THE INTERNATIONAL CRIMINAL COURT – LET'S MAKE IT A REALITY

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The International Military Tribunals at Nuremberg opened its doors 61 years ago. No one then imagined that the use of criminal trials to respond to mass atrocity would become a familiar and even expected feature of international relations. Yet trials at the International Criminal Tribunals for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Courts for Sierra Leone are underway, and the International Criminal Court (ICC) recently issued its first arrest warrants for senior leaders of the Lord's Resistance Party in Uganda.

The ICC is the first ever permanent, treaty based, international criminal court established to promote the rule of law and ensure that the gravest international crimes do not go unpunished. The ICC was established by the Rome Statute of the International Criminal Court on 17th July, 1998, when 120 states participating in the "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court" adopted the statute.[1] The Statute sets out the Court's jurisdiction, structure and functions and it provides for its entry into force 60 days after 60 states have ratified or acceded to it. The 60th instrument of ratification was deposited with the Secretary General on 11th April, 2002, when 10 Countries simultaneously deposited their instruments of ratification.[2] It was established in March, 2003 in the Hague (Netherlands) and is initially composed of 18 Justices and the Argentine attorney Luis Moreno Ocampo was the first Chief Prosecutor of the Court.

Till October, 2005, only 100 countries have ratified or acceded to the ICC statute.[3] India, US and China have not even signed the treaty. Though the establishment of ICC is quite an achievement but the creation and existence of the Court has been controversial with a number of states. The largest disagreement continues to surround the source and nature of the Court's jurisdiction. Against this backdrop, this paper seeks to analyze certain questions, like, do we actually need an ICC and why? What is the future of ICC? Second section of the paper deals with the ever expanding dimensions of the crime of terrorism and the ICC's jurisdiction regarding terrorism.

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1 Historical Introduction of the ICC, available at http.//www.icc-cpiint/about/ataglance/history.html.

2 Ratification list of the Rome Statute of the ICC, available at http://untreaty.un.org/ENGLISH/bible/englishinternet bible/partI/chapterxviii/treaty10.asp.#N6.

3 available at,www.iccnow.org.

SECTION A

Necessity of The International Criminal Court

The development of the ICC followed the creation of several ad hoc tribunals to try war crimes in the former Yugoslavia and Rwanda. Subsequently, it was desired to create a permanent tribunal, so that an ad hoc tribunal would not have to be created after each occurrence of these crimes. An international criminal court has been called the missing link in the International Legal System. The International Court of Justice (ICJ) at The Hague handles only cases between states, not individuals. It was thought that without an International Criminal Court for dealing with individual responsibility as an enforcement mechanism, acts of genocide and egregious violations of human rights often go unpunished. In the last 50 years, there have been many instances of crimes against humanity and war crimes for which no individual have been held accountable. Where as one of the purposes of the Nuremberg and Tokyo trial was to warn those who might commit such acts in the future that they would be held accountable and punished by International Law. Yet Dusan Tadic[4] was the first person to be prosecuted by an International Court in almost 50 years. This raises certain questions: why haven't there been other war crime trials? Do we need a permanent International Criminal Court? In view of the opposition to the ICC, are there any other alternatives?

Why do we need an International Criminal Court?

a. to end impunity

> "*A person stands a better chance of being tried and judged for killing one human being than for killing 100,000.*"[5]
>
> The judgment of the Nuremberg Tribunal stated that "crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced,"[6] thereby establishing the principle of individual criminal accountability. This principle applies equally and without exception to any individual throughout the governmental hierarchy or military chain of command.[7]

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4 *Prosecutor v. Dusan Tadic*, Case No. IT-94-I-T before International Criminal Tribunal for Former Yugoslavia.

5 Jose Ayala Lasso, former United Nations High Commissioner for Human Rights on the ICC, available at http.//www.legal.coe.int/criminal/icc/Default.asp.

6 Martha Minow and Margot Stern Strom, "The Lessons of Nuremberg", available at boston.com.

7 Draft Code of Crimes against the Peace and Security of Mankind, International Law Commission (1996), available at http://www.ilc.org.

b. to take over when national criminal justice institutions are unwilling or unable to act.[8]

"*Crimes under International Law by their very nature often require the direct or indirect participation of a number of individuals of least some of whom are in positions of governmental authority or military command.*"[9]

In times of internal or international conflict, government often lack the political will to prosecute their own citizens, or even high-level officials (Milosevic), as was the case in the former Yugoslavia, or national institutions may has collapsed, as in the case of Rwanda.

c. to deter future war criminals.

