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HISTORICAL BACKGROUND FOR THE ESTABLISHMENT OF ICC: AN APPRAISAL

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Abstract

Although the International Criminal Court (ICC) was specifically created to deal with humanitarian issues, however, interestingly, the ICC primary function is to ensure that states standardize their domestic laws on war crimes, genocide, and crimes against humanity. The norm of international law sets one function of ICC as the institute for legal homogenization, and by doing so, it helps spread the idea that these crimes will not go unpunished.

Key Words: ICC, Nuremberg Tribunal, Tokyo Tribunal, ICTY, ICTR

1. Introduction

Interesting to note that, the creation of ICC does not ensure that it itself will hear such cases outside the jurisdiction of domestic courts. Another *function* is to create a completely new international institution with autonomous legal powers, and of course having a powerful political role. Blending these two functions together results the concept of "complementarity," [1] which specifies that the ICC shall be "complementary" to domestic courts rather than to supersede them. However, the ICC has the mandate and jurisdiction to hear cases related to genocide, war crimes, crimes against humanity, and crimes of aggression.[2]

2. The International Tribunal Prior to World War I

The idea of the establishment of a criminal court having international jurisdiction is not new. The first tribunal with an arguably international character summons in Breisach, Germany, in 1474. It involved the Holy Roman Empire conducting the trial of Peter von Hagenbach with 28 judges, appointed from the members of the coalition who had fought von Hagenbach.[3]

Von Hagenbach was charged with murder, rape, torture, perjury, and giving orders to the non-German 'mercenaries' whom he had brought to Breisach that they should kill men in their houses. The defendant was found guilty by the tribunal and put to death for the crimes he had committed against the laws of God and the laws of men.[4]

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[1] ICC Statute, Article 17.

[2] ICC Statute, Article 5.

[3] G. SCHWARZENBERGER, INTERNATIONAL COURTS AND TRIBUNALS, THE LAWS OF ARMED CONFLICT 462-463 (Vol. II, 1968).

[4] *Id.* at 465.

After the trial of Peter von Hagenbach, on 3 January 1872, one of the founders of the Red Cross movement, Gustav Moynier of Switzerland, proposed the establishment of a permanent international criminal court by treaty at a meeting of the ICRC.[5] He even drafted a proposal for a permanent court to prosecute individuals for the breach of the Geneva Convention of 1864. He thought it inappropriate to leave judicial remedies to belligerents because the judges could be placed under pressure at any time, whereas an international court could offer better assurances of neutrality. This, in turn would make belligerents more likely to use it.[6]

In fact, no serious attempt was taken to establish the international court following Moynier's proposal. The next attempt at the establishment of an international tribunal occurred after World War I.

3. The Establishment of the Leipzig Court after World War I

In the aftermath of World War I, the victorious Allies decided to prosecute Germans responsible for aggression and other war crimes. There was outrage concerning war crimes on the part of Allied states, against Germany's war crimes, and also on the part of foreigners, such as against the Ottoman Empire for the Armenian massacres.[7]

During the war the Allies repeatedly expressed their strict determination to bring to justice all Germans who had committed acts which violated the laws and the customs of war. Hence, shortly after World War I, the Allies set up a commission in 1919 in order to 'investigate the responsibility for the start of war crimes' and which type of tribunal would be adequate for trials.[8] The commission reported the responsibility of the Central Powers for initiating the war, and made a number of recommendations, such as the prosecution of high authorities such as the Kaiser and establishing an Allied 'High Tribunal' among the Allied member states.[9]

The Report's suggestions were largely followed by the Allies, and led to the Treaty of Versailles being signed between the Allied and Associated Powers. The Treaty provided the legal grounds for the prosecution of Kaiser Wilhelm II and other war criminals before a military tribunal which would be established by the Allied powers.[10] It seems that the first serious initiative to implement the individual responsibility of holders of high

[5] CRISHTOPHER KEITH HALL, THE FIRST PROPOSAL FOR A PERMANENT INTERNATIONAL CRIMINAL COURT 58 (322 International Review of Red Cross, 1998).

[6] *Id.* at 57-59.

