TRACING THE HISTORY OF INDIVIDUAL CRIMINAL LIABILITY IN INTERNATIONAL LAW

Written by ***Vidit D. Kumat***

5th Year BA LLB Student, School of Law Christ University, Bangalore

INTRODUCTION

The evolution of individual criminal responsibility under international law marks the advance of modern human rights law, humanitarian law and a more traditional approach to international law; but this issue includes the consideration of both domestic and international law enforcement mechanisms. The roots of individual liability under international law can be traced back to actions constituting piracy of any kind and the notion of slave trading. [1]

Also in matters involving individual criminal responsibility in public international law, jurisdiction to hear the offences is somewhat restricted in nature; moreover the concept of piracy and the universal jurisdiction enjoyed by states over it stem from the long established principle of world community.[2] The principle of world community entails that the primary aim of international law is to enable punishment in each country of offences committed within its national boundary, because only in the nation where the offence has taken place can the evidence of the offence be most probably gathered as that is where the offence generally produces its effects.[3]

Thus the permanent court of international justice observed in 1927 that "in all systems of law the principle of territorial character is fundamental."[4] *Judge Guillaume* in his separate opinion in Congo vs. Belgium noted the same.

[1] Article 99 of United Nations Convention on law of the sea (UNCLOS) covers prohibition of the transport of slaves and the responsibility of every state to take effective measures.
[2] Congo vs. Belgium (Arrest warrant case) ICJ Reports, 2002, pp3, 37-8; 128 ICR.
[3] *Id.*
[4] "Lotus" judgement, No.9, 1927 P.C.I.J, Series A, NO.10, p.20.

PIRACY JURE GENTIUM

Piracy Jure Gentium (piracy against the law of nations) is the oldest crime in public international law. Judge Moore in the Lotus[5] case described *pirates "as the enemy of all mankind which any nation may in the interest of all punish".*

The elements of piracy jure gentium were considered primarily by the Privy Council in "re Piracy Jure Gentium"[6] , in this case on special reference of Hong Kong, the Privy Council although declining to formulate a comprehensive definition ruled that actual robbery on high seas did not constitute an essential element of the crime, but on the other hand attempt to commit such act is sufficient to constitute piracy even though such attempt may even not be successful. At the same time, piracy under international law should be distinguished from piracy under municipal law in a concrete manner because offences which may constitute piracy under municipal law may not necessarily come under the definition of piracy under international law.

'Piracy Jure Gentium' was defined in Article 15 of the High Seas Convention[7] and reaffirmed in Article 101 of 1982 convention on the law of the sea, which also laid down the rules regarding the seizure of a pirate ship.[8] However the Inter – American court of human rights in their advisory opinion in the case of "Re-Introduction of death penalty in the Peruvian Constitution"[9] noted that individual responsibility may only be invoked for violations that are defined under international instruments as crimes under international law. Further with the advent of the 20th century it was worth noting that domestic courts are indeed exercising a greater jurisdiction directly over individuals with regard to certain specific crimes.

[5] *Id.*
[6] This case considered an incident on high seas near Hong Kong where a Chinese cargo junk was attacked by two other junks on board; attackers were taken on trial by the special reference of the royal navy ship.
[7] Geneva Convention on High Seas, 1958.
[8] Article 19 of the High Seas Convention and Article 105 of the United Nations Convention on the law of the sea, 1982.
[9] Re-Introduction if death penalty in Peruvian CONSTITUTION CASE, 16 HRLJ, 1995, pp.9, 14. However, the range of offences under international law where individuals bore responsibility was quite narrow.

EVOLUTION OF INTERNATIONAL COURTS AND TRIBUNALS

A commission was set up after the first world was by the allied powers which recommended that the defeated powers have violated the laws of was and their high officials should be prosecuted for giving orders for such crimes based on the chain of command responsibility.[10] The 1945 agreement for the Prosecution and Punishment of certain Major war criminals which was signed in the year 1945 was one of the first international instruments which gave a specific provision for individual criminal responsibility for crimes against peace, war crimes, and crimes against humanity.