Inspite of the military tribunals following the Second World War and the two recent ad hoc international criminal tribunals, most perpetrators of war crimes and crimes against humanity have gone unpunished. Hence effective deterrence is a primary objective of the ICC. Once it is clear that the international community will no longer tolerate such monstrous acts without assigning responsibility and meting out appropriate punishment to the criminals irrespective of their status, it is hoped that those who indulge in these criminal activities will no longer find willing helpers.

d. to help and conflicts

"*There can be no peace without justice, no justice without law and no meaning of law without a Court to decide what is just and lawful under any given circumstances.*"[10]

The guarantee that at least some perpetuators of war crimes or genocide may be brought to justice acts as a deterrent and enhances the possibility of bringing a conflict to an end.

e. to remedy the deficiencies of ad hoc tribunals

The establishment of an ad hoc tribunal is criticized as an example of "selective justice". "Tribunal fatigue" is another problem which can have serious consequences like crucial evidence can be destroyed, perpetrators can disappear, and witness can relocate or be intimidated. Investigations become increasingly expensive, and the tremendous expense of ad hoc tribunals may soften the political will required to mandate them.[11] Apart from these, ad hoc tribunals are

8 Also provided under Art.17 of the Rome Statute.

9 Report of the International Law Commission (1996), available at http://www.ilc.org.

10 Benjamin B. Ferencz, a former Nuremberg prosecutor, available at http.//www.legal.coe.int/criminal/icc/Default.asp.

11 Why do we Need an International Criminal Court?, available at http.//www.legal.coe.int/criminal/icc/Default.asp.

subject to limits of time or place. Thousands of refugees continued to be murdered in Rwanda, but the mandate of that Tribunal was limited to events that occurred in 1994.[12] Crimes committed since that time are not covered.

Opposition to the International Criminal Court

The ICC has jurisdiction to prosecute individuals responsible for the most serious crimes of international concern, like genocide, crimes against humanity and war crimes.[13] The jurisdiction of the ICC is complementary to national Courts, which means that the Court will only act when countries themselves are unable or unwilling to investigate or prosecute.[14] The Rome Statute also has strong protections for due process, procedural safeguards to protect it from abuse, and further victim's rights and gender justice under International law. Irrespective of these safeguards to protect national sovereignty, rights of accused and the cherished ideals and purposes enshrined in the Rome Statute, there is a widespread opposition against the implications of the operation of the ICC and its universal jurisdiction and the legal effect of the Statute even in case of non-member countries.[15]

Some countries object to the Court, saying that there is very little legal supervision of the Court's apparatus, and that the Court's verdict may become subject to political motives. They argue that the Court's mandate was already excessively wide (and would be even more so if the Crime of Aggression[16] was defined in its Statute), meaning the Court could (perhaps) unwillingly become a tool for barratry and pointless legal hassle.[17] Supporters counter that the ICC's definitions are very similar to those of the Nuremberg Trials. Although supporters say that the checks and balances in the ICC made this an unlikely possibility opponents argue that giving even a temporary member of the Security Council, the power to veto any objections of prosecutorial bias gave the ICC no accountability whatsoever.[18] Supporters of the ICC argue that the States which object to the ICC are those which regularly carry out War Crimes and Crimes Against Humanity in order to promote their political or economic interests.[19]

United State's Objection

- The US fears that American soldiers and political leaders may be subject to "frivolous or politically motivated prosecutions," because many countries

12 Paul Travernier, "The Experience of the International Criminal Tribunals for the former Yugoslavia and Rwanda", available at http://www.icr.org/review/articles.
13 Art. 5, the Rome Statute, available at http.//www.un.org/law/icc/statute/romefra.htm.
14 Art. 17 of the Rome Statute.
15 For e.g. under Art. 4 & 87 of the Rome Statute.
16 Art. 5(2) of the Rome Statute.
17 Opposition to the ICC, available at http.//www.globalissues.org./geopolitics/icc/us.asp.
18 *id.*
19 *ibid, supra* note 17.

in the world have an anti-American agenda, and may constantly charge American politicians or military officials with war-crime charges, simply to cause embarrassment and bad publicity for the United States. For e.g., opponents of the ICC cite that in the past, when the US failed to act quickly enough to prevent disaster (e.g. Rwanda), it is criticized for allowing genocide to occur; yet in cases where the US has acted quickly (e.g. Yugoslavia, Somalia) they are still criticized and even accused of war crimes.[20]

- Many in the US believe that the US has a history of supporting human rights also believe that the US is more qualified to move against war criminals then many of the signatories of the ICC.[21]
- Opponents, further, contend that neither the ICC nor the United Nations has any real power to enforce the extradition of war criminals from signatory states. Therefore any kind of military action to force compliance would have to be undertaken largely by the US.
- Opponents contend that prosecution of a US national would not lead to the obligation of the US to cooperate or assist the Court in any way and would therefore not create any 'obligation for a non-state party'.[22] Supporters of the Court further argue that under International Law states have the right to try foreign nationals for crimes committed on their territory anyway; and if a state has the right to exercise jurisdiction in this case, that state can request an international organization to exercise that jurisdiction on its behalf by means of the treaty establishing that organization,[23] as traditionally in International Law, international organizations are considered to be instrument through which their member states act. Providing the ICC with jurisdiction over US nationals in this case would not interfere with the US sovereignty. Some have, however, argued that their territorial jurisdiction is non-delegable.[24]

In view of these oppositions, the United States adopted a number of measures to exempt US nationals from the Court's jurisdiction. In August 2002, the US passed the American Service Member's Protection Act, promising military action to prevent the trial of any US troops or nationals by the Court. The Act also cuts military assistance to countries that refuse to sign Bilateral Immunity

20 US Objections to the ICC, available at http.//www.globalissues.org./geopolitics/icc/us.asp.
21 *id.*
22 *id.*
23 S.K. Kapoor, *International Law*, Central Law Agency, 13th Ed. (2000)
24 Medaline Morris, *High Crimes and Misconceptions: the ICC and non-party States, Law and Contemporary Problems*, 2001. Vol. 64 No.1, p. 13ff.

