CRIMES AGAINST HUMANITY AND THE INTERNATIONAL CRIMINAL COURT

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ABSTRACT

Due to the absence of a consistent definition and uniform interpretation of the crime, it is difficult to determine the exact scope and true nature of the term 'Crime against Humanity.' The following paper has been written with an aim to analyze the long evolutionary jurisprudential history of such crimes from the inception of the definition to modern-day trials, particularly at the International Criminal Court based on Rome Statute. While it took a great deal of time for the inception of the definition, the codification of the laws has seen a gradual development for over a period of nine decades till 1996 for the formulation of Rome Statute of ICC wherein the acts that constituted CAH have been enlisted. The ICC, based on its own set of principles as specified under the Rome Statute, plays a major role in tackling these crimes, and the procedure followed by it, based on essential ingredients as per Article 7 of the Statute, has been discussed in the research paper. A referral case studies of Kenya in 2010, Congo (2003) and Sudan (2005) wherein certain terms were expansively interpreted, and a number of considerations were laid down based on jurisprudence from Nuremberg to the International Law Commission Draft codes, and the validation of the legal principles prevailing in the courts of former Yugoslavia brings to light the role of ICC in combating international crimes and its attempt to bring the perpetrators of such crimes to justice considering the challenges faced including limited resources and selectivity of situations. A conclusion has been drawn to the effect that hurdles to adjudge the Crimes against Humanity can be countered by a strong normative framework, wider interpretation, and elaborate pronouncements, strengthening the mechanism of prosecution and effective cooperation of all state parties.

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INTRODUCTION

The commission of Crimes against Humanity dates back to the First World War, after which the sparks of such heinous crimes were seen for a long time. For many years, people suffered from barbarity and atrocities. The concept of Crime against Humanity is highly attributable to the propensity of terror and destruction saw at the time of the two world wars as well as the unanimity of opinion in the international community that certain crimes committed within the ambit of domestic nations are subjects of international criminal law.[1] No doubt efforts were taken by various international forums to curtail this issue, but the establishment of the International Criminal Court (hereinafter referred to as the "ICC") was seen as a major step to control this crime. Understanding the theoretical basis and application of the elements of Crime against Humanity (hereinafter referred to as "CAH") has been rendered difficult by the absence of a conventional definition approved by the international community and consistent interpretation of the same.[2] Due to the absence of specialized convention, it is quite difficult to determine the exact scope as well as the true nature of the term "Crimes against Humanity."[3] The researchers have restricted the research to the commission of crimes against humanity in relation to ICC, particularly. The sections in the research paper shall discuss the long evolutionary history of Crimes against Humanity, the role of ICC in combating this crime along with the case referrals, and the future prospect of ICC in relation to such crimes within its jurisdiction.

JURISPRUDENTIAL HISTORY OF CRIMES AGAINST HUMANITY

The theory of Crimes against Humanity was for the very first time codified under the Hague Convention, 1907.[4] The Preamble of the said Convention contains 'Martens Clause' (named

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[1] M.MDeGuzman, *Crimes Against Humanity*, Handbook Of International Criminal Law, Schabas et al., eds., Routledge,Temple University Legal Studies Research Paper, No. 2010-9 (2010)

[2] L.N. Sadat *Crimes Against Humanity in the Modern Age,* American Journal of International Law108, 334 (2013).

[3] C.M Bassiouni, *Crime Against Humanity The Need for a Specialised Convention*, Columbia Journal of Transnational Law, 31, 457 (1994).

[4] Convention Concerning the Laws and Customs of War on Land (Hague IV), 18 October, 1907, 3 Martens Nouveau Recueil (3d) 461.

after Russian representative), specifying the treaty as of utmost importance.[5]The Martens Clause enumerates that in cases not covered by the rules of international humanitarian law, the inhabitants and belligérants will not be devoid of protection as they would continue to be governed by customary principles of the law of nations, the law of humanity, and the requirements of public conscience."[6] The Martens Clause basically aimed at extending the protection to combatants and civilian populations where the law was silent or in development, until such time as more comprehensive rules were adopted.[7]

The annihilation by the government of Turkey upon the Armenians was duly condemned by Great Britain, France, and Russia in the year 1915 as "Crimes against Humanity and Civilization" through a declaration and, therefore, the term "CAH" was employed for the first time for official purposes. Albeit no indictments resulted, the term reverberated and the possibility of ensuring accountability for Crimes against Humankind was brought up again in a report of the Commission entrusted with the duty of prosecuting persons "guilty of offenses against the laws of war and humankind" during the First World War.[8]

The Holocaust was a turning point for the development of international criminal law and opened the doors for the prosecution of international crimes. The charter establishing the International Military Tribunal (IMT) of Nuremberg defined crimes against humanity as: "… murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or prosecutions on political, racial or religious grounds in execution or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated."[9]

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[5] Gasser, H.P. (1999).International Humanitarian Law' in M.K. Balachandran and Rose Varghese (ed.), *Introduction to International Humanitarian Law,* ICRC, at p.8.

