CHALLENGES TO THE SUCCESSFUL PROSECUTION OF WAR CRIMES.

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The horrors of Second World War had perforce to consistently impelling the International community to work out a judicial mechanism of permanent character in order to punish those responsible for any such holocaust and also to deter future possibilities of wreaking havoc in the mankind. But the cherished aim of Geneva Conventions calling for the penal actions[1] to prevent breaches of International Criminal Law could not come true nor is it possible to be effectively enforced without reliable prosecutions of the war crimes. It is all the more essential to delineate the factors thwarting successful prosecutions of the war crimes in the International criminal justice system. The failure to prosecute war crimes stems from non-effective procedures and absence of political will on account of various issues like sovereignty, concurrent jurisdiction and weak executing mechanism etc. which often frustrate the investigations and prosecutions of those crimes.

The noble efforts of the global community eventually culminated in formulating the Rome Statute which took effect from July 1, 2002 with the establishment of first International Criminal Court (ICC) having its permanent headquarters in The Hague (Netherlands) and had codified virtually all the potential war crimes.[2] Besides the august forum of ICC, a scope for local tribunals in the national procedures, and the establishment of *ad hoc* tribunals, the specialised courts and the commissions, were actually aimed to punish the war crimes and also to guard against the prospective crimes. But such mechanism could *prima facie* not turn out to be very efficient, for different reasons, to address all the prosecutorial requirements of international and non-international armed conflicts. The foremost consideration to dispense justice by holding perpetrators of war crimes to the account confronted serious prosecutorial challenges not only to militate against the lofty objectives but also to contribute to the high incidence of recurring war crimes; and unveiled that no matter whatever is the sensitivity of the international community, the International Criminal Law does not possess an adequate capacity as yet to effectively carry out the prosecutions of all war crimes. The research essay explores as to which procedural and structural reforms are essential to make this organisation more vibrant by evaluating those problems which elude prosecutions of the war crimes across-the-board. It shall dilate upon the inherent internal and external prosecutorial limitations relating to:

- the sovereignty and complementarity,
- concurrent and universal jurisdiction,
- international recognition and executing mechanism, and
- inadequate contemplation for war-on-terror

All the aforementioned factors impinge upon the credibility of the prosecutions of war crimes and call for its review so as to reinforce the global perception as regards its independence and all-encompassing capacity as an International Criminal Justice System.

The Principle of Sovereignty

The voluntary ratification of the Rome Statute by the sovereign member states became a pre-requisite for vesting universal jurisdiction with domestic tribunals as well as the ICC. Such a scheme gave rise to a possibility for the states to ratify the Statute at will and, in effect, also a reluctance to precisely incorporate internationally defined penal acts in the domestic legislations. Although the complementarity[3] approach strikes a balance to address the concerns of state sovereignty[4] and gives an option to the states to prosecute these international crimes, nevertheless, many states become hesitant to ratify the Rome Statute on account of the provisions relating to certain immunities referring to the surrender of their nationals before the ICC. Such an outlook emanating from obstinate concept of sovereignty becomes a stumbling block to defeat the prospects of very genuine prosecutions of those crimes at the domestic level. The biased notion of sovereignty by the member states empowers them to decide as to which acts ought to be criminalised when a particular treaty enjoins upon those states to prosecute and penalise their organs and individuals in vertical[5] and horizontal relationships.[6] The extradition treaties[7] permitting refusal on pretext of the ongoing adjudication is an example to prevent the liability in such horizontal relationship. Some of the prosecutions may be implemented in such a way as to allow the states exert their influence, which may actually end up in non-compliance with the international law. By and large, states only ensure protection of their citizens under international law but lose sight of their responsibility of prosecuting the war crimes against individual organs as well as citizens on account of local legislation lacking scope for effective prosecution of these crimes. Such a phenomenon smacks of the tendency of states to abstain from adherence to international customs. The liability to prosecute emanates from the general principle that several international treaties make individuals responsible for a particular behaviour in addition to obligating the states to act in certain ways. For example, the claim for avoiding arrest warrant of former Liberian President Charles Taylor as head of the state[8] and removal of indictment to constitute the amnesty in the national law so as to bar prosecution, could not be tenable, in that, the official status as a "Head of State" cannot relieve that person of the criminal liability nor can it mitigate the punishment under the Geneva Conventions.[9] Therefore, the obligation to prosecute must exclude the possibility of amnesty and immunity on account of sovereignty for those elements.

