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PROSECUTION AND PUNISHMENT OF INTERNATIONAL CRIMES UNDER INTERNATIONAL LAW.

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Keywords: International Criminal Law, International Crimes, Genocide, Crimes Against Humanity, War Crimes, International Criminal Court, Individual Criminal Responsibility, Accountability.

Abstract

There have been a number of cases that have been prosecuted and punished under International Criminal Law. To discuss these, this paper set out to explain crimes considered as International Crimes which are: genocide, crimes against humanities, war crimes and aggression. The paper further discusses the principles of liability and defences such as joint criminal enterprise, co-perpetration and command responsibility. It provides the available defences and finally it lists the prosecutions that have taken place under The Nuremburg and Tokyo International Military Tribunals, The International Criminal Tribunals for Rwanda and Yugoslavia and The International Criminal Court.

The prosecution and punishment of international crimes being of key focus in this research it is anticipated that this study will be used to inform the Kenyan population on the problems accompanying the prosecution and punishment of international crimes. It will help in developing policies much needed for future inclusiveness in the legal operationalization of Article 2(5) of the Constitution of Kenya which provides that general rules of international law shall form part of the laws of Kenya.

The study also aims to promote further research especially on the level of adoptability and implementation of International laws governing crimes. This study will therefore be a vital and handy tool for researchers, legislators and policy makers whose main concern is International criminal law.

1.1 Introduction

There are various ways of defining international criminal law. These include aspects of international law involving allocation of jurisdiction, or international cooperation in criminal

matters.¹ It would be of utmost importance to consider the concepts of individual criminal responsibility and its direct implication noting that the majority of cases involving the breach of international criminal law have taken place in Africa. International Criminal Law deals with the direct criminal responsibility of individuals under the law. it can be summed up in the famous statement of the Nuremburg International Military Tribunal that “.....*individuals have international duties which transcend the national obligations of obedience imposed by the individual State, 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*.....”². For international crimes, the locus of the criminal prohibition is the international legal order, although in various countries including Kenya (through the international crimes Act) international crimes have been criminalized through domestic legal process.

Sometimes international crimes are referred to as ‘*jus cogens*’ crimes³ although there is considerable overlap between *jus cogens* norms and international crimes, the crime of genocide for example was considered by the international Court of Justice and considered as a *jus cogens* prohibition⁴.

An International Crime is created when international law directly criminalizes something. It is required that the rule doing so has *jus cogens* status. The vast majority of international criminal law finds its basis in customary international law, and thus is applicable throughout the world⁵. International criminal law is an amalgam of international and criminal law. As such its sources are those of international law, which has its own approach. An understanding of both international law and criminal law is essential for the full understanding of international criminal law. Sometimes, the dual nature of international criminal law has led to critique.

1.2 International Crimes

There are four international crimes, these are: genocide, crimes against humanities, war crimes and aggression.

1.2.1 Genocide.

¹ G. Schwarzenberger; The Judgement of Nuremburg ;Tulane Law Review; 1950

² Nuremburg International Military Tribunal

³ L. Sadat(2007)The effect of amnesties Before Domestic and International Tribunals,Law, Morality and Politics ;Tokyo University press

⁴ Armed activities on the territory of the Congo

⁵T. Kelsall (2009) Culture under Cross Examination: International Justice and the special Court for Sierra Leone: Cambridge University Press.p24

Schabas (2008) considers genocide to be the crime of crimes⁶. The term itself was invented by Raphael Lemkin in 1944 to describe the holocaust. The crime focuses on conduct that relates to threats to the existence of groups.⁷ The first express definition of genocide as an international crime was in the Genocide Convention in 1948. The convention came into force in 1951 and in that same year the International Court of Justice in the Reservations to the Genocide Convention case⁸, determined that the principles underlying the convention are principles which are recognized by civilized nations as binding on states, even without any conventional obligation.

Genocide is defined under Article 2 of the Genocide convention in the following terms:

Any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such:

- a. Killing members of the group.
- b. Causing serious bodily or mental harm to members of the group.
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.
- d. Imposing measures intended to prevent births within the group.
- e. Forcibly transferring children of the group to another group.

Both the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for Yugoslavia (ICTY) statutes have adopted the above definition.

Genocide may also be committed in other manners provided by Article 2 of the Genocide convention in the **Akayesu case**⁹. In this case the ICTR accepted that rape and other forms of sexual violence are covered under the ICTY statute.