[6] Convention Respecting the Laws and Customs of War on Land, pmbl., Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (emphasis added). The Hague Convention of 1899 contains similar language. See, Convention With Respect to the Laws and Customs of War on Land, pmbl., Jul. 29, 1899, 32 Stat. 1803, 1 Bevans 247.

[7] Bantekas, Nash and Mackarel, International Criminal Law(Cavendish Publishing Limited 2001)

[8] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, reprinted in 14 AM. J. INT'L L. 95, 117 (1920).

[9] 82 UNTS 279 (1945), Charter of the International Military Tribunal.

Subsequently, the same definition of CAH was adopted by the International Military Tribunal for the Far East[10] and Council Law 10[11].

As per Margaret M. deGuzman, "the post-World War II prosecutions for crimes against humanity were widely criticized on the grounds that they violated the principle of legality or nullacrimen sine lege, which holds that there can be no conviction for a crime without prior law."[12] However, this argument was universally rejected by the Courts.

In the aftermath of World War II, United Nations General Assembly, through a Resolution[13] on 21st November 1947, authorized the International Law Commission (ILC) to document the Seven Nuremberg Principles[14], and these principles thus became a part of customary international law. The primitive role of ILC was to formulate a Draft Codes pertaining to the offenses disturbing the peace and security of the human civilization. The ILC was able to come up with a draft statute in early 1950, but the Cold War hampered the progress, and eventually, the draft was abandoned by the General Assembly.

Four decades later, in 1996, a document called the 'Draft Code of Crimes against the Peace and Security of Mankind' was finally completed, and it contributed greatly to the formulation of the Rome Statute of the ICC. The Draft Code of 1996 characterized CAH as incorporating different insensitive acts when committed systematically or on a large scale and which may be provoked or directed by a Government or by any organization or group."[15] This period also saw a few countries showing their commitment towards prosecutions of CAH by the codification of such crimes in their domestic laws.[16]

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[10] 14 State Dept Bull 391, 890; TIAS No 1589, Art 5 (c) 'Tokyo Tribunal', as amended by General Orders NO 20, (1946).

[11] CCL No 10 1945, Punishment of persons Guilty of War Crimes, Crimes against Peace and Crimes against Humanity. 3 official Gazette: Control Council for Germany 50-55 (1946); 36 ILR 31.

[12] *Supra* Note 1.

[13] (UNGAR) 177 (11).

[14] 1950 International Law Commission Yearbook Vol 374; UN Doc A/CN 4/SERA.A/1950/Add 1; 44 *American Journal of International Law* (Supp) 15 (1950).

[15] Ilc, Draft Code of Crimes Against The Peace And Security Of Mankind, In Report Of The International Law Commission On The Work Of Its Forty-eight Session, 51 U.N. Gaor Supp. (No. 10), Art. 19, At 47, U.N. Doc.A/51/10 (1996), Reprinted In [1992] 2 Y.B. Int'l L. Comm'n Pt. 2, U.N. Doc. A/Cn.4/Ser.A/1996/Add.1 (Part 2).

[16] For Example, Canada, France AndIsrael Bassiouni, M.C. (1999).*Crimes Against Humanity In International Criminal Law* 224 (2d. Ed.).

The law of CAH was given a push forward by the establishment of the ad hoc tribunals by the United Nations Security Council, namely the International Criminal Tribunal for the former Yugoslavia (hereinafter referred to as "ICTY") in 1993 and the International Criminal Tribunal for Rwanda (hereinafter referred to as "ICTR") in 1994. The ICTY Statute defines CAH as any of the listed inhumane acts when committed as a part of an armed conflict, which may be international or internal, and directed against a civilian population.[17]However, legal recognition of CAH under the ICTR statute additionally includes activities carried out by the perpetrator resulting in widespread attacks upon the population solely on the basis of political, racial, or religious factors.[18] While, the relation to armed conflict was done away with.