The notion of sovereignty is overshadowed by International Law which makes liability still possible through compliance of a treaty as an international obligation and can somehow be controlled by effectively adopting sanctions for the international crimes. But such a strategy, at times, may turn out to be a very weak when compared with the gravity of crime constituting a serious violation. The diplomatic manipulations, power politics and partisan outlook of the states may avert such measures. For example, the exercise of "veto" power in the security council by

China and Russia on the situation in Syria and support for them by some of the non-permanent members like Brazil, Lebanon, India, and South Africa prevented the European-sponsored resolution from being put to the voting[10] and no sanctions could be imposed on Syria despite a bloody crackdown by the Syrian military forces on the pro-democracy protestors. The emerging scenario extending recognition to the international organisations as legal persons subject to international law,[11] gives rise to the trend of restricting state sovereignty. Several international treaties such as Hague Convention of 1907 and the Geneva Convention of 1949 are epitomes of the acceptance of International legislations by the states.[12] As a matter of fact, the issue of relationship of the principles of sovereignty with the universal jurisdiction should not be seen as a phenomenon to interfere with the sovereignty of state.[13] Rather there is a dire need for the members states to accurately conceptualize the relationship between international criminal law and sovereignty in order to understand that such law does not undermine rather fortify their sovereignty in terms of the principle of complementarily.

The Principle of Complementarily[14]

The principle of complementarity empowers the member states to assume primary jurisdiction at the domestic level and thereby vindicates their sovereignty. This mechanism circumvents future violations besides facilitating diligent collection of evidence and ensuring prompt availability of victims and witnesses. The *locus delicti* makes the testimonies easier and gives a sense to the victims that justice is being done in a true perspective. Although the ICC has operated as a catalyst in terms of its role of monitoring institution, yet the presence of active dockets of many domestic courts under International Law with an appropriate capacity to prosecute war crime is vitally important to translate the dream of global peace into reality.[15] The "*complementarity"* provision[16] of the Rome Statute lays emphasis on tangible prosecutions by the states with genuine ability[17] for prosecuting those involved in war crimes in a true perspective. Therefore, it becomes imperative for states to provide adequate rules of prosecution for certainty at domestic level to benefit the prosecutors and judges. The member states are often not so eager as to make their domestic legislations compatible with the International Criminal Law for providing a greater scope of domestic prosecutions against the accused facing trial for the commission of these crimes.

The Geneva Convention does not clearly provide a "standard" with regard to implementation of law under the doctrine of complementarity and merely states that the legislation is liable to be carried out and must take effect; without underlining any direct consequence for failure of a state to fulfil its obligation. Another challenge is the kinds of procedures that may be considered mandatory by the states and a high probability of unwillingness of the states to prosecute and punish war criminals having regard to those procedures already practised by the ICC.[18] Although the procedural standards are available in the instruments of human rights like the Additional Protocols I, the Geneva Conventions and the Rome Statute, however, they do not cater to all possible aspects for the prosecutions of war crimes. The obligation to prosecute a crime can take effect either by incorporating those crimes in domestic legislation or by referring to International law. Both the modes can be useful simultaneously in a particular situation i.e. crime defined in national law and jurisdiction in the international treaty respectively. But the ultimate object ought to be effective prosecution and penalising culprits with competence, for their crimes under international criminal law.

