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International Criminal Law

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ABSTRACT

Public International Law basically governs the interaction between the States, although International Criminal Law is mostly concerned with the conduct of individual persons. If any person is found violating the international laws, in that case the States are under the obligation to penalize those actions. International law mainly governs the rights and responsibilities of States. It focuses on dealing with the criminal responsibility of individuals for international crimes. It is observed that International Criminal Law is less developed in comparison to any other domestic criminal law. International law has defined very few crimes as totally prohibited which are seen as a serious threat to the interest of the whole international community or to the majority of their fundamental values. With the advancement of technologies along with the increase in trade and globalization, the world has seems to become smaller and connected, as a result of which many crimes have gained recognition. For instance, piracy has been considered as an international crime under customary international law. Also, slave trading came under this list at the end of the nineteenth century when this practice was outlawed by a treaty. International Criminal Law includes laws, procedures, principles relating to modes of liability, defence, evidence, court procedure, sentencing, victim participation, witness protection, mutual legal assistance, and cooperation issues. In this article, the author wants to talk about the background of international crimes, various types of international crimes listed along with its need and importance in the present scenario.

Public International Law is fundamentally a balance between the States. However, International Criminal Law is basically concerned with the behaviour of individual persons. If any person is found violating any international laws, in that case the States are under the obligation to penalize that person for his actions. There is rapid growth in the concept of international criminal law since the Second World War. Therefore, we can say that with the increasing time international law is focusing more on protecting humans rather than focusing more on the obligation and interests of the States. But there is an exception to this is that the crime of aggression can only be committed by the high ranking officials of the States. The concept of international law is so recent that international criminal courts and tribunals still do not possess universal jurisdiction. Their rulings and judgment are not always homogeneous and consistent. This is so because the international criminal law has been derived from a number and variety of sources. For example, War Crimes were developed from international humanitarian law. Genocide and Crime against Humanity have been developed together from international human rights standards. Genocide, War Crimes, Crimes against Humanity, and the crime of aggression are the most important and focused international crimes. Other international crimes also include piracy, drug trafficking, terrorism, and torture. Apart from all these crimes, international criminal law also focuses on the regulation of international investigation and prosecutions.

HISTORY AND BACKGROUND

Initially, the vague concept of international crimes began to arise in the Roman Empire with the writings of jurists Marcus Tullius Cicero along with the concept of "hostes humani generis" which means "the enemies of humanity." The following concept was used by the writers to talk about the criminals of international crimes like piracy and slavery. But after the Second World War, the Nuremberg and Tokyo tribunals were set up to prosecute the leaders who were accused of heinous crimes. These crimes were criminalized under international law after which the foundation of International Criminal Law was laid down.

As per the current apprehension, the foundations of international criminal law is based on three fundamental concepts, that is, 'the international law recognizes individuals as subjects which have proper rights and duties, and not just objects; it identifies certain crimes for which individuals are held liable, and it differentiates criminal liability from the

civil responsibility of States under international law'. All these preconditions have become hallmarks for a better understanding of international criminal law.

In the Hostages case, 1948, international crime was defined as "an act universally recognized as a criminal, which is considered as a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances".[1]

With the establishment of International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Court (ICC) along with several other international and hybrid criminal courts have been started to prosecute international crimes in a much more procedural and proper way.

INTERNATIONAL CRIMINAL LAW

International Criminal Law is comparatively a new and constantly developing branch of Public International Law. Till today an accurate and universally definition of international crimes is non-existent. The definition of international crimes differs from author to author. International Criminal Law deals with different violations like political violations, forced displacements, transfer of persons, and protection of cultural property.

Before the establishment of Tribunals for the former Yugoslavia and Rwanda, the concept of international criminal law was concerned with crimes that were potentially influenced across the border of States. That body of law contained the laws of domestic jurisdiction that a State may apply in its own system of law in which crimes were considered to be transactional Also, transactional law made the States join their forces against such crimes and criminals. Thus, we can say that international criminal law has a narrower concept than transactional criminal law.

International crimes are considered with international order as a whole. According to this point of view, the whole of the international community seeks to secure its values and interests. All the needs from the fundamental values of the international community have been continuously influencing the development of different areas of law.