These were the developments constituting the background within which CAH emerged as one of the few crimes on which the International Criminal Court would subsequently exercise its subject-matter jurisdiction. While it was being negotiated as to what will constitute a CAH under the Rome Statute, a number of issues had to be addressed. For years, there had been confusion regarding the nexus between crimes against humanity with armed forces. Other issues included whether the definition should require discrimination generally or only for persecution and also whether the contextual elements of "widespread" and "systematic" should be conjunctive ("widespread and systematic") or disjunctive ("widespread or systematic.").[19]

Even the Preparatory Committee took up the ILC's draft for the ICC, and after lessons from ICTR[20] and ICTY, along with decisions from Tadic case[21] and trial in Akayesu,[22] changes were proposed in the definition of CAH which are at present the part of the definition of crimes against humanity[23] under the Rome Statute. It was important for the Rome Statute to

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17 ICTY Statute. art. 5.

18 ICTR Statute. art. 3.

19 deGuzman, M.M. (2000). The Road From Rome: The Developing Law of Crimes Against Humanity. *HUM. RTS.Q,* 22, 335.

20 SC Res 955, UN SCOR 49th Session, 3453rd mtg, U.N Doc S/Res/955 (1994); 33 ILM 1598 (1994) (ICTRSt).

21 Prosecutor v Tadić, Case No IT-94-1-T, International Criminal Tribunal for former Yogaslavia, May 7,1997.

22 Prosecutor v Akayesu*,* ICTR-96-4-T, Judgment, para 599–644 (Sept. 2, 1998).

23 Rome Statute, Art 7.

represent a codification of the principles of customary international law, which is uniformly applicable to cater to the possibility that the Statute could be relevant to non-State Parties and their Nationals through a referral of a situation by the UN Security Council.[24]

Article 7 Para 1 of the Rome Statute enunciates eleven acts which constitute Crimes against Humanity if committed as part of a widespread or systematic attack directed against any civilian population,[25] with knowledge of the attack. Eventually the Rome Statute did away with the requirement that CAH could only be committed during an armed conflict.

Crimes against Humanity are defined as 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: murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, enforced disappearance of persons, the crime of apartheid and other inhumane acts of a similar character intentionally causing.[26]

THE INTERNATIONAL CRIMINAL COURT

The Rome Statute represents the most significant accomplishment in the international legal order post-1945 era.[27] ICC's powers are invoked whenever any of the four crimes specified under the Rome Statute is committed within the ambit of ICC. The mechanism of ICC is based on the Principle of Complementarity wherein ICC will complement the domestic judicial systems of the States Parties but not supersede their national jurisdiction, and

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[24] L.N Sadat & R.S Carden, *The New International Criminal Court: An Uneasy Revolution* Georgetown Law Journal, 88, 391 (2000).

[25] *Supra* Note 2.

[26] ICC Statute, art 7.

[27] Otto.,Commentary on the Rome Statute of the International Criminal Court (2nd ed. 1999)

national courts will continue to have priority over their cases.[28] In this part, we shall be discussing the basic procedure followed by ICC to curb the increasing Crimes against Humanity's concern.

The ICC consists of four distinct bodies, namely, the Presidency, the Appeal Division including the Trial and Pre-Trial Division, the Office of Prosecutor, and the Registry. Part 4 of the Rome Statute clearly defines the work of each body for the proper implementation of law and coordination amongst these bodies. Subsequently, Part 5 and 6 stages the procedure for investigation and prosecution along with the measures taken at the time of the trial of an offense. The first step taken by ICC after the commission of the crimes is an investigation. Investigation basically covers the collection of evidence to support the fact that there are reasonable grounds and sufficient evidence to prosecute the accused. After the conclusion of the investigation, the warrant of arrest will be issued, which shall be complied with based on cooperation by the State Party or the Non-State Party, where the accused belongs.

ICC exercises its jurisdiction through referrals[29] wherein the State Party, United Nations Security Council, or Chief Prosecutor can request ICC to take up the matters for further investigation. The only requirement is that the crime committed should fall within the jurisdiction of ICC. When a State party has exhausted their domestic remedy to tackle the situation, but the atrocities continue in the State, and then the State party may request the Prosecutor to investigate the case accordingly. On the other hand, the intervention of the UNSC will be there when the commission of Crimes against Humanity has reached to the extent that it hampers the peace and security of the citizens. Then, the UNSC, in order to maintain peace and security, shall take the assistance of ICC by referring the matter to ICC. The last referral mechanism is the discretionary power vested with the ICC prosecutor to initiate investigation Proprio Motu after analyzing the seriousness of the information received. If the Prosecutor comes to the conclusion that there is a reasonable ground for commencing an investigation, then it shall forthwith submit a request for authorization of the said investigation to the Pre-Trial Chamber.[30]

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[28] Roy S. Lee, The International Criminal Court: The Making Of The Rome Statute: Issues, Negotiations, Results. The Hague: Kluwer Law International.(2nd ed 2002)

[29] Rome Statute, art 13.