The commission of war crimes takes place under special circumstances and prosecutions of those acts as ordinary crimes cannot be tenable in many cases on account of peculiar features of those crimes. Many states may be inclined to prosecute such grave crimes through their own implementing legislation but it can only be true to the extent of crimes of torture and unlawful killings, and their views may not be correct for specific crimes like attacks on and killings of the civilians and unnecessary belated repatriation of the prisoners of war etc. There is no denying the fact that all municipal laws which prescribe a penalty for the murder do not make the act of murder an international crime. The killings of those protected under International Humanitarian Law are international crimes, which have been sought to be prosecuted and made punishable by the international community. Such additional features distinguish an international crime from the ordinary crime. It often becomes a difficult challenge to prosecute the former as ordinary crimes.[19] The prosecutions under such circumstances cannot be carried out in a manner representing the voice of the international community in terms of seriousness of the crimes so as to allay the grievances of victims and cannot give them a true feeling of substantial justice. No doubt the prosecution of war criminals in national courts is also a representation of international community but such prosecution must be given effect so eagerly as to realistically serve the interest of global society. A trial can be seriously prejudiced in view of special features of the case if there is any loophole in prosecution of a crime for want of clarity in the local laws not providing a solution to address all the possible substantive as well as procedural aspects for prosecuting the war crimes. The Geneva Convention calls for prosecutions of and punishments for those violating International Humanitarian Law irrespective of their nationalities. Since the prosecutorial obligations strictly in keeping with humanitarian values primarily lie with the states, the prompt implementing legislation and capacity building of judges, prosecutors and specialised investigations by those states constitutes a challenge which necessitates a uniform code in the member states for minimising procedural and structural hurdles in prompt and efficient prosecution of the war crimes in exercise of the concurrent universal jurisdiction.

The Concurrent Universal Jurisdiction

It has been enjoined upon all member states to search and prosecute offenders of war crimes before their courts and therefore, the ICC has also to attach credence to domestic prosecutions of their nationals in those states. As a matter of fact, a State itself and the ICC are vested with concurrent jurisdiction; therefore, universal jurisdiction has a wider scope than the jurisdiction of the ICC. A state cannot justify its failure to comply with international obligations of prosecuting those criminals on the premise of its inadequate implementing legislation. The complementarity principle encourages national prosecution for the crimes.[20] The ICC is supposed to exercise its jurisdiction as a last resort.[21] The Rome Statute enables the ICC to assume its jurisdiction following omission of a state to prosecute those criminals. The referral of the case of Uganda was a manifestation of unwillingness to prosecute at domestic level as such. A state opting to invoke waiver is also treated as a state unwilling or unable to

prosecute.[22] Although the ICC had not been contemplated as an appellate body against decisions by the domestic courts but the assumption of appellate jurisdiction by it in cases of its free will is open to serious criticism. The non-adherence to fundamental principles of due process only leads to the inference of "*victor's justice*" and derogates from a basic right of due process.[23] It is noteworthy that *ad hoc tribunals* had taken a more strict view than the ICC while taking national procedures into consideration.[24] Both the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for Yugoslavia (ICTY) statutes provide that a case may be retried even if an accused was prosecuted at national level despite the fact that elements of crime in domestic laws were identical in substance.[25] Hence, it appears that ICTR and ICTY could cast aspersions on the prosecutions and procedures before the domestic courts. Such an attitude to the domestic implementing legislations, patently contrary to the principles of *double criminality,* is inconsistent with the principles of natural justice and operates as a challenge to the efficient prosecution of war crimes. At the time of deliberations of the Rome statute, it became most difficult to negotiate a criteria for setting out procedure as regards assumption of jurisdiction by the ICC where prosecution at national level had already been completed, and when it was further contested, a vague term "genuinely" was coined as a basis for the ICC to evaluate national procedures for prosecution of these crimes.[26] However, a bar of jurisdiction in the face of willingness of a state to prosecute cannot operate either for ensuing inability of a state to prosecute a case or insufficient domestic legislation for the purpose; and such a bar cannot preclude from exercise of jurisdiction by the ICC. Such an ambiguity is liable to be addressed and a definitive procedural and supervisory criterion for such prosecutions is imminently required to ensure certainty and credibility for the proceedings in the ICC after a logical conclusion of a trial at the domestic level.