The Nuremberg tribunal was the first international criminal tribunal and it laid down the stepping stone for international criminal law as a separate field altogether.[11] This tribunal through its decisions echoed the concept or to certain extent a 'thought' that international law may imposes specific duties and liabilities on individuals and on states because offences which constitute crime under international law are committed by men and not abstract entities. Also a number of war crimes trials were instituted within allied occupied Germany itself under what was known as the "Control Council law No.10".[12]

This was preceded by the 'International Military Tribunal for Far- East'[13] which was constituted to deal with the war crimes committed during the Japanese war in 1946, this tribunal reaffirmed the findings of the Nuremberg tribunal and its charter too provided for individual responsibility for certain crimes. Since the United Nations General Assembly in the year 1946 affirmed the principle of the Nuremberg Charter[14], the provisions of the same are regarded as a part of international law.

[10] High officials including the Kaiser (William II; the last German emperor and the King of Prussia) were held individually responsible under Article 227 of the Treaty of Versailles (1919) (which also recognised the rights of Allied powers over Germany through Article 228).
[11] The Nuremberg tribunal was composed of four principle judges from United States, United Kingdom, USSR and France.
[12] Twelve major trials took place in Nuremberg, under British occupied sector of Germany by the Royal Warrant of 1946.
[13] The tribunal was composed of judges of 11 states; United States, United Kingdom, USSR, Australia, Canada, China, France, India, Netherlands, New Zealand and Philippines.
[14] General Assembly resolution 95 (1), 1946. This assemble also stated that Genocide was a crime bearing individual criminal responsibility under international law, which was later affirmed in the Genocide Convention of 1948.

The International Law Commission through their 'draft code of offences against peace and security of mankind' was of the view that "offences against peace and security of mankind, as defined in this code, are crimes under international law for which the individuals responsible will be punished.[15] Further individual responsibility was established with regard to grave breaches[16] of four 1949 Geneva Red Cross conventions and additional protocols 1 and 2 dealing with armed conflicts. [17]

This makes each and every individual regardless of what their government status of rank will be personally liable of committing either grave breaches or war crimes. This also entails in itself a principle of command (superiority) responsibility, according to which any person who is in a position of authority, ordering a commission of a certain war crime or any of the grave breaches would be separately but equally accountable as the subordinate office committing it.

Subsequently the 'Draft Code of crimes against peace and security of mankind was adopted provisionally by the International Law Commission in 1991 and revised again in 1996; there exists a specific provision under it relating to criminal responsibility of an individual in regards to :-

1. Aggression
2. Genocide
3. Crime against humanity
4. Crimes against United Nations and associated persons.
5. War crimes.

The Genocide convention, 1948 was a very important step for the recognition of genocide as an international crime. Specifically speaking there exist a very distinct feature to the crime of genocide; this distinctness is derived from the fact that to establish the crime of genocide, there should be a specific intent to destroy a particular set of people in whole or in half, therefore it constitutes more than a mere act of killing, the intention to kill or destruct a particular group is of prime importance. In the *Jelisic case*[18] the ICTY noted that it is the existence of mens rea

[15] Article1 of the Draft Code of Offences against Peace and Security of Mankind, 1954.
[16] Such Grave breaches include: - Wilful killing, torture, inhuman treatment, extensive destruction, appropriation of property, unlawful deportation of protected persons and taking of hostages.
[17] Protocol 1 of 1977 extends this list to causing excessive loss of life or knowledge to the civilian population and wilfully causing death or serious injury. These grave breaches also include racial discrimination and attacking historical monuments etc.
[18] ICTY-95-10, 1994, PARA.66

which gives a special status to the crime of genocide and gives it a distinct position from other crimes under international humanitarian law.

This was later reaffirmed later in the *Akayesu case*[19] which establishes the specific intent necessary to establish the crime of genocide as "specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged". This case underlined the difficulties which relates to the establishment of the critical intent requirement and held that recourse may be held in the absence of confessions from inferences of facts. In the *Ruggiu case* the tribunal held that "any person who incites others to commit genocide must himself possess a specific intent to commit genocide".[20]

At the same time, one can see that many of the criminal acts constitute both; war crimes and crimes against humanity, but the only point of difference between the two is that for the latter it is not necessary that these crimes have to be committed during an armed conflict. But to constitute 'crimes against humanity', the acts which are in question have to be committee, 1)as a part of widespread activity which is very systematic in nature,2) committed against any civilian population, which makes any references to the nationality irrelevant. Of course it can be inferred that an act of genocide by definition will also constitute a crime against humanity but clearly the visa-versa is not possible.

