7(3) of the Statute. First part of the test lays down the existence of a superior-subordinate relationship between the superior and the accused person. In the second part, the Article states that the accused knew or had the reason to know that the crime had been committed or had the means to know that such a crime would be committed. Finally, there was a failure on the part of the accused to take precautionary measures that are reasonable enough to prevent the commission of the crime or to punish the perpetrators of the crime.

The ICTY and the ICTR stressed the importance of 'command responsibility' stating that a person in a position of authority would have used it to incite another to commit an offence. The superior-subordinate relationship can be a formal or informal relationship that's hierarchical in nature between superior and subordinate. With respect to the mental element, it is matter of establishing the knowledge the superior officer had about the commission of the crime by his subordinate officer or had reasons to know that such a crime would be committed by the officer under his command. The court has established that superior responsibility is not a form of strict liability. The Appeal Chamber of the ICTY held that the principle that military and other superior might have been criminally responsible for the acts of their subordinates was well established in conventional and customary law. Thus it is evident that international law targets individual with respect to criminal liability. The law also recognizes individuals as responsible for actions in addition to the rights of then non-combatants and victims and thereby establishes the existence of the concept of individuality.

The individual responsibility for offenses committed during armed conflict has evolved into a mature system of responsibilities. There are two doctrines approaches to these responsibilities, that of the doctrine of 'respondent superior' and the position of 'absolute liability'. According to the former, an officer who carries out the orders of his superiors will not be held liable for the criminal act. This doctrine finds its origin in the early military rules where the subordinate officers are inculcated the principles of discipline and obedience. The doctrine of absolute liability is defined as the "think for themselves" principle where the subordinate officers are assumed to individuals of free thinking and are bound by their actions as the belief is such an officer should analyze the situation before executing the superior orders. In this context two outcomes can be concluded. The first aspect is to acknowledge the superiors for their actions and direct contributions in the violation of law and order and also their

failures to prevent the commission of such crimes. The second outcome is the situation where the ICC obliges the member states who are parties to the treaties and conventions to initiate proceedings against the accused officers. These actions would conclude the accepted principle that in the event of violations of humanitarian law, the responsibility would rest upon the person who instituted or commissioned the act by their acts or in the prevention to stop these acts.

III. The Role of International Criminal Court

Under international law, the protection of individuals from violations of human rights and freedom requires appropriate mechanisms to enforce the law and punish the wrong doers. In the absence of an effective mechanism exists, the law cannot exist. However, the problem arises when the national courts do not or are unwilling to act due to various factors including the acts of the agents of the state in perpetuating the crime. Further, in these situations where the national courts are unwilling to act, the international courts should intervene to impart justice and its enforcement. However, the main drawback is that as compared to national courts, the do not have the legislative powers and decision making procedures. There will be a failure if the municipal laws do not take actions and rely on the indirect responsibility to evade the punitive charges.

3.1 -Drawbacks of the current system

One of the main drawbacks of the ICC is that it is a complementary to the national jurisdiction of the State and as such it does not have a universal jurisdiction. It is considered as the court of last resort as the jurisdiction of the court is limited in terms of the action attributed to the individuals or the states that has ratified its statute and as a result consented to its jurisdiction. Further, the Security Council plays an important role in maintaining peace and security. The provision under the SC is to refer to the ICC, which means that the previous system of creating ad hoc tribunals has ended. An example of this is the referral to the ICC in the case of Darfur in Sudan, even though Sudan is not a party to the Rome Statute.

There is a restriction on the jurisdiction of the Court in the sense that only the events that has been committed since the inception of the Statute can be dealt by the ICC. This means that any crimes that had taken place before the Statute entered into force is beyond the jurisdictional powers of the ICC. Another aspect of the ICC is that the even though the subject matter of the Court is the international crimes committed by any entity, whether the state or an individual, the core subject matter would be the violation of human rights. In this respects, doubts have been raised as the role of the court as a international criminal court or that of a human rights court. This ambiguity has been cleared as the Statue has stated that the nature of the ICC is that of an international criminal court where the scope of the court relates to the genocide, war crimes and crimes against humanity. Further, these crimes against humanity have been established in international as well domestic laws as well.

According to the Statute, the Court has the jurisdiction to hold people responsible for crimes against humanity and wherein the Court has the jurisdiction over the entities. Further according to the Statute, the Court can exercise the jurisdiction only when the crime against humanity and the exercise of the jurisdiction has been clearly

defined. In most cases, instead of crime there could be aggression, which requires proof of the act as well as the result. It is very essential that under international criminal law, there is amble proof of evidence that the act is the 'substantial cause' of the outcome. The lack of clarity in this situation is under international law there is a lack of definition as to what constitutes an aggression and also there is no uniform agreement regarding the role of State as an aggressor to an individual under the State. The ambiguity happens because the Statute states that a person who commits an act against humanity is responsible for his acts and liable for punishment provided such an act happens within the jurisdiction of the court.