International Recognition and Execution Mechanism

The ICC has considerably bridged over shortcomings in the international legal system but a lot more needs to be accomplished for successful prosecutions before this august forum. A member state is obligated to extend optimum support to this judicial body after ratifying the Statute. Although the ICC has put in place institutional mechanism to ensure cooperation by the member states[27] in criminal prosecutions but it has not yet received universal recognition by many countries, which has precipitated a serious challenge to the prosecutions of these crimes for administration of global justice and the countries that have not become party thereto do not fall under its universal jurisdiction. The UN Security Council Resolution No. 1564 passed in the year 2004, calling for issuance of warrants against former Sudanese Interior Minister Ahmad Haroon and Janjaweed leader Ali Kushayb, following their involvement in commission of war crimes in Darfur which claimed hundreds of thousands of human lives in Sudan, could not be given effect and a requisition for execution of the warrants was turned down under protest by the relevant government on the premise that Sudan was not a party to the Rome Statute and therefore, the ICC cannot exercise its jurisdiction in the matter.[28] Such a situation cannot help ensure effective and transparent prosecutions in the international criminal justice system, as apparently only those countries have abstained from assenting to the Statute which either have been involved or have some degree of propensity to be engaged in the violations of international law and are apprehensive to be held accountable as such. The absence of recognition of the universal jurisdiction by them not only serves to downplay the rationale underlying the Statute to guarantee global peace rather it also runs counter to the purported notion of deterring future possibilities of the loss of human lives and property at a large scale. Kofi Annan, the former Secretary General of the General Assembly had observed that the repetition of crimes in Cambodia, Bosnia Herzegovina and Rwanda had eclipsed the dream; and which is why, the impending consensus of nations must be prioritized in order to maintain dignity of the court and credibility of prosecutions before it.[29] The impression of prosecuting the weaker for dispensing selective justice also cannot be dispelled unless all the states, recognised by the United Nations, volunteer to respect the universal jurisdiction of the ICC. The conspicuous ongoing investigations and emphasis on such prosecutions in the African countries has also entailed sharp criticism by many authors who termed the ICC as a tool of the western countries.[30] Also failure of the ICC to arrest the perpetrator of war crimes like Omar al-Basher i.e. President of Sudan, even during his visits to Qatar and Egypt, both the member states of the ICC, due to his network support entailed enormous condemnation and significantly tarnished image of the ICC, as the failure to arrest him was the consequence of the lack of independent enforcement mechanism.[31] It has further been noted that voices to prosecute powerful individuals like US President George W. Bush and the Prime Minister of UK Tony Blair for alleged commission of war crimes by them causing gross human rights violations in Iraq, is an open secret but such demand by the victims and international community claiming prosecutorial action did not bear fruit. The gigantic task to prosecute and bring the mighty culprits to justice is one of the serious challenges the ICC is confronted with, primarily due to want of its own implementing organs and reliance on Security Council. The inability to arrest such culprits despite a greater probability of successful prosecutions, cannot give a strong feeling to all the victims and critics seeking prosecution against those involved in killings of innocent people nor can it add to the credibility of prosecutions before the ICC.

Inadequate Contemplation for War-On-Terror

The insufficient procedural consideration for the trials of those involved in terrorism also poses a challenge to the prosecution of war crimes committed by them. International law applies to various situations including declared war between two or more states and also may include armed conflict of non-international character initiated by non-state actors like terrorist organisations of ISIS and Al-Qaeda, as envisaged by Article 2 of the Geneva Convention. The international armed conflict (IAC) is distinguishable from non-international armed conflict (NIAC) depending on the nature of operations meant to counter terrorism. The UN Security Council and even the belligerents have deemed the same rules applicable to the situations which are different from IAC. For instance, the US Joints Chief Staff Standing Rules enjoin upon the US forces to abide by those laws regardless of the character of operation.[32] The farcical notion that universal jurisdiction of the ICC only applies to the prosecutions of war crimes committed in international armed conflicts stands nullified and the development of law admits of such jurisdiction in non-international conflicts as well. The customary law also lends support to this concept which was further vindicated by the international tribunals of Rwanda, Cambodia and Sierra Leone. A resolution of the Institute of International Law in the year 2005 urged that the prosecution of both international and non-