[30] Rome Statute, art 15, Para 3.

An accused person can try his/her luck before the Appeal Chamber after being convicted by the Trial Chamber. After the conviction, the sentence so passed would require enforcement.[31] This enforcement shall be effective only with the cooperation of the State Parties,[32] the UN Security Council,[33] or the Assembly of State Parties.[34]

ESSENTIAL INGREDIENTS OF CRIMES AGAINST HUMANITY UNDER THE ROME STATUTE

Article 7 of the Rome Statute enumerates four essential elements of CAH. These elements are characterized as "contextual elements" by the Elements of Crimes[35]and lay down the basis for specifying which inhumane acts would fall under the category of CAH, and on such basis, the jurisdiction of the ICC is justified. These elements are:

A. The commission of the crime as part of a 'widespread or systematic attack.'

It is imperative that these acts are committed as part of a widespread or systematic attack. The term "attack" has been defined under Para 2 of Article 7 of the Rome Statute as involving "multiple commission of acts referred to in paragraph 1 of Article 7 against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack.

The meaning of the term "widespread'' was elaborated by the Pre-Trial Chamber of ICC as the attack need not be a random occurrence but must have been targeted at a perceived group using a variety of means to identify the group.[36] It has been further clarified that both requirements of "widespread" and "systematic" may exist in one

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[31] Rome Statute, art 76 and 77.

[32] The matters have been discussed in detail under art 86-111 of the Rome Statute.

[33] Rome Statute, art 13.

[34] Rome Statute, art 112(1).

[35] PCNICC/2000/1/Add 2 Elements of Crimes, 2 November 2000. Elements of Crimes was adopted pursuant to art 9 of the Rome Statute.

[36] Russell, *The Chapeau of Crime Against Humanity: The Impact of the Rome Statute of the International Criminal Court*. Eyes on the ICC, 8(1), 25-72. (2011).

scenario, but the existence of either of them is sufficient to establish an offense.[37] In the case of Prosecutor v. Akayesu,[38] the ICTR held that widespread criteria might be defined as "…large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.[39]

B. Against a civilian population

It is essential that the attack must be directed against a civilian population, and this is where crimes against humanity differ from war crimes, which may be targeted at combatants or civilians. However, an area of concern is that the Rome Statute does not precisely define who shall be considered as a "civilian" for the purposes of crimes against humanity.

When CAH was linked to war crimes and, therefore, international humanitarian law, the word "civilian" was used in distinction to "combatants."[40] This nexus has been rejected by the Rome Statute, and this gives rise to ambiguity in the absence of an exact definition of "civilian," more so because of a dearth of jurisprudence on CAH committed in times of peace. Only ICTR has a ruling to this effect holding that, in case of absence of any armed conflict, all persons will be termed as civilians other than the persons who are deployed with the duty to exercise legitimate force and maintain public order in the nation itself."[41]

The ICC remained silent on this issue in the cases of Katanga, Chui, and Bemba and did not clearly state if it accepted or rejected the definition of a civilian to "exclude combatants' hours de combatant, but held that such a person might be counted as a victim."[42]

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[37] The Prosecutor v. Francis Kirmin Mutaura, Uhuru Mulgai Kenyatta and Mohammed Hussein Ali (2012) ICC 01/09-2/11-382.

[38] Akayesu, *Supra* Note 22.

[39] Cameron C Russell, *Crimes Against Humanity - Understanding The Impact Of The Rome Statute Of The International Criminal Court.* 8 Eyes on the ICC 25(2011-2012)

[40] *Supra* Note 36.

[41] Prosecutor v. Kayishema, (1999), Case No. ICTR-95-1-T, Judgment, 128.

[42] P Hwang, *.Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*.Fordham Int'l L.J. 22,457, 499 (1998).

C. Knowledge of the attack

Finally, the perpetrator must have knowledge of the attack. However, it is not necessary that the perpetrator had awareness regarding each one of the characteristics of the attack or was thoroughly aware of the intricacies of the plan or policy of the state or organization.[43]The Statute of the ICC has not given an expansive meaning to the term "knowledge," and merely envisages "awareness that a circumstance exists or a consequence will occur in the ordinary course of events."[44] Furthermore, in the case of an "emerging widespread or systematic attack," the mental element has been made more rigid by the Elements of Crimes which specifies that when the acts of the defendant are part of such an emerging attack, knowledge of the attack is not sufficient; instead, the perpetrator must intend to further the attack.[45]

D. Involving 'a course of conduct involving the multiple commissions of acts against any civilian population pursuant to or in furtherance of a State or Organizational policy to commit such attack.'