Agreements (BIAs) with the US, which immunize Americans from ICC prosecution. In addition, the Nethercutt Amendment to the Foreign Appropriations Bill signed by President Bush on 7 Dec. 2004, suspends economic support fund assistance to ICC state parties who have not signed BIAs with the US.

The persistent opposition of the ICC from the world's only superpower and most prominent member of Security Council force us to think that whether there can be an alternative to the ICC.

Are there any alternatives to the ICC?

According to the Report of the International Commission of Inquiry on Darfur,[25] the ICC is the only credible way of bringing alleged perpetrators to justice. It strongly advises against other measures. The following paragraphs (573-582) discuss the Commission's finding with regard to the inadvisability of mechanisms other than the ICC to bring justice for crimes in Darfur.

a. The inadvisability of setting up an ad hoc International Criminal Tribunal

In view of the need of urgent action, some suggest establishment of another ad hoc criminal tribunal. But according to the Commission, there are two problems firstly, these tribunals, however meritorious, are very expensive, secondly, at least so far, on a number of grounds they have been rather show in the prosecution and punishment of the indicated persons.

b. The inadvisability to expand mandate of one of the existing ad hoc criminal tribunals.

According to the Commission, the same reasons hold true against possible expansion: first, this expansion would be time-consuming. It would require, after a decision of the Security Council, the election of new judges and new prosecutors as well as the appointment of Registry staff. Indeed at present the Tribunals are overstretched and working very hard to implement "completion strategy" elaborated and approved by the Security Council. In addition, the allocation of new tasks and the election or appointment of new staff would obviously require new financing. Thus, the second disadvantage of this option is that it would be very expensive. Thirdly, this expansion could end up creating great confusion in the Tribunal, which all of sudden would have to redesign its priorities and reconvert its tasks so as to accommodate the new functions.

25 U.N. Commission of Inquiry on why Alternatives to the ICC are Inadvisable for Darfur, available at http://hrw.org/campaign/icc/us.htm.

c. The inadvisability of establishing Mixed Courts

One option was to establish Courts that are mixed in their composition, which is consisting of both international judges and prosecutors and of judges and prosecutors having the nationality of the state where the trials are held. The Mixed Courts established in other conflicts have followed two models. First, the Mixed Courts can be organs of the relevant state, being part of its judiciary, as in Kosovo, East Timor, Bosnia and Cambodia. Alternatively, the Courts may be international in nature, that is, freestanding tribunals not part of the national judiciary, as in Sierra Leone. According the Report of the International Commission of Inquiry, this option has several drawbacks: firstly, financial implications. The Special Court for Sierra Leone, with its voluntary contributions, is hardly coping with the demands of justice there. Secondly, the time-consuming process for establishing these Courts by means of an agreement with the United Nations. The ICC offers the advantage, as the ICC is funded by the state parties and is immediately available. Thirdly, the investigation and prosecution would relate to persons enjoying authority and prestige in the country and wielding control over the state apparatus. Fourthly, many of the Sudanese Laws are grossly incompatible with international norms. In contrast, the ICC constitutes a self-contained regime, with a set of detailed rules on both substantive and procedural law that are fully attuned to respect for the fundamental human rights of all those involved in criminal proceeding before the Court. Finally, and importantly, the situation of Sudan is distinguishable in at least one respect from most situations where a special Court has been created in the past. The impugned crimes are within the jurisdiction of the ICC i.e. the crimes committed in Darfur were committed after 1st July 2002.

Thus the Commission strongly holds the view that resort to the ICC, the only truly international criminal institution, is the single best mechanism to allow justice to be made for the crimes committed in Darfur. The same holds true for any future scene of crime.