[7] DADRIAN V., THE HISTORY OF THE ARMENIAN GENOCIDE: ETHNIC CONFLICT FROM THE BALKANS TO ANATOLIA TO THE CAUCASUS (2003), and THE ARMENIAN GENOCIDE AND THE LEGAL AND POLITICAL ISSUES IN THE FAILURE TO PREVENT OR PUNISH THE CRIME (1998)

[8] The Report of the Commission on the Responsibility of the Authors of the War and on the Enforcement of penalties, 14 AMERICAN JOURNAL OF INTERNATIONAL LAW 95(1920).

[9] *Id.*

[10] *Id.*

positions of state was concerned with the case of Kaiser Wilhelm II, Emperor of Germany.[11]

In 1921 and 1922, a total of twelve "war crimes" trials were held before the highest German court, the Reichsgericht in Leipzig. The accused were former members of the imperial German armed forces suspected of having perpetrated war crimes. At first, in keeping with Articles 228 and 229 of the Treaty of Versailles.[12]

4. Post World War I Era Tribunals

After the WWI the idea of the creation of the international criminal court found some support, the League of Nations Advisory Committee in 1921 provided a proposal for the creation of an international criminal court to prosecute war crimes.[13] However, the effort by the League was not successful for the creation of an international criminal court despite the fact that the League drafted and adopted a statute for such an international criminal court.

It was only after the Second World War that international tribunals were established. By creation of Tokyo and Nuremberg tribunals, international law had begun to accept that individuals have both rights and duties under international law.

5. The Creation of the Nuremberg and Tokyo Tribunals after World War II

Due to the widespread brutality and war crimes committed by the Nazis during the WWII, after the war several Allied leaders such as Churchill and Stalin were pressing for the summary execution of Axis leaders and trial for the lower ranks, but because of repeated arguments to the contrary by Henry Stimson of the US they were persuaded to accept the establishment of an international tribunal. The Allied states, under Control Council Law Number 10, agreed to the prosecution of the major Nazi and Japanese war criminals in the Nuremberg (IMT) and Tokyo (IMTFE) tribunals.[14]

Through the creation of the Nuremberg and Tokyo Tribunals, direct individual criminal responsibility for international crimes was stipulated for the first time. In practice, in the Nuremberg Tribunal twenty-four defendants, including political and senior military leaders, were tried from 14 November 1945 to 1 October 1946.[15] Twelve of them were sentenced to death, three to life imprisonment, and four to limited imprisonment; three were acquitted.[16]

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[11] Article 227 of the Treaty of Versailles described the crimes of Kaiser Wilhelm II as 'a supreme offense against international morality and the sanctity of life.'

[12] International Encyclopedia of First World War. Available at: https://encyclopedia.1914-1918-online.net/article/leipzig_war_crimes_trials (Apr. 28, 2025)

[13] T. Mc. CORMACK, FROM SUN TZU TO THE SIXTH COMMITTEE: THE EVOLUTION OF AN INTERNATIONAL CRIMINAL LAW REGIME, IN T. Mc. CORMACK AND G SIMPSON (eds.), THE LAW OF WAR CRIMES NATIONAL AND INTERNATIONAL APPROACHES 51-52(1997).

[14] Charter of The Tokyo Tribunal, Art. 1.

[15] *Id*.

[16] *Id*.

In addition to the number of defendants who were tried in Nuremberg and Tokyo, many other 'subsidiary' tribunals were held before the US military tribunal at Nuremberg and over 800 Japanese defendants in the Australian military tribunal. The Tokyo tribunal (IMTFE) similarly to the Nuremberg, was established by the Allies; the crimes within the jurisdiction of the two courts were almost the same, but the structure of the tribunal was different from the Nuremberg Tribunal, as was the number of countries that took part in each one (eleven countries in Tokyo versus four countries in Nuremberg).
Also, unlike Nuremberg, the Tokyo Tribunal did not characterize any organization as criminal; yet like Nuremberg, the Tokyo Trials neither accepted the defence of superior orders nor that government officials were protected through 'acts of state'. In contrast to the Nuremberg Charter, however, in the Tokyo Trials the 'official position of an accused could be treated as a circumstance in mitigation of punishment if this was required in the interest of Justice.