The Rome Statute included the requirement of 'State or organizational policy' under the definition of CAH and thus, became the first instrument in international criminal law to do so.[46] This was a bold step because such a requirement was absent from the concept of CAH under the Charter of the Nuremberg as well as the Statute of ICTY and ICTR. The Policy requirement appeared for the first time in the Bureau Discussion Paper that came out during the final stages of the Diplomatic Conference.[47]During the course of negotiations, proponents argued that the existence of a policy unites otherwise unrelated inhumane acts so that in the aggregate, they collectively form an 'attack.'[48] The Elements of Crimes further specify that the policy

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[43] Elements of Crime, UN Doc. PCNICC/2000/INF/3/Add.2, art.7, Para 2.

[44] Rome Statute, art.30(3).

[45] Elements of Crimes, art.7.

[46] *Supra* Note19.

[47] UN Doc A/CONF183/C1/L53

[48] Roy S. K. Lee, The International Criminal Court: the making of the Rome Statute: Issues, Negotiations and Results(The Hague: Martinus Nijhoff Publishers, Kluwer Law Intl. 1999)

element requires that a State or organization "actively promote or encourage" the attack.[49]

Furthermore, there is no clarity as to what constitutes "organization." Now, that there is no nexus between crimes against humanity and armed conflict, the exact nature of "organization" needs an explicit definition to differentiate it from the entity of the state.[50]

M. Cherif Bassiouni, a prolific scholar, notes that a state or organizational policy is an essential characteristic of crimes against humanity but that "non-state actors must have some of the characteristics of state actors" to be able to implement policies similar in nature to those carried out by states and thereby trigger the international or jurisdictional element of that offense.[51]

LIST OF ACTS ENUMERATED UNDER ARTICLE 7

Apart from the aforementioned contextual elements, CAH also includes the physical (actus reus) and mental (mens rea) elements coupled with any of the enumerated acts under Article 7.[52] With the exception of acts pertaining to apartheid and forced withdrawal from the society, the list of inhumane acts specified under the Rome Statute can be said to largely embody the principles of customary international law as well as other international instruments.[53]

The crime of Persecution, despite being a frequently charged category of Crimes against Humanity, has been difficult to define as the courts have made strenuous efforts to identify the essential ingredients of the offense.[54] The crime of persecution finds mention as Crime

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[49] Assembly of State Parties to the Rome Statute of the Int'l Criminal Court [ICC-ASP], Elements of Crimes, art. 7.

[50] Cameron C Russell. *Crimes Against Humanity - Understanding The Impact Of The Rome Statute Of The International Criminal Court.* 8 Eyes on the ICC 25(2011-2012)

[51] Bassiouni, *Supra* Note 16.

[52] *Supra* Note 1.

[53] *Id.*

[54] P.MWald,.*Genocide and Crimes Against Humanity*. *WASH. U. GLOBAL STUD. L. REV. 6,* 621, 630(2007).

against Humanity under Article 7 paragraph 1 clause (h) of the Rome Statute, which prohibits persecution on political, racial, national, ethnic, cultural, religious, gender, or other universally impermissible grounds may be committed against any identifiable group or collectivity. The last part of this provision employs the use of the words 'in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court' which considerably narrows the scope of the crime.

Feminism got a push forward through the recognition of Gender Crimes at the Rome Statute. This is a remarkable accomplishment since the Nuremberg Charter did not recognize rape as a form of crime against humanity.[55] CAH under the Rome Statute refers to rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.[56] The Statute defines the term 'forced pregnancy' in a manner that puts to rest the fears of the States which were having anti-abortion laws. The term 'Forced Pregnancy' is defined as 'unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out grave violations of international law."[57]

"Other inhumane acts" under Article 7 (1) (k) of the Rome Statute includes "acts of a similar character intentionally causing great suffering" constitutes a residual category of Crimes against Humanity. This clause leaves the standard of inhumane acts open for evolution by decisions of the ICC. In the famous decision of Akayesu,[58] the term "other inhumane acts" was interpreted to encompass such behavior as forced nakedness of the Tutsi women. However, the concept of 'inhumane acts' has been narrowed by the drafters of the Statute through the addition of other corresponding intentional acts aimed at causing suffering or harm to mind and body. [59]

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[55] W.A. Schabas, An Introduction to International Criminal Court. (United Kingdom: Cambridge University Press. 2001)

[56] Rome Statute, Art 7(1)(g).