[1] http://www.worldcourts.com/imt/eng/decisions/1948.02.19_United_States_v_List1.pdf

The system of domestic law does not play any role in the development of international criminal law. The judgment of the International Military Tribunal stated that individual persons have international obligations that overrule domestic duties that States impose on persons. Also, the unique penal system of international criminal courts and tribunals is described as supranational criminal law system. Supranational law mainly refers to laws that are made by supranational organizations and not by any treaty or customary laws. However, the International Criminal Tribunal for the former Yugoslavia and Rwanda along with the International Criminal Court are not based on supranational agreements.

IMPORTANCE OF INTERNATIONAL CRIMINAL LAW

Criminal liability for serious crimes is of primary importance in respect to the rule of law, deterrence of future violations, and the provisions regarding redressal and justice for victims.

All the violations of international law and international humanitarian law are not to be considered criminal nature. Only the most serious breach of international human rights law (IHRL) and international humanitarian law (IHL) are to be considered as international crimes. These crimes include war crime, the crime of aggression, crimes against humanity, and genocide. For preventing all these serious crimes, all the States have held the criminals who are accountable for these crimes. Crimes like the massacre of civilians, rape, forcible transfer, torture, indiscriminate bombings and apartheid, all violate the most basic principles of humanity, morality, and dignity. Over the past years, the international community has strengthened the importance and protection of these basic values by forbidding the conduct of these crimes and started to make individuals liable for committing these offence.

INTERNATIONAL CRIMES

International Criminal Law constitutes some of the most serious crimes that concern the whole of the global community. Committing such crimes results in the imprisonment of the individual. The core international crimes may include genocide, war crimes, and crimes against humanity. These crimes are also referred to as “atrocity crimes”.

Over time these crimes have been defined in a number of international conventions and various agreements. At the end of the 19th century, the first Hague Convention laid down the rules of military conduct during wartime. These agreements increased the criminal

responsibility to just not to direct criminals of any crime, but also to those who commanded, planned, and allowed these crimes to take place.

International crimes have been prosecuted by a number of international and domestic courts. The International Criminal Court was formed by Roman Statute 1998 and signed by 123 countries. Some of the main international crimes include-

1. War Crimes

2. Genocide

3. Crimes Against Humanity

4. Aggression

5. Torture

6. Terrorism

1. **War Crimes-** The centuries of war and conflict between armed forces have resulted in various humanitarian law along with the advancement of law governing the conduct of hostilities. This development was an area of interest for military experts who realized that excess of violence and destruction by the military is not a necessity but is immoral and a way of attaining the political objectives for which the use of military force is necessary.

War Crimes refer to a wide category of acts that are prohibited during any armed conflict which is recognized as crimes in international law. Most of the war crimes are defined by treaties, but some of these treaties are outlawed because of the unwritten customary international law. In certain cases even of a treaty is prohibiting any war crime, then also the treaty's effectiveness is limited because of the fact that many states have not signed it or have failed to ratify it.

The universally accepted rules and regulations for war are the four Geneva Conventions of 12th August 1949, along with its two additional protocols of 1977. Almost every country of the world, including the United States, is a party to the Geneva Conventions. These agreements have codified a number of principals of international law in regard to war crimes. In the national law of the United States, these rules have been included in the Uniform Code of Military Justice. The Geneva Conventions compels every party to prevent any actions which are contrary to their provisions. They directly incorporate the

element of criminal law when they identify any act as a grave breach according to their terms. The parties of Geneva Convention agree (1) to enact legislation under their domestic law to criminalize these grave breaches; (2) to search for those who have been found to commit them; (3) either to prosecute them or to deport them to another party that will do so. The enforcement plan which is applicable to these grave breaches became the model for other treaties which further established international crimes like the Convention Against Torture.

People who are protected under the Geneva Conventions include wounded, sick and shipwrecked persons, medical and religious personnel, prisoners of war and civilians. Mainly these protections apply to people who are in hands of foreign power. Specifically prohibited acts of war crimes include torture, inhumane treatment, the taking of hostages, destruction of protected property, physical mutilation, performing of medical experiments, and refuse to release detained civilians or military personnel after the termination of active hostilities.