international armed conflicts were encompassed in the universal jurisdiction in connection with the war crimes.[33] However, a crime under International Humanitarian Law does not enable every state to have jurisdiction on it for its prosecution. The criminal nature of an act and exercise of jurisdiction are two different propositions to be dealt with accordingly. It is pertinent to point out that excuse of absence of implementing legislation after the act perpetrated and defence of no violation of ex post facto rule, cannot be valid in prosecutions of such crimes of terrorism particularly when such responsibility already finds mention in the international rules.[34] But the omission of competent trials, on such excuse, was a treatment meted out to prisoners of Guantanamo which not only discredited domestic legislation of the USA but was also violative of human rights on the pretext of security[35] and posed a serious challenge to the effective and transparent prosecution of war crimes. Even the reports of a perverse approach of the Northern Alliance in Afghanistan to let the Taliban prisoners die in the shipping containers and suggestion of Rumsfeld[36] that unlawful combatants were not entitled to the treatment for POWs is an outlook which must be taken care of and those prisoners involved in the terrorism ought to be put to the trial under the concurrent universal jurisdiction contemplated by the Rome Statute. There is also a possibility that the prosecutors may prevent the investigation of these incidents on account of inherent difficulties and lack of support by the UN Security Council due to the mighty powers like member countries of the NATO. Many innocent villagers died when bombing was carried out by the Allies on December 1, 2001 in a village of eastern Afghanistan not far from Torah Bora[37] but no investigation was carried out for the massive killings of the civilians. No illegality of intentional and wilful attacks and the killings of civilians can be condoned under the International Humanitarian Law. Even the relevant provision of Article 57 of 1977's Geneva Protocol explicitly makes it obligatory for a commander of the military force to exercise due care and caution to protect the civilian population as well as the civilian objects. There is a pressing need for the doctrinal provisions to be applied to the complex situations like the war-on-terror for the effective prosecution of the war crimes. Such a situation ought to be addressed within the purview of the Rome Statute. These are palpable challenges for prosecuting the war crimes, committed in the scourge of global terrorism, require unequivocal supplementary legislative provisions to punish those involved in the atrocious terrorist activities.

Conclusion

The potential deterrence of the ICC is essentially liable to be increased failing which the very purpose of its creation may be frustrated and essence of the administration of International Criminal justice may end in the smoke. It has been observed that many of the member states failed to discharge their obligation to cooperate with the ICC which is lacking an independent enforcement mechanism, and non-cooperation by them further undermined the authority this international organisation is supposed to wield. On many occasions the serious war crimes were neither investigated nor the culprits were prosecuted before the national courts under the complementarity provision but there was no tangible attempt on the part of the ICC to ferret out the reasons for their failure nor could it properly evaluate the political manipulations in prosecutorial process and the referral was also not even made by its Office of the Prosecutor to make sure that no culprit of war crimes goes scot free. Therefore, the structural and procedural reforms as discussed above are direly needed through legislative measures to evolve an effective monitoring and enforcement mechanism for the diligent prosecution of war crimes at both local as well as international levels. The purpose of creation of the ICC depends entirely upon the successful prosecution of these crimes as such.

The failure of universal recognition of the ICC has also circumvented the comprehensive and all-embracing dispensation of justice. The greater population of the world habitats in the countries like China, India, Russia, USA, and Pakistan etc. that have been involved in many wars in the past but none of these countries have ratified the Rome Statute so far despite the fact that all of them are in possession of the weapons of mass destruction. Similarly, the criticism on account of the focus of ICC on prosecuting the alleged war crimes in Africa only has also been characterised as selective justice. These issues of sovereignty, universality, alleged selective justice and the absence of efficacious prosecutorial mechanism to cater to war-on-terror are serious impediments to prosecute the war crimes and liable to be addressed imminently having due regard to the very rationale the Rome Statutes were conceived on, otherwise it will not only be enormously difficult to successfully prosecute the war crimes rather the commission of these crimes with impunity may also increase manifold and the politics of power at the cost of innocent lives across the world, will continue to predominate at the international level.

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