Future of the International Criminal Court

In future, the ICC will extend the rule of law internationally, impelling national systems to investigate and prosecute these crimes themselves – thus strengthening those systems – while ensuring that where they fail, an international court is ready to act. But in order to make it a reality, a lot of groundwork is required to be done both by the member states and the international community. To be effective the ICC will depend not only on widespread ratification of the

Rome Statute but also on States Parties complying fully with their treaty obligations. For almost every state this will require some changes in national laws. This paper recommends that states should incorporate all the ICC crimes into national law to ensure that they can prosecute the crimes enumerated in the Rome Statute in their own courts as both international and national crimes. This paper also recommends that states should enact law to allow for the prosecution of the ICC crimes under universal jurisdiction so that their Courts can prosecute them no matter where they are committed and regardless of the nationality of the perpetrator and victims. This paper further recommends that States should take the opportunity, as implementing the Rome statute provides to strengthen their own criminal justice systems so they can prosecute the ICC crimes themselves and, in this way, fully contribute to an effective International Criminal Justice System in which there is no safe haven for those who commit the worst international crimes. Regarding the implementation of ICC crimes, Human Rights Watch recommends that states must adopt the most progressive formulations of these crimes,[26] whether found in the Rome Statute or elsewhere, to ensure that their national law is consistent with the current state of International Law.

Apart from this, the ICC need cooperation of the member states at all the stages of trial, prosecution and for the execution of the sentence. All the member states must assist the ICC both financially as well as for other purposes.

Need to remove obstacles to the International Criminal Court

There are certain obstacles which are required to be removed to ensure effective functioning of the ICC. The first is the UN Security Council Resolution 1422/1487 adopted as Resolution 1422 in July 2002, and renewed as Resolution 1487 in June 2003, this UN Resolution requests that the ICC not proceed with investigations or prosecutions of officials participating in UN Peacekeeping or authorized missions who are from countries that have not yet ratified the Rome Statute (Under Art. 16 of the Rome Statute). This Resolution should not allow to be automatically renewed so as to prevent it from becoming customary International Law. The resolution was originally designed to apply to exceptional and very specific situations, in which the Court's action could interfere with the efforts of the Security Council to maintain international peace and security. A further intention was to prevent politicization of the Tribunal's international jurisdiction. However, it was not the intention of the framers to transform the Resolution into a general Article that would be forever transitory, creating the suspicion of hidden immunity that would alter the spirit of the Rome Statute. At

26 Making the International Criminal Court Work : A Handbook for Implementing the Rome Statute (2001), available at http://www.hrw.org.

the time of the 2003 renewal of Resolution 1487, the UN Secretary General also expressed his concern, saying, "*Allow me to express the hope that this does not become an annual routine. [...] If that were to happen, it would undermine not only the authority of the ICC, but also the authority of the Council and the Legitimacy of the United Nations Peacekeeping.*"[27]

Another obstacle to the universal jurisdiction of the ICC is the Bilateral Immunity Agreements (BIAs) which the US has promoted and obtained with a number of countries in terms of Art. 98 of the Rome Statute, with the objectivity of achieving Reciprocal Immunity for its troops (as discussed earlier in this paper). Legal experts from around the world have condemned the BIAs as illegal because they are contrary to International Law and the ICC treaty.[28] In this respect, Kenya's on-going resistance to the US-ICC Immunity Agreement deserves special mention, given the enormous pressure exerted on Kenya by the Bush Administration since 2003 to sign, pressure that has included the threatened loss of millions of dollars of both military and governance aid. The Coalition for the ICC (CICC) also praised Kenya's commitment to the ICC treaty and to the concept of equality of all before the Law.[29] Criticism of the US' BIA policy, however, is not coming solely from the human rights community. The US's strategy has recently received strong criticism from a much more unlikely source General Bantz Craddock, Commander of US Southern Command. In a statement delivered before the US House Armed Services Committee on March 9, 2005, General Craddock declared, "*[US BIA Policy] ... in my judgment, has the main tended consequence of restricting our access to and interaction with many important partner nations ... [it] hamper [s] the engagement and professional contact that is an essential element of our regional security cooperation strategy ... and may have negative effects on long term US Security interests in the Western Hemisphere.*" Craddock later declared that China is building up its military ties with Latin America, partly as a result of the US' BIA policy.[30] Apart from this, the Amnesty International, FIDH and the Human Rights watch has also criticized the US administration's continued failure to comprehend the pivotal notion of complementarity regarding the ICC's jurisdiction. "*These immunity agreements not only undermine the integrity of the Rome Statute of the ICC, they also disregard the clear safeguards already built into the ICC's mandate*," said,

27 U.S. Requests Renewal of Security Council Resolution 1487 seeking ICC Immunity for U.S. Military Personnel (May 19, 2004), available at http://www.iccnow.org./documents

28 U.S. "Nethercutt Amendment" threaten Overseas Aid to Allies that have joined the ICC (Dec. 7, 2004), available at http:/www.iccnow.org./pressroom

29 Global Coalition Voices support for Kenya's on' going Resistance to U.S. ICC Immunity Agreement (July 20, 2005), available at http://www.iccnow.org./documents

30 *id.*

African Coordinator of the CICC.[31]