2. Genocide- One of the important crime in international law is genocide. Genocide basically means the denial of the right to live to the whole of human groups. Genocide often refers to mass killings. But this concept of genocide is narrower in international law. It is used for a specific subset of brutalities that aim at annihilating groups.

In 1948, after the few years of the Nazi Holocaust ended, the United Nations General Assembly adopted the Genocide Convention. The text included the new international agreement which defined the crime of genocide. This convention has achieved broad international acceptance. According to the definition of the United Nations genocide occurs when acts are committed with the intent to destroy wholly or partly any national, ethnical, racial, or religious groups. These acts include the killing of members of a group, imposing birth control measures on them, force transferring children from the group, and cause them severe mental and physical harm or deliberately imposing such conditions on a group that causes physical destruction on them.

After ratifying the genocide convention, according to Article 1, it states that the,"parties confirm that genocide committed either at the time of war or peace is a crime under international law which they undertake to prevent and punish." Parties have also agreed to validate the necessary domestic legislation to provide effective penalties for those who committed genocide.

This provision establishes a decentralized control scheme under which crimes are defined by treaty to enforce them under the criminal law of States. Also, Article IV of the Genocide Convention says that people who are charged under genocide are to be tried by such international penal tribunals that have the proper jurisdiction.

3. Crimes Against Humanity- The idea and the concept of crimes against humanity is very recently developed and emerged in the early twentieth century, after the war crimes which were developed in the nineteenth century. The Charter of the Nuremberg Tribunal was the first multilateral legal system the explicitly provided for the prosecution of crimes against humanity as a totally separated offence than war crimes. The main concept of crimes against humanity was developed as a remedy against the argument that the existing international law did not apply to any criminal acts which a government did against its own civilians. As a matter of fact it was traditionally seen as a falling off the sovereignty of the State. The key element of the definition of crime against humanity is extensive or widespread atrocities that were committed against civilians, like, enslavement.

Various States have objected the extension of international law in the domestic sphere so much and have proposed a number of conditions to limit the application of this concept. The 1995 Nuremberg Charter authorized the prosecution against crimes against humanity only if the crime was committed while executing or in connection with crime against peace or war crime. It is now recognized that the crime against humanity can be committed at the tome of war or in time of peace or even if there is no armed conflict. But States are still reluctant to give international institutions the authority to investigate or prosecute the crimes that are not committed in connection with any international armed forces.

The United Nations has considered a number of different definitions for crimes against humanity. Among these include General Assembly resolution undergoing the standards of the Nuremberg Charter, the International Law Commission's Draft Code of Crimes Against Peace and Security of Mankind and the statutes of the two ad hoc international criminal tribunals established by the United Nations in the 1990s. Negotiations leading to the 1998 adoption of the Statute of the International Criminal Court produced consensus on a very narrowly defined core concept of crimes against humanity to be applied by the institution.

4. Aggression- throughout the history the world community has prevented war and aggression. In the middle ages, the theories of "just"and "unjust" were drawn upon. After World War I, the League of Nations was established. The Treaty of Versailles of 1919 was called upon for the prosecution of Kaiser Wilhelm II for waiving off the unjust war, but all the efforts for carrying out this provision were completely useless. The Kellogg-Briand Pact of 1928 was provided for the refraining of the war as an instrument of national policy. This renunciation became the basis of the London Charter of 8th August 1945, which established in Nuremberg the International Military Tribunal for the prosecution of the major Nazi war criminals. For the 1946 Charter of the International Military Tribunal for the Far East and established similar tribunal in Tokyo also. These charters, accusations, and judgment along with the 1947 United Nations resolution including the "Nuremberg Principles", are among the legal sources considering aggression as crime against peace. In 1946 the United Nations charter prohibited "aggression" but failed to define it.