Under chapter 7 of the United Nations charter, the Security Council has competence to determine whether or not an act of 'aggression'[21] (the crime of aggression has been referred to in Article 5 of the statute of the ICC, but in no other instrument) has taken place prior determination by the Security Council is necessary for the court to exercise jurisdiction in regard to individual responsibility for aggression. [22] The crime of aggression is very distinct from that of say, genocide because to establish aggression, the individual cannot be help strictly liable, as it a crime of leadership, and it is of utmost importance that the person who has been accused as the leader has committed aggression to a certain extent.[23]

[19] ICTR-96-4-T, 1998, PARA.498
[20] ICTR-97-32-I,2000, PARA .14
[21] Cryer et al, Introduction to international criminal law, pp. 276 ff.
[22] A. Carpenter, 'The International criminal court and the crime of aggression', 64 Nordic Journal of International Law, 1995, p.223
[23] Id.

THE INTERNATIONAL CRIMINAL COURT (ICC)

The Genocide convention, 1948 (Article VI) provided that anyone who is charged with genocide should be tried either by a court having jurisdiction over the territory where the act has been committed or by an International criminal tribunal which has to be established, the International law Commission was then asked to submit a report on the viability of such court and that's just what it did.[24]

This International court enjoyed jurisdiction over aggression, crimes against humanity, war crimes, genocide, and also certain 'treaty crimes' (crimes found under UN conventions) such as terrorism and drug trafficking, at the Rome conference on 17th July 1998 the Rome statute containing provisions for the International criminal court was produced and as sixty states were needed to ratify it, it came into force on I July 2002. Distinct from the former two international criminal tribunals (for Rwanda and former Yugoslavia) the ICC is a result of not only of the treaty but also of a binding Security Council resolution.

This confidence which laid down the track for the establishment of the ICC is only fortified through the range of matters the ICC has jurisdiction over, which is limited to 'most serious crimes of concern to the international community as a whole, being genocide, aggression, war crimes and crimes against humanity.[25] Moreover the person who is found guilty of committing these crimes shall be individually responsible and liable for punishment in accordance with the statute.[26]

But it is necessary that for the court to exercise jurisdiction, it can be only exercised on the state on the territory of which the conduct in question occurred or the state of which the person accused of the crime is a national is a party to the statute.[27] This gives a diverse flavour to the jurisdiction of the ICC, because this portrays that the jurisdiction of the ICC is not universal in nature but more on the lines of territorial or personal in nature. One t=of the most important features of the ICC which distinguished it from the two former tribunals is that national courts have a distinct priority.

[24] General assembly resolution 260 (III) B and A/CN.4/15 and A/CN.4/20 (1950)
[25] Article 5 of the Rome Statute 1998, these principles is further defined in Article 6 &8.
[26] Article 25 of Rome Statute, 1998.
[27] Article 12(2) of Rome Statute, 1998.

CONCLUSION

The fact that in certain situations individuals may be held responsible with regards to the crimes in question is deemed not the affect the responsibility or liability of a state. This is auxiliary through the two resolutions of the Security Council in regards to the situation witnessed in Somali (early 1990) and the situation concerning Iraq's unanimous occupation of Kuwait, both of these situations have served the world community as experiences where breaches of international humanitarian law should be condemned and it should be noted through these past experiences that responsibility of grave breaches should without a doubt extend to 'individuals who commit or order its commission'.

As the recognition of individual criminal liability in international law is developing, there is a constant need which relates to the human rights of the accused pre, post and during such trial. This can be only ensured if all persons are treated equally in the international forum and as far as determination of charges go, the accused should be given appropriate legal representation and a fair hearing, which contains in itself the presumption that the accused in innocent until proven guilty, moreover it is also of utmost importance that the human rights of the accused are not violated.

The crimes which give rise to the individual criminal liability are various serious and sensitive in nature, and it should be ensured that the investigation of such crimes is carried out in the most formal and pristine form, this includes the assumption that no one who is accused of such crimes will be compelled to incriminate himself or be subjected to a kind of torture, coercion, threat or duress or any kind of punishment which is inhumane or degrading. Also, as far as the status of international criminals, the arrest or even detention of such individuals becomes a task because the liberty of the person accused should be maintained in such situations.