Inspite of all these obstacles, on October 4, 2004, United Nations Secretary General Kofi Anan and H.E. Judge Phillipe Kirsch, President of the ICC, signed an agreement that established a legal foundation for cooperation between the UN and the ICC within their respective mandates. This agreement includes important provisions regarding the exchange of information between the two organizations, judicial assistance and intra-institutional co-operating, apart from granting Observer status to the ICC at the UN General Assembly. This is a historic agreement which allow vital support of Court's work.[32] Another fillip to the Court's worldwide acceptance was provided by the first UN Security Council referral for Darfur, Sudan in March, 2005. These positive developments in the international scenario reflect the determination of the international community to make the ICC an effective and functional unit. However, still there is a long way to go if one look at the substantive provisions of the Rome Statute. More teeth are required to be given to the ICC which now appears only to be a paper-tiger. For the ICC to be effective, more powers should be given to it, like for e.g.

a. The power to try suspected war criminals in absentia

Art. 63(1) of the Rome Statute requires the presence of accused at the time of the trial. The same provision was there in the Statute of both ad hoc tribunals. Paul Tavernier, a Professor at the University of Paris-XI and Director of CREDHO, observes that the absence of provision for trial in absentia in the Statute of a criminal Tribunal reflects the wishes of countries of the Common Law tradition, which refers, on account of their requirements in this regard (fair trial, due process of law), whereas the possibility of holding this type of trial would have guaranteed the Tribunal a certain degree of efficiency, even in the event of lack of cooperation on the part of the states.[33]

b. The power to arrest suspects anywhere in the world and bring them before ICC.

Respect for law starts with fear of the policeman. It is largely admitted that most people are largely motivated by fear of the punishment they may incur. Moreover, there is no international "policy" to capture violators. Under the various provision of the Rome Statute (Art. 59, 87, 91, 92), the ICC can only request the state parties for arrest and surrender of the suspected persons. The Statute under Art. 87 (7) simply provide that if a state party fails to comply with a request to co-operate by the Court, the Court may refer the matter to the

31 *ibid, supra note* 29.

32 International Criminal Court and US to sign Historic Agreement (Oct. 4, 2004), available at http://www.hrw.org.

33 *ibid, supra note* 12.

Assembly of State Parties or, where the Security Council referred the matter to the Court, to the Security Council. The same was the situation with the earlier ad hoc tribunals. The Security Council thus appears to be, the "punch" of the International Criminal Tribunals, but actually the Council's action, when solicited, has never gone further than a simple reminder to States of their obligations by means of new Resolutions or Declarations by the President. The measures taken have hardly ever extended beyond the very limited practice observed in connection with Art. 94 of the United Nation Charter, and the execution of orders of the ICJ.[34] Apart from this, the most important function of UN Security Council is maintaining peace and security which obviously take precedence over those of law and justice. Hence, there is a need to give more coercive powers regarding arrest to the ICC as the most essential element of criminal law are the presence of coercive sanction, which cannot be altogether eliminated from the International Criminal Law.

c. The power to force any government to turn over evidence to the ICC.

Gathering and presentation of evidence is essential to establish guilt, so the ICC should be given more power to force any government to turn over evidence irrespective of the fact that the country is a non-member State and the presence of any BIAs under Art. 98 of the Rome Statute. This will not be demanding too much in view of the safeguards provided regarding fair means of gathering evidence under Art. 69 (7) and the protection of national security information under Art. 72. Accordingly, the researcher is of the view that Art. 73, which allow the refusal to disclose the content of a document by the originator the document, should be modified.

Apart from these powers, there is also a need to modify the Rome Statute in view of the seriousness of the offences with which it deals. **The pro-accused spirit, which is prevalent in the Rome Statute, requires reconsideration.** The rules included in the Statute were developed with a view to their national application to all kinds of offences, and are not necessarily adapted to repression at the international level. Moreover, the principles of criminal law like presumption of innocence, mens rea etc have already being modified in respect of certain serious offences, worldwide, like socio-economic offences, in view of the damage caused to the society by this new form of criminality. Therefore, the fundamental principles of criminal law are no more sacrosanct and deviation is being accepted by the society in exceptional circumstance. Similarly the researcher is of view, that the Roman Statute consists of sufficient safeguards for the protecting the

34 *ibid, supra note* 12.

rights of the accused both during the investigation (Art. 55) and during the trial (Art. 67), so there is no need to adhere to the principle of presumption of innocence as is provided under Art. 66 and also modification is required in the Rules of Procedure and Evidence to the ICC, thereby raising certain presumption against the accused on the same line as in the Indian Evidence Act, 1872. Hence, in order to make the ICC functional there is a need of gradual convergence between the opposing systems of Common Law and Civil Law. In view of the 'complimentarity' principle recognized under Art. 17 of the Statute, member states should not fear giving coercive powers to the ICC.

SECTION-B

In this section, the researcher seeks to analyze the relation between the ICC and international terrorism. Presently, the ICC does not have the authority to judge cases of international terrorism. Terrorist activity has gained in frequency within the last few decades. The dreadful terrorist attacks against The United States on September 11, 2001, made it clear than ever that the international community needs to cooperate and take actions against terrorism on an international level. Terrorism no longer is a domestic problem. Fast emerging dimensions of terrorism raises certain questions. Is it not high time for the global community to re-examine the existing regulatory regime on international terrorism? Can't we consider international terrorist attack as a crime against humanity? And finally how can international terrorism be included as a crime coming under the jurisdiction of the ICC? The researcher is of the opinion that the case against international terrorism can be used to highlight the need to have an effective and functional ICC.