6. The Establishment of ad-hoc ICTY and ICTR

Security Council decided that an international tribunal should be established for the prosecution of persons responsible for serious violations of IHL (e.g., deportations, mass executions, mass sexual assaults and rapes, and concentration camps) committed in the territory of the former Yugoslavia since 1991.
On February 22, 1993, the Security Council in one of the resolutions[17] decided that an international criminal tribunal should be established and asked the UN Secretary General, Butros Butros Ghali, to prepare a report. In only 60 days, the Secretary General reported back to the Security Council with the Statute of the future ICTY, which was adopted without changes on May 25, 1993, by the Security Council, acting under Chapter VII of the UN Charter. Crimes covered by ICTR Statute are- Grave breaches of Geneva Convention, Genocide, Crime Against Humanity and War Crimes.

ICTR was established in a like manner 18 months later.[18] Crimes covered by ICTR Statute are- Genocide, Crime Against Humanity and War Crimes. The structural similarities between the ICTY and the ICTR are numerous, including the fact the ICTY and the ICTR share the same Chief Prosecutor and the same Appeal Chamber. The affinity of the two institutions, often called the twin tribunals, also set them apart from all other international judicial bodies.

Unlike all other bodies included in this compilation, the ICTY and the ICTR are ad-hoc in nature. As enforcement measures under Chapter VII, the life span of each is linked to the restoration and maintenance of international peace and security in the territories of former Yugoslavia and Rwanda. Their establishment by a Security Council resolution[19] (as

[17] UNSC Resolution No. 808 (1993)
[18] MICHEAL P. SCHARF & MARGAUX DAY, THE AD HOC INTRNATIONAL CRIMINAL TRIBUNALS; In WILLIAM A. SCHABAS & NADIA BEMAZ (eds.) ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 58(2011).
[19] UNSC Resolution No.808(1993).

opposed to an international agreement, as in the case of all other international judicial bodies) has three further consequences.

Firstly, all member States of the United Nations are bound to comply with the requests and decisions of the tribunals.

Secondly, unlike the Nuremberg and Tokyo tribunals, neither the ICTY nor the ICTR possess the means to bring an accused to trial of its own. However, non-compliant or even non-collaborative States can be referred to the UN Security Council for sanction.

Thirdly, the ICTY and the ICTR are subsidiary organs of the Security Council within the terms of the Charter.[20]

The single most important element that sets the ICTY and the ICTR apart (and for that matter also the ICC) from all other international judicial bodies, is that they are criminal courts. This has multiple implications.

Firstly, it means that the parties to the judicial process are always, on the one hand individuals[21], as indicted, and on the other hand the Prosecutor.

Secondly, unlike in the case of all other international judicial bodies, States and international organizations do not have standing. Individuals convicted of crimes of genocide or crimes against humanity are subject to criminal sanctions (i.e., serving jail periods up to life-sentencing). Accordingly, unlike all other international judicial bodies, the ICTY and the ICTR have a special detention unit located at the Hague and in Arusha, respectively. Their statutes and rules of procedure and evidence provide elaborate protective measures for victims and witnesses, especially in cases of rape or sexual assault.

Finally, it should be mentioned that the jurisdiction of the ICTY and the ICTR is not exclusive but concurrent with that of national courts.[22] However, both have primacy over national courts (something the ICC does not have). At any stage of the procedure, the two ad hoc international criminal tribunals may formally request the national courts to defer competence.

7. The Establishment of ICC

After the World War II, the successful functioning of the Nuremberg and Tokyo Tribunals helped establish the principle of "individual criminal responsibility". This inspired the UNGA to invite the International Law Commission (ILC) to examine the possibility of establishing a permanent international criminal court to try persons charged with genocide or other crimes of similar gravity. But with the ideological and political tensions during the cold war and consequent polarization of interests the establishment of such an international body remained ineffective for about three and a half decades during 1953-1989.