1.2.2 Crimes Against Humanity.

Crimes against humanity were first defined in Article 6(c) of the Nuremburg International Military Tribunal Statute as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the Country where perpetrated ”.

⁶W. Schabas, *The UN International Tribunals: Yugoslavia, Rwanda, Sierra Leone*, Cambridge University Press, 2006p 18.

⁷ (SUPRA)

⁸ Reservations to the convention on the prevention and punishment of the crime of genocide ,Advisory opinion ICJ Reports ,p 15.

⁹ The Prosecutor versus Akayesu Case no ICTR -95-4-T ,September 1998,

However the Tokyo International Military Tribunal Statute, the International Criminal Tribunal For both Rwanda and Yugoslavia have slight variations in their definition of crimes against humanity. The most widely ratified definition of crimes against humanity is that in Article 7 of the Rome Statute of the International Criminal Court, which reads:

For the purposes of this Statute crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

- (a) Murder
- (b) Extermination
- (c) Enslavement
- (d) Deportation or forcible transfer of population
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law
- (f) Torture
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity
- (h) Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender, as identified in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in any crime within the jurisdiction of the Court
- (i) Enforced disappearance of persons
- (j) The crime of apartheid
- (k) Other inhumane acts of similar character intentionally causing great suffering or serious injuring to a body or to mental or physical health.

The core of crimes against humanity, is that it renders what are generally domestic crimes (such as rape and murder) into international crimes, the core of the contextual element is that the conduct occurs in the context of widespread or systematic attack on the population. The ICTY has previously held that widespread refers to the large scale nature of the attacks and the number of victims while the phrase “systematic” refers to the organised nature of the acts of the violence and the improbability of their random occurrence¹⁰.

1.2.3 War Crimes.

The law of war crimes constitutes part of international criminal law, it is in essence the criminal

¹⁰ ICTY trial chamber ii, Prosecutor versus Tadic case no IT-94-1T May 1997

phase of international humanitarian law. In effect all serious violations of international humanitarian law would amount to war crimes, the law of war crimes differs depending on whether the armed conflict is international or non –international. In international armed conflicts, there are treaty based and customary norms that are relevant. Of the treaty –based norms the most important are grave breaches of the Geneva conventions that are explained under Article 8(2) (a) of the Rome Statute as being:

Any of the following acts against persons or property protected under provisions of the relevant Geneva Convention i.e. essentially the wounded, sick, shipwrecked, Prisoners of War and interned civilians and civilians in occupied territory.

- I. Wilful killing;
- II. Torture or inhuman treatment ,including biological experiments;
- III. Wilfully causing great suffering, or serious injury to body or health
- IV. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- V. Compelling a prisoner of war or other protected person to serve in the forces of a hostile power;
- VI. Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial
- VII. Unlawful deportation or transfer or unlawful confinement
- VIII. Taking hostages.

Aside from the Rome Statute of the international Criminal Court, the above acts are also subject to mandatory prosecution on the basis of universal jurisdiction for instance under the Geneva Convention 1 Article 49.

Turning to non-international armed conflict ,the International Criminal Tribunal for Rwanda Statute under Article 4, the Special Court for Sierra Leone Statute under Article 3 and the Rome Statute of the International Criminal Court Article 8(2) (c) all have jurisdiction to prosecute violations of the common Article 3 of the Geneva Conventions¹¹ which reads;

Persons taking no active part in hostilities, including members of the armed forces who have laid down their arms and those displaced *hors de combat*¹² by sickness, wounds, detention or any other cause, shall in the circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, birth or wealth ,or any other similar criteria. To this

¹¹ The ICTY also has this jurisdiction as it interpreted Article 3 of its statute to cover all applicable humanitarian law in force during the Yugoslav Wars of dissolution in the case of **Tadic versus the Prosecutor**

¹² literally meaning "outside the fight," is a French term used in diplomacy and international law to refer to combatants who are incapable of performing their ability to wage war.

end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons.

- a. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.
- b. Taking hostages.
- c. Outrages against personal dignity, in particular humiliating and degrading treatment.
- d. The passing of sentences and carrying out of executions without previous judgement pronounced by regularly constituted court, affording all judicial guarantees which are recognized as indispensable by civilized peoples.