International Terrorism

Terrorism is generally considered as a system of coercive intimidation brought about by the infliction of terror or fear.[35] In other words, it is terror inspired by violence committed by individuals or groups against non-combatants, civilians, states, or internationally protected persons or entities in order to achieve political ends. International Terrorism includes those acts where two or more states are involved, i.e., where the perpetrators and victims are citizens of different states, or where the act is performed in whole or in part in more than one state. International terrorism assumes various forms which include: aircraft hijacking, bombing, kidnapping of diplomatic personnel and other persons, attack on diplomatic missions, taking hostages, terrorism in war of national liberation, terrorism in armed conflicts and nuclear terrorism.[36]

35 Malcolm N. Shaw, *International Law*, Cambridge, Cambridge University Press (1997)

36 Balakista Reddy, Terrorism, Counter Terrorism and International Law in *Human Rights Education, Law and Society* edited by Ranbir Singh & Ghanshyam Singh, NALSAR University (2004)

The international terrorism has been and continues to be regulated by several international treaties, depending on its nature and the means used in committing it. However, the crime has never been defined on the basis of a widespread consensus. The debate on the nature of the crime places many countries in a difficult position, because there is no definition of terrorism that is completely free from political consideration. Many national liberation movements, when confronting colonizing powers in their struggle for freedom and other movements that have and continue to use force to defend their right to the self-determination of peoples have been accused of being terrorists but have later become governing parties or participants in national or international political negotiations (The Africa National Congress in Sough Africa, the PLO, the IRA, the East Timor Liberation Front, etc.).[37]

Defining terrorism should be at the top of the agenda and is the first step towards successful elimination of terrorism. The thematic approach as well as regional agreements which worked best in the past will not be good enough for future international law enforcement, because of two reasons, first being globalization and modern technology that have broadened the terrorist range of action and secondly, terrorism is not a domestic or regional problem any longer.[38] Unless there is an accepted definition we will always find ourselves preoccupied with dealing with the differences of who is a terrorist, a freedom fighter or a guerrilla. Though it is not easy to define terrorism, but the world body has to overcome its political reasons and excuses.

Definition of Terrorism

Statements like "one man's terrorist is another man's freedom fighter" hinder the accomplishment of reaching a useful, and much needed, definition of terrorism. They have become a cliché and an obstacle to efforts to deal successfully with terrorism. If nothing else, these statements lead to the questionable assumption that the ends justify the means. The statements approach to terrorism is particularly problematic because it privileges the perspective and world view of the person defining the term.[39] Such a culturally relativist approach, however, should not be accepted as it may sanction all causes, and create more terrorism. In order to achieve a universally accepted definition, we have to rely on objective and authoritative principles. The definition must be founded on a system of principles and Laws of War, legislated and ratified in many countries.[40]

37 The International Criminal Court and Terrorism, available at http://www.dgroups.org/gtroups/fipa/public/docs/doc_Marcelo_Stubrin_Corte_Penal-Eng.pdf.

38 Mira Banhchik, The International Criminal Court & Terrorism, , available at http://www.peacestudiesjournal.org.uk/docs/icc./.20and%20terrorism.pdf.

39 Boaz Ganor, Defining Terrorism : Is One Man's Terrorist Another Man's Freedom Fighter? (Sept. 24, 1998), available at http://www.ict.org.ii.

40 *id.*

International Terrorism and the Jurisdiction of the International Criminal Court

Before suggesting that international terrorism should be made a subject-matter of jurisdiction of the ICC, it is important to weigh the pro and cons of including Crimes of Terrorism in the Rome Statute and also the best way how we can extend the subject matter jurisdiction of the ICC. The ICC's subject matter jurisdiction encompasses the most serious crimes of international concern. According to the analysis developed thus far, terrorism certainly falls within that category.[41] The phenomena of 'leaderless resistance', networks that are difficult to detect, and the availability of technology including weapons of mass destruction – that can be used against large numbers of civilizations highlights the changing nature of terrorism, and its heightened (global) threat in the current era.[42] Various advantages of extending the subject matter jurisdiction of the ICC are:[43]

1. Smaller states will particularly benefit from including crimes of terrorism in the ICC Statute. As compared to the US, countries such as Egypt, Algeria, the Philippines or the Russian Federation, just to mention a few, that have serious problems with terrorists, often lack the ability to put them on trial. If the ICC could exercise jurisdiction over crimes of terrorism, a large economic burden could be lifted off of smaller states.

2. Unstable and weak governments are also faced with difficulties. In these states prosecution or extradition efforts can easily be thwarted by threatening the government with adverse political consequences or even more violent repercussions. If these criminal forces are more powerful than the government forces, then the state will not be able to act in a controlling manner. Colombia, for example, has been faced with this dilemma time and again, so instead of complying with legal rules and procedures, weak governments sometimes find themselves compelled to resort to illegal methods, like assassination, for example.