Thereafter, the establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda in 1993 and 1994 respectively once again encouraged the UNGA to take initiative

[20] The UN Charter, Article 29.
[21] Nuremberg Principle I
[22] ICTY Statute, Article 9.

for the establishment of a permanent court. At last, in July 1998 in Rome international community overwhelmingly decided to establish a permanent ICC to try individuals for the most serious offences of global concern, such as genocide, war crimes, crimes against humanity and crime against aggression.[23]

ICC acts as a complimentary[24] institution which respects the domestic jurisdiction of the individual states to prosecute their own criminals if they find the evidence to prosecute as well as possess a functioning judicial body to properly convene a fair and just trial.

The Court will serve as a catalyst to states' investigating and prosecuting such crimes committed either within their territories or by their nationals. The ICC will be a global judicial institution with universal jurisdiction complementing national legal systems. The jurisdiction of the Court will not be retroactive[25] and binds only those States that ratify[26] it. The Court's very existence will be hoped to serve as a deterrent to future tyrants by sending a strong signal that never again will such acts be met with impunity[27].

The ICC is a fairly young institution, having only been open and active since 2003. In September 2009, the ICC opened its first case, prosecuting Congolese warlord Thomas Lubanga Dyilo. Found guilty, on 14 March 2012, of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities (child soldiers). Sentenced, on 10 July 2012, to a total of 14 years of imprisonment. Verdict and sentence confirmed by Appeals Chamber on 1 December 2014.[28]

The ICC depends on the cooperation of the states. Unfortunately for the ICC, this is not always the case. Specifically, many instances have occurred where the prosecutor has the evidence, the indictment has been issued, but no trial ensues simply because the indicted is not turned over to the ICC for trial. Therefore, the suspect remains at large as an international criminal. This is especially the case with Omar Al-Bashir of the Sudan.

The Conference in 2010 in Kampala, Uganda inducted a definition of aggression[29] and added it to genocide, war crimes and crimes against humanity as a list of possible crimes that fall under the umbrella of the ICC. This amendment to the Rome Statute showed the flexibility of the court, the ICC was able to add new amendments that would further extend its jurisdiction and ensure international peace.

The final major flaw of the ICC definitely stems from the lack of participation by three permanent members of the UN Security council. As of this text, China has not signed the Rome Statute, and neither the United States nor Russia has ratified it. In fact, as of the Bush Administration actions of 2002, the United States actually unsigned it. This lack of participation certainly hinders the ability to enforce the laws instituted by the court. The lack of U.S. participation especially hinders any recognizable advancement of the court.

[23] The Rome Statute, Article 5.
[24] The Rome Statute, Article 17.
[25] The Rome Statute, Article 24.
[26] The Rome Statute, Article 4 (2).
[27] The Rome Statute, Preamble.
[28] The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06.
[29] UNSC Resolution No.3314 (2010).

Also, the cases being brought before the court are mostly located in Africa. Now, as some Africans claim bias, the turmoil in Africa is no secret. So, it seems that there is no consistency in the prosecution of the cases by the ICC.

Overall, despite a strong foundation laid out at the Rome Conference, the ICC has had few tangible successes since its inception. Some of this can be attributed to the youth of the court, but much can be realized specifically from the three major flaws, the ineptness of the prosecutor's office, the unwillingness of states party to the treaty to cooperate with the wishes of the court, and the lack of support from permanent members of the UN Security Council which holds veto powers over the cases of the ICC. Due to hindrances such as these, the court has struggled to carve out its niche in the world of international criminal law.

8. Conclusion

The first tribunal with international character summons in Breisach, Germany, in 1474 for conducting the trial of Peter von Hagenbach by the Holy Empire. Gustav Moynier of Switzerland, proposed the establishment of a permanent international criminal court by treaty at a meeting of the ICRC in 1872. After World War I, the Allies set up a commission in 1919 in order to 'investigate the responsibility for the start of war crimes.' League of Nations Advisory Committee in 1921 provided a proposal for the creation of an international criminal court to prosecute war crimes. However, the effort by the League was not successful for the creation of an international criminal court despite the fact that the League drafted and adopted a statute for such an international criminal court

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