For a conduct to amount to a war crime there has to be a nexus between that conduct and the armed conflict. The ICTY has explained the position as follows” what distinguishes a war crime from a purely domestic offence is that a war crime is shaped by and dependent upon the environment the armed conflict in which it was committed¹³

It therefore follows that the armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must at a minimum, have played a substantial part in the perpetrators ability to commit it, his decision to commit it the manner in which it was committed or the purpose for which it was committed.¹⁴

1.2.4 Aggression.

Aggression as an international crime was first prosecuted as a crime against peace before the Nuremburg International Military Tribunal. The prosecution proceeded on the basis of Article 6(a) of the Nuremburg IMT statute, which criminalised planning, preparation, initiating or waging of war of aggression, or a war in violation of international treaties, agreements or assurances, or participating in a common plan or conspiracy for any of the foregoing. The article does not provide a definition of war crimes. Under the Kellog Briand Pact recourse to non-defensive force was rendered unlawful, however it did not contain any hint of criminal responsibility¹⁵.

Neither the Nuremburg nor the Tokyo IMTs provided a direct definition of aggression, although all made determination of whether or not particular conflicts were aggressive or not.

2.0 PRINCIPLES OF LIABILITY AND DEFENCES

International criminal law provides for principles of liability and a defence; international law

¹³ Prosecutor versus Kuranac

¹⁴ Supra.

thus does have a number of specialized forms of liability and defences that are worth noting. On the liability side there is the *doctrine of criminal joint enterprise, co-perpetration* and *command responsibility*. For defences there is the defence of *superior orders*.

2.1 Joint criminal enterprise

It is a characteristic of most international crimes that they tend to be committed by groups as a result international law has adopted a theory of liability i.e. joint criminal enterprise, the doctrine was set out in the case of the **Prosecutor versus tadic** to include:

- I. A plurality of persons.
- II. The existence of a common plan, design or purpose which amounts to or involves the commission of a crime under international criminal law.
- III. Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the statute.

The mental element as set out in the Tadic case involves an intention that the group commit the crime or the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group.

2.2 Co-perpetration

The objective aspect of this doctrine is the existence of an explicit or implicit agreement or common plan between the co-perpetrators and a coordinated essential contribution by the suspect which was essential for the commission of the objective elements of the crime¹⁶. In Prosecutor versus Lubanga¹⁷ it was held that this contribution can be made through control of a hierarchically structured organization in which interchangeable subordinates can be relied upon to carry out the orders.

In relation to the subjective elements, it is necessary that the defendant has the mental element required for the relevant offence, the co-perpetrators realize that the common plan will result in a crime and that the defendant is aware of the circumstances that allow them to jointly control the crime.

2.3 Command Responsibility

Command responsibility is the responsibility of those who have effective control over subordinates for offence committed by them, where they failed to prevent them. This doctrine

¹⁶ Pre-Trial Chamber Chamber 1, Prosecutor versus Stakic judgement in case no IT- 97 -24-A, March 2006.

¹⁷ Decision on the confirmation of charges ICC Case No.01/04-01/06.

derives its history from the case of Yamashita¹⁸

Article 28 of the Rome Statute of the International Criminal Court has considered this doctrine within the jurisdiction of the Court by stating to the effect that;

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces where;
 - i. The military commander or person either knew or owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.
 - ii. That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigations and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally liable for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control as a result of his failure to exercise control properly over such subordinates.

3.0 DEFENCES

The Rome Statute of the International Criminal Court has made provisions for defences including: self defence, duress, necessity, insanity and intoxication all of which are standard criminal law defences, however it is the defence of obedience to superior orders that is often frequently raised by defendants, the Nuremburg IMT Statute, under Article 8 excluded reliance on this defence, also under the Tokyo IMT Statute under Article 7, The ICTY Statute under Article 7(4), The ICTR Statute Under Article 6(4) have all excluded this defence.

The Rome Statute of the International Criminal Court on the other hand, permits the defence in narrow circumstances for war crimes under Article 33 of the Statute which reads:

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian shall not relieve that person of criminal responsibility unless.

¹⁸ (1946)327 US 1

- a) The person was under the legal obligation to obey orders of government or the superior in question;
- b) The person did not know the order was unlawful;
- c) The order was not manifestly unlawful.

All the three conditions must be fulfilled before a defendant can rely on the provision, the provision has been criticized for being vague, in that the provision does not clarify to whom the illegality must be manifested and furthermore it has been alleged by legal scholars that the customary status of Article 33 is in itself controversial.¹⁹

4.0 PROSECUTION

4.1 The Nuremburg and Tokyo International Military Tribunals

Prosecutorial responses to international crimes have occurred at both the national and international level. The first international tribunal was the Nuremburg IMT, which sat between 1945 and 1946 to prosecute high ranking Nazis. It was set up by France, the United Kingdom, the United States and the Union of Soviet Socialist Republics. Pursuant to Article 6 of its Charter, the tribunal had the jurisdiction over crimes against peace (aggression), crimes against humanity, and war crimes. Pursuant to Articles 9 and 10 of its Statute, it was permitted to make declarations of criminality against organizations, to pave way for domestic prosecutions of members of such organizations that included the leadership Corps of the Nazi Party and the Gestapo.