Another drawback of the ICC is that the uncertainty about exercising its jurisdiction. Under international every state is sovereign, which means that in order to maintain this principle, the Court will not intervene. A classic example of this is the aftermath of the Yugoslavia war of dissolution and the Rwanda genocide, where concerns have been raised on the grounds that the national courts are taken measures to protect the guilty. According to the Statute, the court will intervene and take measures only when the national courts fail to take appropriate actions.

It follows from the concern of States regarding the nature of the court that it would perform the role of a judicial institution abiding by the principles of a judicial body where in the principles of natural justice are followed, like the guarantee of fair trial and the rights of the accused. Further to uphold the principles of natural justice, the Statute has taken measures to incorporate the rights of the accused and also the due process has been well incorporated into the international and domestic legal systems.However this participation was largely as witnesses for the prosecutor or for the defense. With respect to ICC this is different as the victims can participate not just as witness alone. The principles of restitution, compensation and rehabilitation are the mean the ICC has powers to order reparations to the victims. With respect to women and child the ICC has unique measures to protect them. Further under the doctrine of absolute liability, where in the superior officers are responsible for the actions they take and also the subordinate officers who carry out the orders are also liable unless they can claim any defense to exonerate them.

IV. Reforming the Current System

4.1- Enforceability

The ICC is the first comprehensive instrument in international human rights and encompasses all the civil, political, social and cultural rights of an individual. However as the name implies, it was neither intended to impose legal obligations on States, nor does it establish any supervisory organ to enforce the rights. The major problem is that it does not possess a legally binding enforceability and as such cannot create any obligations on the member states to enforce it. In other words, there is no mechanism set forth for implementation of the rights in the event of any violation. It is simple a statement of intent and principles, nothing more because it is merely a declaration. As a result some critics have questioned its significance.

On the other hand, its defenders emphasize that since it is a unanimous adoption by the UN, reflects the international moral commitment of the member states to translate it through the mechanism of the respective State's constitutional law. Also that it imposes a moral obligation on the States not to ignore its effectuation. Though the ICC has attained significant recognition by the UN Member States, there isn't any system to check its enforceability. Even though the ICC has been held to be setting the grounds to avail basic human rights and human dignity, it has received greater recognition from all countries and has acquired the status of customary international law.

As customary international law, ICC works on international sphere of human rights violations. It does not have the direct impact on the sporadic police atrocities unless the State itself is perpetrating the mass killings or torture with the State. Even though the ICC lacks in enforceability mechanism, it has contributed a lot to the growth and development of global and national human rights instruments. To make the ICC more effective, measures have been suggested to make the rulings of the body enforceable. The three tier mechanism of international remedy, control and supervision are highlighted as the main opposition to make the ICC effective.

The enforcement mechanism under the International Criminal Law may be categorized as follows:

1. State Reporting
2. Communication/Complaints

(i) Inter-State communications and complaints

(ii) Individual communications and complaints

On the emergence of trans-national human rights jurisprudence, States have the obligation to submit reports to treaty monitoring bodies at prescribed intervals. Such reports shall indicate should also include the progress made in the enjoyment of the rights. Finally, the report should include all the factors and difficulties affecting the implementation of the ICC rules.

4.2- Individual Communication

Individual communication is the method by which individuals may submit communications directly with a view to obtain remedy, claiming that the State party has violated rights recognized by the ICC. The real test for effectiveness of an international system of protection of human rights lies on the fact that whether there are provisions where an aggrieved individual whose rights have been infringed, can approach an international institutions to seek remedy. There are stipulations for admissibility of individual complaints. One of the stipulations is the rule of exhaustion which dictated that all domestic remedies must have been explored by the individual before approaching the ICC. The Committee must communicate regarding the individual complaint to the State party concerned. The ICC has a weak mechanism for enforceability of the rights in the event of violation of such rights.

V. CONCLUSION

It can be concluded that the International Criminal Court is one of the most effective international legal enforcement entity that has been created. Its role has been seen to unprecedented in the history of international law. However, enforcing international criminal law has a different approach because the enforcement agency, the ICC has a different approach with regards to the adjudication of international human crimes. ICC has been created by the UN as an international treaty ratified by the member states. It is an independent organization that has permanent structure even though it is not a part of the wider UN post-conflict strategy.

International criminal law is less effective because of the complementary nature of its jurisdiction. The international law can be enforced in those States which are inactive or when such State is unwilling to carry out its domestic or national proceedings. Further, the international law is applicable is those States that are signatory to the treaty or under the referral role from the Security Council. Secondly, under international criminal law it is the primary role of the States to protect its individuals and therefore the principle role of the responsibility to protect rests with the State. Only when there is a breakdown of the internal machinery of the State, will there be external interference from the international agency. Therefore, the ICC main role is the responsibility to protect while maintaining the sovereignty of the State.

Enforcing the court's decision is another aspect for the success of an international organization. As long there are punitive measures that cannot be enforced, there will be a drawback in the system. Sanctions, political isolation and reformative justice are other options that should be included to make the system more effective. There should be a broader conception to the international crime based on consensus among the member states. As the statues of ICC state, the criminal liability towards aggression and crimes of aggression needs necessary conditions to be enforced.

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