No real meaning of "aggression" was used until the United Nations "Definition of Aggression" was reached upon on 14th December 1974. the definition stated that "aggression is the use of armed force against the sovereignty, territorial integrity or political independence of another state, or in any manner inconsistent with the Charter of the United Nations." This definition also stated seven examples of aggression and puts forward their legal and political consequences. So far no proper definition of aggression has been stated in an international convention, but this issue has been discussed in various multilateral negotiations. The Statute of International Criminal Court lists aggression as a crime in its jurisdiction, but at the same time delays any prosecution on aggression until the concerned parties have agreed to adopt the definition of aggression.

5. Torture- The 1948 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as any act by which severe pain or suffering, whether physical or mental is inflicted intentionally on a person with the consent of a public officer in order to achieve certain purposes. The most common purposes for this is to obtain information or confession, punishment, intimidation, or coercion.

The Torture Convention has achieved a very broad acceptance by the states. It establishes an enforcement agreement which is similar to that of the 1949 Geneva

Convention, in which the parties agreed to make the torture punishable under their domestic laws and also agreed to take necessary steps to prosecute the criminals under their jurisdiction.

The definition of convention of torture is very narrow. It does not include the acts of torture which are committed by individuals in their personal capacity, except in case where there is any government or official present. The concept of torture as an international crime is comparatively restrained.

6. Terrorism- Terrorism is one of the most dangerous form of criminal activity that need to be suppressed at both national and international levels. States have found it impossible to suppress terrorism therefore they have agreed on the definition of terrorism as an international crime. The 1999 International Convention for the Suppression of the Financing of Terrorism came closer than ever before to this goal when they defined this offence of providing or collecting funds to be used to carry out terrorist activities.

The European Convention on Suppression of Terrorism is a regional initiative that incorporates a functional definition of terrorism among its parties and creates a comparatively strong regional enforcement.

There has been a broad international acceptance of effective international criminal standards that relate to at least two from of terrorism, which include both national and international terrorism.

SOURCES OF INTERNATIONAL LAW

The main sources of international law include treaty law, international customary law, and general principles of law recognized by civilized nations.

1. Treaty Law- Treaties and conventions are written agreements that states willfully sign and ratify from time to time and at the same time they are obliged to follow them. These agreements are also called statues and protocols. They create mutual relations between the states. However, they are only binding on those states who have signed and ratified the particular treaty.

The Vienna Convention of the Law of Treaties of 1969, sets fundamental legal rules relating to treaties. The Vienna Convention defines a treaty, identifies who is of the

capacity to enter into treaty, interprets treaty, disputes and reservations. The basis of treaty law is 'pacta sunt servanda' which means agreements must be honoured and adhered to.

Reservations, Declarations and Derogation

Many states take part in the process of drafting a treaty, which mostly involves a sharp disagreement on the scope and content of the agreement. So as to achieve a large number of signatories and ratification of a treaty, international law allow states to limit the full application of a treaty and clarify their understanding on the specific legal content. This is done by the way of reservations, declarations and derogation.

Reservations are defined under Article 2(1)(d) of the Vienna Convention as, "*a unilateral system, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to the state."* Only specific reservations are permitted and they should not diminish the object and purpose of the treaty.

Declarations do not affect any legal obligation, but they are often made when a State gives its consent to be part of a specific treaty. The State uses the declaration to explain its understanding on the treaty.

Derogation. Some treaties like human rights treaties provides a derogation system. Under this they allow a state party to temporarily suspend their legal obligations in exceptional circumstances like that of armed conflict or national emergency. But some rights can never be derogated under any circumstances, mainly on the prohibition of torture, inhumane, and degrading treatment.

2. Customary International Law- Customary International Law is made of rules that derive from "a general practice accepted as law". Customary international law consists of all the written and unwritten rules that form a part of the general international concept of justice.

In contrast to treaty law which is only applicable to those states that are party to a particular agreement, customary law is binding on all the states regardless of the fact that they have ratified a treaty or not. Customary international law is limited and not codified in a clear and accessible format. The contents of the rules are less specified in

comparison to any treaty. International customary law is of great importance in armed conflicts because of the limited protections granted to international conflicts by treaty law and the lack of ratification of key treaties. Customary international law exists free from treaty law and in 2006 the Independent Commission of the Red Cross (ICRC) published the collection of the rules of the International Humanitarian Law considered to be customary in nature.