The Tokyo IMT was designed to prosecute the leaders of the martial Japan. It was set up by Australia, Canada, China, India, France, the Netherlands, New Zealand, the Philippines, the UK, the US and the USSR, all of whom appointed one judge. Article 5 of the Statute gave the tribunal jurisdiction over crimes against peace, crimes against humanity and war crimes. The indictment charged both military and civilian leaders, with crimes against peace and war crimes. The general critiques of both the Tokyo and Nuremburg IMT'S have often made reference to the fact that the tribunals did not hear allegations about possible war crimes by the Countries that constituted the tribunals.²⁰

4.2 The International Criminal Tribunals for Rwanda and Yugoslavia

In 1993 the United Nations Security Council, responding to atrocities in the former Yugoslavia created the ICTY under the powers of chapter VII of the United Nations Charter. The Tribunal

¹⁹C. Garraway ;Superior Orders and the International Criminal Court; International Review of the Red Cross 1999p.87

²⁰ N.Bolster; Transnational Criminal Law; Oxford University Press,2008p 67

has jurisdiction over grave breaches of the Geneva Convention under Article 2, war crimes under Article 3, crimes against humanity (Article 4) and Genocide (Article 5). As per the Statute the ICTY has primacy over National Courts. This means that the tribunal may require States to defer proceedings to the tribunals and the State has a duty to co-operate with the tribunal, however in 2002 the ICTY adopted rules of procedure and evidence, which allowed it to refer cases back to national court, effectively outsourcing part of its work.

The ICTY as an institution has been able to promote accountability rather than impunity through the various prosecutions, the tribunal has also been able to establish the facts of the crimes in former Yugoslavia and brought justice to the victims and given them a voice, the tribunal has also played a role in developing international criminal law.

The United Nations Security Council also established the International Criminal Tribunal for Rwanda which has jurisdiction over genocide, crimes against humanity, and war crimes under the common Article 3. The tribunal has the same powers in relation to primacy and cooperation as the ICTY.

There has been criticism that the tribunal has failed to prosecute possible atrocities carried out by the Rwanda Patriotic Front (RPF) in the aftermath of the genocide. It has been suggested that the RPF, having taken over power in Rwanda proceeded to control co-operation and with the ICTR. Other legal scholars have in turn argued that the allegations are less serious as opposed to those facing the Hutu defendants²¹

4.3 The International Criminal Court

The Rome Statute of the International Criminal Court was finalized in 1998 after negotiations in Rome, however the Court as an organization came into being in 2002, when the required 60 ratifications of the Statute were obtained.

As mentioned, before the Court may exercise jurisdiction over genocide, crimes against humanity, and a closed list of war crimes, the ICC also has a dormant jurisdiction over the crime of aggression. The jurisdiction of the Court is over crimes committed by nationals of State parties or on their territories, or over any situation referred to it by the Security Council²². The jurisdiction of the ICC is prospective; it began as at the date the Court came into being in 2002 as provided for by Article 11(1) of the Rome Statute. States that were not party to the Statute at that date, unless they make a specific declaration that the ICC may exercise

²¹V. Thalman, French Justice's Endeavour to Substitute for ICTR ,6 JICJ (2008) pg 1001-1002

²² The Situation in Sudan even though Sudan was not a State party the Security Council referred the matter to the Court.

jurisdiction prior to their ratification of the Statute, then the Court can only exercise jurisdiction in relation to the relevant offences committed after the entry into force of the Statute.