3. Neutrality of the ICC: The ICC is a neutral forum for prosecution on the international level. In accordance with Art. 36(3) (a), judges working at the ICC "shall be chosen from among persons of high moral character, impartiality and integrity". Among many other criteria ensuring neutrality, Art. 36(8) (a) (ii) guarantees that the panel of judges be selected according to an equitable geographical representation. The neutrality of the ICC would contribute to a more effective prosecution of terrorists. It would

41 *ibid, supra note* 38.
42 *ibid, supra note* 38.
43 *ibid, supra note* 38.

help avoid the possibility that terrorist seek safe haven in states that distrust the judicial system of the victimized state, do not want to extradite for political reasons or are simply unwilling to prosecutes and it would potentially minimize the risk of states acting in violation of international law and against international concerns by referring to extradite or prosecute (for e.g. the Libya refused to handover alleged suspect of Pan Am Flight 103 bombing for a long time to U.S.A.).

Extension of the ICC's Subject Matter Jurisdiction for Crimes of Terrorism

There are basically two schools of thoughts regarding how the ICC's subject matter jurisdiction should be extended to includes Crimes of Terrorism: one school of thought contend that terrorism is nothing but crime against humanity and so can be prosecute as such, the other school of thought suggest that there should be a separate provision in the ICC statute for crimes of terrorism. There is, however, a third point of view which consider terrorist act as war crimes, which is not considered in the present paper as the scholars are still debating this question.

Terrorism as Crime Against Humanity

The concept 'Crimes Against Humanity' evolved under the rules of customary international law and was proclaimed for the first time in the Charter of the International Military Tribunal of Nuremberg. It is a serious crime of international concern because its acts are so abhorrent that they shock our sense of human dignity. Murder, extermination, enslavement, deportation, torture and other acts amount to crimes against humanity, if the offense was part of a widespread or systematic practice, which must at least be tolerated by a state, government, or entity holding de facto authority over a territory, be state-sponsored, or else, be part of a governmental policy: systematic practice is at hand if acts are carried out pursuant to an explicit or implicit plan or policy. Such a policy can be deduced from the manner in which an act occurs. Namely, it suffices that a single act, committed within the framework of a systematic or widespread attack, has the potential to demonstrate such a policy. If a multiplicity of victims is targeted, we talk about a widespread attack. As far as the mens rea is required, the perpetrator has to have knowledge of the wider context in which his acts occur. However, he does not need to have a concrete idea of the consequences of his acts.[44]

The provisions concerning Crimes against Humanity in the ICC statute is not identical with previous provisions of Crimes against Humanity. While

44 *Prosecutor v. Dusko Tadic*, Case No.IT-94-1-AR72.

some of its aspects are construed more narrowly, others are broader. Art. 7(1) of the ICC statute condemns widespread or systematic attacks targeted at any civilian population. Art. 7(2) describes such an attack as a "worse of conduct involving the multiple commission of acts [...] pursuant to or in furtherance of a State or organizational policy to commit such an attack." The perpetrator must be aware that his act built part of an overall widespread or systematic attack. This connection between the single act and the widespread attack is the central element. It raises an ordinary crime to one of the most serious crimes. However, the offender must be aware of this central and essential connection.[45] Art. 7 (2) (a) refers to the possibility of crimes against humanity occurring in the context of an organizational policy. Customary international law has developed with respect to the policy argument and today also includes non-state actors such as terrorist organizations.[46] The September 11 attacks could be theoretically viewed as crimes against humanity. It was not the first time Al Qaeda had attacked American facilities and there is more than ample ground for putting September 11 in the context of previous Al Qaeda strikes. Still Art. 7 would not be adequate to prosecute all terrorist.

The concept of 'systematic' was defined by the International Criminal Tribunal for Rwanda (ICTR) as follows: "thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources."[47] It implies that there is no need to adopt a formal policy but there must be a preconceived plan or policy. Hence, all Al Qaeda attacks considered indicate a systematic policy which aims to target and destroy American symbols or facilities, like the World Trade Centre or America Lives. But certain questions like what about the previous attacks? How many such single attacks have to occur in order to meet 'systematic' criteria? Even if all these attacks are carried out by the same group, one could argue that the intervals in which they occurred are much too broad to reveal a regular pattern.[48] It follows that one needs several attacks in order to prove a regular pattern and the first few attacks could not be tried as crimes against humanity, unless they meet the widespread criteria. The Trial Chamber of the ICTR in Akayesu held that "Widespread criteria may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against

45 Darryl Robinson, "Developments in International Criminal Law. Defining "Crimes Against Humanity" at the Rome Conference (1999), available at http://www.icc-cpi-int.

46 Michael Whine, The New Terrorism, (2001), available at http://www.fau.ac.ii/anti-semitism/asw2000-1/whine.htm.

47 *Prosecutor v. Jean Paul Akayesu,* Case No. ICTR-96-4-T.

