INTERNATIONAL CRIMINAL LAW: EVOLUTION AND CODIFICATION

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ABSTRACT

This article elaborates upon the gradual development and codification of international criminal law. International Criminal Law is a body of international law that permits individuals to be held responsible for any international crime committed by them. The author has sought to divide the gradual development and codification of this area of law in various sections of the article. The first section introduces international criminal law as a body which was found on not a national or domestic level but a multi-national level since the very beginning of formation of law itself. The second section of the article elaborated upon the evolution of this law through four stages. The division of these four stages are based upon the two world wars and the cold war era that followed. The author has carefully and critically analysed all significant attempts made by various treaties and tribunals to codify international criminal law. There has been special reference made to the Nuremberg trials and the ICTY both of which played a significant role in the establishment of the International Criminal Court. Finally, as a conclusion the author has a posed a question regarding the establishment of the International Criminal Court and whether it really can be considered as a conclusion to the codification of this area of law. Unfortunately, the answer can only be made in the negative due to the many shortcomings of the International Criminal Court.

Keywords: International Criminal Law, Rome Statute, Codification, Evolution, Criminal Law

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INTRODUCTION

Any student of international law would agree that the practice of public international law is generally based upon the consent of states that are parties to the dispute. However, this statement is not absolutely correct as in certain rather rare instances, even natural persons can be considered subjects of international law. It is true that most wrongs committed by individuals are governed by their respective domestic legislations. However, there are certain acts that are considered so grave and severe in nature, they inevitably invite the application of international law. This application of international law on real persons rather than states are usually governed by International Criminal Law. Therefore, International Criminal Law can be defined as a body of rules governing wrongful criminal acts, committed by individuals.

Unlike other fields of public international law, International Criminal Law is considered rather contemporary in nature. Due to it being still new, it is safe to say that International Criminal law is at a nascent stage of development within international law at large. Despite its nascent stage, this area of law is indispensable owing to its roots being found in the prosecution of individuals for grave crimes committed both in war as well as peace time.

The gradual codification of International Criminal law and its emergence and development in a separate body of law can be traced back to as early as before the first World War. During this time, all criminal activities, no matter how heinous in nature, were governed by domestic legislations of the state which had jurisdiction of the individual in question. The rationale behind this was to protect the sovereignty of nations which called for the exclusive jurisdiction of states over such individuals. It was only after certain developments in international law and the principle of sovereignty itself that this changed. As crimes started to get more and more severe and heinous in nature, another doctrine, known as the doctrine of universal jurisdiction developed. This doctrine sought to address those crimes that had a devastating impact in a manner where even states which did not have territorial jurisdiction over the individual who committed the crime, could exercise jurisdiction over him. Despite this doctrine being established sufficiently, it was only used in rare situations as most states feared that the application of this doctrine would result in some sort of political retaliation. Some instances that did witness the application of this doctrine include the Eichmann Trial, in which Israel prosecuted Adolf Eichmann, a former Nazi officer and the trial of General Augusto Pinochet, commonly known as the Pinochet Trial.

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This paper is divided into three main sections. The first section focuses on the evolution of International Criminal Law from a historical perspective. This section elaborated upon the four stages of evolution of criminal law, namely- the period prior to the first World War, the period between the two world wars, the period between World War II and the cold War and finally, the period after the Cold War ended till present. The second section of the paper focuses on the formation of the International Criminal Court. This section deals mainly with the Rome conference and how it shaped the International Criminal Law as we know it today. The last section of the paper deals with the conclusion of this gradual codification of the International Criminal Law.

EVOLUTION OF INTERNATIONAL CRIMINAL LAW: THE FOUR STAGES

a) The Period Prior to World War I: Inception of Codification

When one goes way back to the historical accounts of as far as the fifth century, it seems that the world at large always was inclined towards having a judicial body at an international level for the governance of heinous criminal activities such as war crimes.[i] Evidence supporting such claims can be found by the prosecution of individuals for war crimes in ancient Greece in 405 BC.[ii] This is further corroborated by instances in various other nations such as ancient China, Japan and India.[iii] Further, the establishment of a concept of a permanent International Criminal Court can be found way back in the thirteenth century.[iv] Both historians and international criminal lawyers agree that the first ever known international tribunal responsible for prosecuting an individual for a criminal wrong was in 1474. This ad hoc tribunal dealt with the crimes committed by Peter von Hagenbach[v] who was later convicted of crimes that were against "*the laws of Gods and man*".[vi] The crimes he was convicted of were committed by him against a civilian population in Austria during its military occupation.[vii] This is the earliest known precedent of a trial of an individual by an international criminal tribunal which saw twenty eight judges from different locations such as Switzerland, Austria, Rhineland and Alsace come together to prosecute him.[viii] This trial is considered to be the only international criminal trial before the World Wars. Nevertheless, there had been several notable attempts of codification of the law of wars such as the "**Lieber Code**".[ix] This was a set of rules created by

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Francis Lieber[x] and applied by Abraham Lincoln himself during the American Civil War.[xi] However, no such codes or regulations can be considered international in nature as all of these were, at the end of the day, national or domestic legislations.