There are three ways in which the prosecutor may initiate an investigation. The first is after a referral by a state Party to the Rome Statute as provided for under Article 12(a) of the Statute, this provision has made it possible for Countries to make use of “self-referrals” where States refer the situation in their own territories to the ICC²³. This has happened three times, with references by Uganda, The Democratic Republic of Congo, and the Central African Republic. The second way in which the ICC may commence an investigation is via the prosecutor, with the consent of the Pre-Trial Chamber, initiate an investigation on its own motion as provided for under Article 15 of the Statute, this has been invoked by the prosecutor in relation to the post-election violence in Kenya. In October 2008, a Commission of Inquiry into Post-Election Violence (CIPEV) in Kenya published its report, recommending that a special tribunal composed of Kenyans and foreigners be established to prosecute cases arising from Kenya’s Post Election Violence of 2007-2008. Shortly after, in December 2008, Kenya enacted the International Crimes Act to domesticate the Rome Statute. However, it soon became clear that the political leadership in Kenya was not committed to accountability. On February 12, 2009, the Kenyan Parliament voted down a Bill seeking the establishment of a special tribunal to deal with the Post-Election Violence. Later attempts to establish a national accountability mechanism also failed. As a consequence of Kenya’s failure to prosecute these crimes in its national courts, on March 31, 2010, Pre-Trial Chamber II (PTC II) of the ICC authorized the ICC prosecutor, acting *proprio motu*,²⁴ to commence an investigation into the Kenyan situation. After the ICC prosecutor named six suspects, five of them high-ranking government officials, the Kenyan Parliament passed a nonbinding motion on December 22, 2010, urging the government to withdraw from the Rome Statute and repeal the International Crimes Act. In this context, several members of Parliament called for the establishment of a domestic accountability process to replace the ICC. In mid-January 2011, the government announced that the coalition partners had agreed to establish a special division of the High Court to try PEV cases. However, government officials simultaneously argued that a criminal justice process could jeopardize peace and security, and launched diplomatic efforts aimed at gathering support for a United Nations Security Council deferral of the Kenyan ICC cases. Kenya also filed a suit at the International Criminal Court challenging the admissibility of the

²³ M. Arsanjani and R. Reisman :The Jurisdiction of International Criminal Court Over Nationals of Non- Parties
99 AJIL2005p 43

²⁴by one's own motion : on one's own initiative

cases before the Court however; PTC II rejected the admissibility challenge, noting that there remains a “situation of inactivity” in Kenya. It made it clear that for admissibility challenge to succeed, proceedings at the national level must be on-going and concrete evidence must be presented to support their existence.

The Security Council also has the power to refer a situation anywhere in the world to the ICC under Article 13(b) of the Statute. The Security Council has done this once, referring the situation in Darfur Sudan, to the ICC²⁵, the Council also has the power under Article 16 of the Statute to require the Prosecutor to defer an investigation or prosecution for a period of one year, this period can be renewed indefinitely²⁶.

In contrast to the ICTY and the ICTR, which enjoy primacy over national Courts, the ICC’s jurisdiction is said to be “complimentary “to domestic jurisdictions. This is provided for under Article 1 of the Statute, this means that the ICC can only exercise jurisdiction where it determines that a competent national Court is **unwilling or unable** to prosecute the case itself. The concept of unwillingness is elaborated upon by Article 17(3) of the Statute which explains that such genuine unwillingness is absent if;

- a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5 of the Statute;
- b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- c) The proceedings were not or are not being conducted independently or impartially and they were or are being conducted in a manner which, in the circumstances, is inconsistent with intent to bring the person concerned to justice.

Inability to prosecute is the subject of Article 17(3) of the Rome Statute which reads “in order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings”.

There are both legal and political critiques of the ICC. The main legal challenge, which was first raised by the United States Government, is the allegation that the ICC can exercise its

²⁵R. Cryer; Prosecuting International Crimes Selectivity and the International Criminal Law Regime; Cambridge University Press; 2006p 28

²⁶ In 2013 Kenya unsuccessfully tried to utilize this provision on the basis that the the defendants had now acquired a new status i.e of President and Deputy President of Kenya and as such there was need to preserve the dignity of the offices.

jurisdiction over nationals of non-State parties (where they commit international crimes on the territory of States Parties)²⁷

Politically there has been criticism that all the prosecutors' investigations relate to situations in Africa, and that the Prosecutor is acting selectively, concentrating in less powerful States; however it must be noted that there are indeed circumstance in Africa where the State itself referred the matter to the International Criminal Court.

5.0 CONCLUSION

International and national courts which have prosecuted state officials have faced challenges. Such challenges include jurisdictional matters and the enforcement of warrants of arrest against sitting state officials. Despite these challenges there is hope for the future because the statutes of international courts and international conventions prove clarity on the prosecution and punishment of international crimes. International law and courts have long held that the immunity of state officials is not a defence from holding state officials criminally responsible for international crimes. Neither is it a ground for mitigation of punishment for such officials convicted of international crimes.

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²⁷(SUPRA)