[57] B.C. Bedont, *Gender-Specific Provisions in the Statute of the ICC. Lattanzi and Schabas* (ed.), Essays on the Rome Statute.

[58] Akayesu, *Supra* Note 22.

[59] *Supra* Note 55.

CASE STUDY: REFERRAL OF SITUATION IN KENYA (2010)

Kenya: officially, the Republic of Kenya, in east Africa gained its independence in 1963. Kenya has struggled hard to adopt an effective Constitution which was eventually amended in 1969 and this made Kenya a unitary state with a powerful President. The Constitution adopted by Kenya failed to fulfill the aspirations of the Kenyan citizens. The existing ethnic tensions amongst these people were prevalent since the country acquired independence. Kenya ratified the Rome Statute in March 2005 when Kibaki, the then President, planned to change the Constitution but somehow failed.

The general election of 2007 in Kenya was marred with violent attacks between the small ethnic tribes. Mwai Kibaki of Party National Unity (PNU) won the election against Raila Odinga of the Orange Democratic Movement (ODM). After these Presidential elections, there arose a conflict between the people who voted for PNU and those who voted for ODM.[60] Almost 1000 people were killed, and approximately 900 acts of documented rape and sexual violence took place in Kenya. These ethnic prejudices took the lives of more than 1500 innocent people, and about 3, 50,000 families were displaced.[61]

Thereafter, an independent inquiry known as the Waki Commission made the following recommendations as an attempt to solve the political and ethnic tensions amongst the Kenyan citizens:

(i) Institution of a Special Tribunal with a mandate to prosecute crimes during the post-election.
(ii) Names of the alleged perpetrators to be sent to ICC

However, no credible actions were taken by the government of Kenya upon the recommendations, and thus, after one year, the Prosecutor invoked his proprio-motu power in accordance with article 15(3) of the Rome Statute. The Pre-Trial Chamber granted the Prosecutor's request after reviewing the application.

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[60] A.H Sievers, and R.M. Peters, *Kenya's 2007 General Elections and its Aftershocks .Africa Spectrum 43: Horn of Africa:* 133-144.(2007).

[61] S.Mniassuli, *The Rise of the African Union Opposition to the International Criminal Court's Investigation and Prosecution of African Leaders*, 13International Law Review 385-428(2012).

In a 2-1 decision[62], Judge Hans-Peter Kaul dissenting, the majority examined the available information while emphasizing on the low standard of review applicable to the investigative stage of proceedings; the judges ruled that all the jurisdictional and admissibility criteria for the ICC to assert jurisdiction had been fulfilled.[63]

The Chamber held that on the basis of the supporting evidence presented by the Prosecutor, it could be reasonably believed that crimes against humanity had been committed in Kenya.[64] The Chamber asserted that the following elements must be met along with proof of the elements of the underlying acts to prove crimes against humanity under Article 7(1), "(i) an attack directed against any civilian population, (ii) a State or organizational policy, (iii) the widespread or systematic nature of the attack, (iv) a nexus between the individual act and the attack, and (v) knowledge of the attack."[65]

While considering the meaning of the term "state or organization policy," the majority observed that the term includes within its ambit not only the state policies at the highest level or policies adopted by regional or local organs but also includes those of non-state actors.[66] The Chamber also clarified that whether a particular entity can be considered as the author of the organizational policy would differ on a case to case basis.

Further, the majority noted that the plan or policy to commit an attack might be inferred from the commission of a series of events and listed possible contributory factors, including, but not limited to, the establishment of military structures, the mobilization of armed forces, the general content of a political program, alterations to the ethnic composition of populations, and discriminatory measures directed against particular groups.[67]The majority opinion seems to be based on the Trial Chamber's opinion in the ICTY's Blaškićcase.[68]

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62 Situation in the Republic of Kenya. (2010). ICC PT. Ch. II, ICC01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010.

63 C.C.Jalloh, *International Decision, International Criminal Court, Decision on the Authorization of an Investigation into the Situation in the Republic of Kenya*. 105 Am. J. Int'l L. 540(2011).

64 *Supra* Note 62, para. 73,76, 180.

65 *Supra* Note 62, para. 79.

66 *Supra* Note 63.

67 *Supra* Note 62, para 87.