48 *ibid, supra note* 38.

a multiplicity of victim."[49] Because a single attack causing a large number of victims could also be described as widespread, the September 11 attacks can be viewed as a crime against humanity. But what about smaller terrorist attacks? Does the bombing in Saudi Arabia in 1995 constitute a crime against humanity? Only seven people were killed then.[50] Similarly the bombing of the USS Cole in October 2000, when seventeen were killed and thirty-nine injured.[51] Both these cases could not be tried as crimes against humanity. Consequently, number of terrorist would escape ICC prosecution. There need to be an opportunity to prosecute terrorists without having to prove that terrorist acts are part of systematic or wide-spread attack. Therefore, other approaches need to be available to bring terrorists to justice on an international level.

Crimes of Terrorism as separate provisions in the Rome Statute

The inclusion of terrorism in the jurisdiction of the ICC was dealt unsuccessfully at the Preparatory Commission (PREPCOM) that drafted the Rome Statute during the period 1996-98 and in the Preparatory Commission (Resolution F) of the ICC, which operated from 1999 to 2003[52] for number of reasons like that there was no generally acceptable definition of terrorism, inclusion will cause overburdening of the ICC and risk of jeopardizing the general acceptance of ICC. In 2009, the first Review Conference will take place to determine whether any amendments to the Rome Statute are appropriate. According to Art. 123(1) the review will not only be limited to the list of crimes mentioned in Art. 5. As a matter of fact, the plenipotentiaries for the establishment of an ICC adopted a resolution for this purpose recommending to consider the inclusion of crimes of terrorism in the jurisdiction of the ICC.[53] The resolution recognizes terrorism as a serious crime of concern to the international community and consequently serious threat to international peace and security. Similar conclusions were drawn at the fifty-seventh session of the UN General Assembly. The report of the Policy Working Group on the UN and terrorism also stated that international terrorism would be decreased, if the ICC would try the most serious crimes committed by terrorists.[54]

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49 *ibid, supra note* 47.

50 CNN, Bombing probe goes at possible tie to 1995 terrorist attack (July 28, 1996), available at http://www.cnn.com/world/9606/28/saudi.probe.pm/index.html.

51 CNN, US officials see similarities between USS Cole blast and embassy attacks (Oct. 23, 2000), available at http://www.cnn.com/2000/us/10/23/uss.cole.01/.

52 *ibid, supra note* 37.

53 Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court (July 17, 1998), available at http://www.un.org/law/icc/statute/finalfra.htm.

54. Report of the Policy Working Group on the United Nations and Terrorism, U.N. Gaor 57th sess. Annex to UN Doc.A/57/273(2002), available at http://www.un.org/terrorism/a57273.htm.

Regarding limited financial and personnel resources and so overburdening of the ICC, there is no need to worry. By virtue of the complementarity principle the ICC will exercise jurisdiction only if a state is not doing so. It is expected that state will choose to prosecute offenders in their national courts whenever they will have an opportunity. This state's struggle to preserve some sort of sovereignty will keep the ICC from being overburdened. Certain states also contend against granting the ICC jurisdiction over crimes of existing treaties as it will interfere with state's sovereignty. Again, this is not a persuasive agreement. The ICC will not seize jurisdiction in situations in which states exercise jurisdiction appropriately, be it on the basic of a treaty or otherwise.[55] Most of the existing treaties dealing with terrorism could be easily incorporated into the ICC statute and some are actually included in the preparatory committee's proposal.[56] Even if the international community does not succeed in agreeing on a definition of terrorism before the Review Conference in 2009, at least the International Anti-Terrorist Conventions could be incorporated in a separate provision constituting crimes of terrorism. States, which have ratified those treaties, operate on a "prosecute or extradite" basis, she only difference by including these treaties in the Rome Statute would be that a third actor would come into play in cases where states are unwilling or unable to prosecute terrorists. It will imply fill an existing gap. Therefore, the researcher suggests that terrorism should be treated as a separate category and hence deserve separate contemplation and prosecution so that certain terrorist could not escape the ICC jurisdiction.

Thus, we can conclude that terrorism is considered as one of the most reprehensible forms of international crime, on account of its massive and that total violation of fundamental human rights with no respect for borders. It is an aberrant crime that represents a true challenge for all humanity. Therefore, the fight against international terrorism should be a multilateral undertaking, in the hands of the countries but coordinated by international organizations, not just general ones such as the UN, but special ones such as specialized UN agencies or regional bodies. The diversity and complexity of criminal behaviour makes a strategy of this kind indispensable to achieve the hoped for result. In this sense, the role that can be played by the ICC is extremely important, owing to its nature as an international judicial body with universal jurisdiction and a specialized area of action i.e. international crimes.

55. *ibid, supra note* 38.

56. AIMCC: Terrorism and the International Criminal Court, available at http://www.avrice.org.docs terrorism.pdf.