68 Prosecutor v Blaškić, (2000). Case No ICTY-95-14-T Judgment.

The Chamber gave an expansive interpretation to the term "organization" and laid down a number of considerations in this respect namely: (a) submission of the group to an authoritative command or established hierarchy, (b) possession by the group of the means to carry out the attack, (c) control of the group over a part of the State's territory, (d) commission of crimes against the civilian population as the primary purpose of the group, (e) express or implied articulation by the group of an intention to attack a civilian population and (f)fulfillment of some or all of the aforesaid criteria by a larger group and the group is a part of the larger group. [69] Simultaneously, it was pointed out that these considerations were not intended to be exhaustive or definitive of the term "organization." The Chamber, while considering the "complementarity principle," held that there was "inactivity" in Kenya regarding potential cases of investigative interest to the ICC, reflecting a general reluctance to address the post-election violence.[70]

However, Judge Hans-Peter Kaul dissented from the Majority view and was in favor of rejecting the Prosecutor's request for an investigation in view of insufficient evidence to support the "constitutive contextual requirements of crimes against humanity" to trigger the jurisdiction of the ICC. Judge Kaul believed that in the context of Article 7(2) of the Rome Statute, the essence of CAH is that certain prohibited acts must be committed in attacks directed against any civilian population in pursuit of or to further a state or organizational policy.[71] As per Judge Kaul, notwithstanding the fact that atrocities were committed in Kenya post elections, the real issue was not whether those acts should be investigated or prosecuted, but whether the ICC, instead of Kenya, was the "right forum" to do so.[72] Following this decision, six individuals were summoned, and out of six cases, two cases were rejected by the Pre-Trial Chamber II in 2012, and the rest four are before the ICC.[73]

Coming to the analysis of the above judgment, Kress was of the view that both the majority and the dissenting opinion in the PTC II decision were based on jurisprudence from

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[69] Kress, C. *On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 20 ICC Kenya Decision.* Leiden J. In'il L. 23, 855, 857-58(2010)

[70] Kenya Decision, para 54, 184-86.

[71] *Supra* Note 63.

[72] *Id.*para 6-8.

[73] Aylis, E., *Function and Dysfunction in Post-Conflict Justice Networks and communities.*47Vanderbilt Journal of Transnational Law 625-698 (2014).

Nuremberg to the ILC Draft codes and the jurisprudence of the ICTY.[74] On the one hand, the Majority relies on the opinion of an ad-hoc tribunal, Judge Kaul warns against the use of the jurisprudence of the ad-hoc tribunals on account of Article 21 of the Rome Statute. Article 21 discusses the hierarchy of the sources of law that govern the ICC regime and gives utmost primacy to the Rome Statute itself. As per Judge Kaul, nowhere in this list is the jurisprudence of other ad hoc tribunals, a factor that becomes critical considering that those tribunals are creatures with a fundamentally different legal basis from that of the ICC.[75]

Moreover, the majority's interpretation of the term "organization" leaves the issue open-ended and largely dependent on analysis on a case-to-case basis by the ICC in the future. Therefore, there is a need to settle the judicial interpretation in this respect to ensure that no individual is able to evade accountability due to ambiguity in the law. It is suggested that the evidentiary requirements should be raised at the stage of authorization of investigation by the Prosecutor. This course appears to be judicious in light of the fact that the ICC may, in the long run, demonstrate incapable of holding up under the weight of trying the many cases that come up for adjudication.

REFERRAL OF CRIMES IN CONGO (2003)

A country well known for its wealth such as diamonds, copper, and zinc instead of harnessing these riches for its own benefit attracted rapacious government, war crimes, crimes against humanity, and rivalry between the ethnic groups. In April 2002, the DRC ratified the Rome Statute. On 1st July 2002, seeing a lot of internal instability and rebellions in the eastern part of the country, the Government of Joseph Kabila referred the situation to ICC by invoking article 14 of the Rome Statute. Sooner in compliance with the regulation 46 (2) of the Regulation of the Court, the Presidency Chamber assigned the situation of DRC to the Pre-Trial Chamber.

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[74] *Supra* Note 69.

[75] *Id.*

In The Prosecutor v. Bosco Ntaganda[76], the accused was involved in attacking the civilian population in consonance with the organizational policy adopted by UPC/ FPLC against non-Hema and those belonging to Lendu, Bira and Nande ethnic groups. The accused was charged with 13 counts of war crimes and crimes against humanity like persecution, forcible transfer of population, sexual slavery. The charges against the accused were confirmed by the Pre-Trial Chamber II, and on 8th July 2019, the Trial Chamber VI found the accused guilty. The accused is sentenced to 30 years of imprisonment. As of now, the verdict has been subjected to appeal.

REFERRAL OF CRIMES COMMITTED IN SUDAN (2005)

Sudan: a country well known for 'Darfur Crisis.' In the year 2011, Sudan got separated into two regions, namely South Sudan and Sudan. The conflict between the regions was prevailing since Sudan attained independence from Britain and took the form of civil war and political instability, later termed as Darfur Crisis.

Omar Al-Bashir came to power in 1993 and paralyzed the various prospects of establishing peace and security in Darfur. Darfur has been the site of terrible violence, death, displacement, and various other forms of crimes against humanity. With no end in turmoil, the United Nations described it as "the world's worst humanitarian crisis" in the light of the continued war crimes and acts of brutality among the ethnic tribes. Though Sudan is not a State Party to the Rome Statute, the UNSC referred the situation in Darfur to the ICC through Resolution 1593 (2005), whereby ICC exercised its jurisdiction on the crimes committed in Sudan.[77]The President of Sudan Omar Hassan Ahmad Al-Bashir himself was involved in the crimes like (a) Genocide: mass killing of the people and serious bodily and mental harm, physical destruction; (b) War crimes: murder, attacks against the civilian population, rape, outraging the personal dignity; (c) Crimes against humanity: murder, prosecution, rape, inhumane acts, torture. Five cases related to the Sudanese situation were

[76] The Prosecutor v. Bosco Ntaganda.ICC-01/04-02/06. (8 July, 2019)

[77] Situation in Darfur, Sudan.ICC-02/05.

brought up before the ICC and are pending trial. In The Prosecutor v Omar Hassan Ahmad Al Bashir,[78] two warrants have been issued against the suspect respectively on 4th March 2009 and 12th July 2010. As of now, the matter is in the Pre-Trial stage and shall remain so until the suspects are arrested and transferred to the seat of the court at Hague. The ICC does not try individuals unless they are physically present in the courtroom.

LEGAL REGIME OF THE ICC

The emergence of the Rome Statute and the establishment of the International Criminal Court ended the long-awaited cry of the victims and punished the perpetrators for their acts against humanity. After analyzing the critical jurisprudential issues, it has been observed that ICC has contributed significantly to International Criminal Law. Some such contributions are discussed below:

A. ICC has interpreted the definition of CAH in a wider sense as it is not restricted to certain conflicts, times, or geographical areas, as was earlier adopted by the ICTY and ICTR.

B. ICC has its own jurisdiction over the cases and delegates the power to investigate its four organs. It is a permanent institution for prosecuting the accused for the commission of crimes against humanity, and this is possible with the support of 123 members who have ratified the Rome Statute.

C. The definition adopted by the ICC has been accepted even by different countries. Countries like the Netherlands and Germany have adopted the same definition as defined under the Rome Statute.

D. There has been a clear distinction drawn between the term “interpretation” and “application of the law” which was lacking in ICTY and ICTR.

E. ICC has made the fact crystal clear that previous jurisprudential development of CAH cannot be ever questioned again.

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[78] The Prosecutor v. Omar Hassan Ahmad Al Bashir.ICC-02/05-01/09.

Therefore, all these contributions supported by the Rome Statute raised the importance of ICC at the international level.

CONCLUSION

The theory of CAH under the Rome Statute seeks to respect not only the sovereignty of the States but also focuses on the purpose for which the International Criminal Courts were created in order to prevent and punish the harsh atrocities that deeply shaken the conscience of humanity. ICC currently has the support of 123 State Parties. Never before has an international institution of such grandeur, as the ICC, conducted prosecutions for CAH. History has shown that the gravity of such crimes cannot be tackled independently and requires cooperation on a global forum. Since the drafters of the Rome Statute of the ICC have not covered all areas concerning CAH, the job of interpretation and application of Article 7 largely falls in the hands of the Prosecutor as well as the Judges. The efficacy of ICC should not be merely linked to the definition that it provides under the Rome Statute but to the expansive ambit that has been given to the term, which builds upon the possibility of increased justifiability of such crimes on a global platform.[79]

ICC has a mandate to deliver justice, and it is possible only when all the member states, as well as the non-member states, conform to join hands in combating such heinous Crimes against Humanity. The researchers thereby conclude with the recommendation that CAH can only be countered by a strong normative framework, which the ICC provides to some extent; however, the Court needs to come up with elaborate pronouncements to fill in the gaps where the law is silent. Since the ICC started functioning only in 2002, it is too early to analyze its achievements, given the number of challenges that it faces, including the limited resources and selectivity of situations. The Rome Statute might require amendments in the future by the Assembly of States Parties to strengthen the mechanism of prosecution of CAH. It is suggested that attempts must be made to make the law relating to CAH more acceptable so that the States can effectively fulfill their obligations to counter this menace. Finally, the

[79] *Supra* Note 36.

effective cooperation of all States Parties to the Statute is imperative for the ICC to prove itself successfully in the prosecution of Crimes against Humanity.