The first ever proposal to create a permanent international court was in 1872. This is the time when **Gustave Moynier**, one of the founders of the International Committee of the Red Cross, bought in the idea of creating an international criminal court to address the violations of the 1864 Geneva Convention[xii] in the Franco-Prussian War of 1870-71.[xiii] The main reason behind the same was to have a body which could act as an effective deterrent to those violating the provisions of the convention. Due to the lack of any such deterrent, even though many states were parties to the convention, none really followed it. However, given the political circumstances of that time, this idea was ignored and not followed owing to it being to "radical". The lack of support resulted in the failure of the adoption of Moynier's proposal.[xiv]

However, all was not lost, as due to the increasing improvement in deadly technology, people started getting more and more afraid of the implications of international wars. Therefore, this period saw the development of two important developments in the codification of international criminal law.[xv] These were the **Hague Conventions of 1899 and 1907**. These are, even today, considered as the first attempts at creating an international penal code. It is pertinent to note that the proposal for the 1899 conference was made by Czar Nicolas II of the Russian Empire on the day of 24th August, 1898.[xvi] This was first accepted by around 26 nations, and later by the Peace Conference which was organised at the Hague. The second proposal in 1907 came from the United States and saw the acceptance and participation of 44 nations.[xvii]

Despite these efforts at codification of international criminal law and the eventual establishment of a permanent court governing the same, there were inherent defects in the same. For starters, the "Hague Tribunal" was not really a permanent court. This is because the judges were not permanent members of the court.[xviii] Rather, they were called from their vocations to adjudge upon a given matter and once it was done, go back to their respective private professional lives.

The Hague Convention of 1907 attempted to move a step forward and attempted to make the jurisdiction of this "permanent court" mandatory. However, these attempts were deemed unsuccessful.[xix] Despite being more significant than its predecessor, this Convention too fell

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short in various aspects.[xx] First and foremost, it only obliged states to comply with the rules set underneath. This meant that no criminal liability was created for individuals, even if they had committed grave or heinous crimes.[xxi] Additionally, the enforcement was based upon the reparations that were to be paid by the defeated state. If not reparations, the solution given was retaliation, which more often than not, resulted in the situation getting out of hand. Another problem was the "*clause of solidarity*", in accordance with which, states parties to the convention were only obliged to abide by the rules set underneath, as long as other state parties were complying with the same.[xxii] Therefore, if other states did not comply with convention, no state would be obliged to follow the same. However, despite its many shortcomings, the Hague Conventions can be described as a good starting point towards the codification of international criminal law as we know it today. Many references to the Hague Conventions can be seen much later.[xxiii] Some examples include the Statute of the International Criminal Tribunal for the Former Yugoslavia[xxiv] in the year 1993. Even the Rome statute has borrowed Article 8(2)(b), (e) and (f)[xxv] from these conventions. Therefore, they cannot be considered as complete failures.

b) The Interwar Period: Failure due to lack of support

The World War I undeniably had catastrophic effects all throughout the world. The biggest concern of many was that unlike previous wars fought, this war did not differentiate between civilians and military. The world-wide scale of the war added to the deadly nature of this war.[xxvi] The world, for the first time saw the notorious mass killings caused due to aggressive campaigns by the warring parties. Today, the infamous acts committed during this war are referred to as war crimes. This war introduced the world with the term "genocide".[xxvii] It is widely accepted today that the aggressive and inhumane campaign against the Armenians was indeed nothing else but genocide.[xxviii] Despite the heinous nature of the crimes committed, the powers that were victorious ensured that no mechanism, either domestic or international, ended up prosecuting the culprits of the crime.[xxix]

During this time, several attempts were made to codify international criminal law and have a permanent international criminal court to ensure that those who committed crimes got punished for the same. Eventually, the Convention for the Creation of the International Criminal Court was also formed around this time.[xxx] However, lack of support from the international community got better of it as only 13 states signed it, and none ratified it.[xxxi]

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Therefore, this interwar period was considered as a failure in codification of international criminal law. The main reason behind the same was the lack of support of the international community owing to the threat such codification would pose to the absolute sovereignty of states.[xxxii]

c) World War II - Cold War

Due to the lack of action taken against the culprits in the first World War, future atrocities committed during the second World War could not have been prevented. Due to the horrific nature of the atrocities committed against the Jews in territories occupied by Germany, it was impossible for the international community to overlook the crimes committed. Therefore, there was a serious cry in the community to codify criminal law and assign individual responsibility to those who commit heinous crimes. This time again, there were. Lot of attempts made at codification of law and gradual development of the formation of an international criminal court. However, not all such attempts were successful. For instance, the Moscow Declaration or the London Declaration, both aimed at forming International Military tribunals which could act as trial courts for war criminals. The tribunal formed under the London Declaration was able to prosecute 24 war criminals. Unfortunately, none of these criminals belonged to the Allied military forces. This was also the time when **Nuremberg trials** took place. These trials saw the prosecution of around 20,000 German nationals in different war tribunals based in occupation zones established by the Allies.[xxxiii] These trials have an undeniably international nature. However, due to the political circumstances of the time, the Nuremberg trials were not as big a success as they were sought to be. Due to the belief of Allied forces that Italian fascist were prominent adversaries of communism, Italian war criminals were never prosecuted despite the strong evidence present against them. Further, these trials gave punishment without a codified law- which was significantly criticised. Despite the shortcomings of this trial caused due to the political climate of the era, it had a strong impact in the codification of International criminal law. This is because these trials strikingly achieved what was considered impossible- the application of customs, norms and doctrines to impose punishments on individuals. Many believed that due to the support of the international community, the Nuremberg trials and the tribunal thus formed, could serve as a precedent for a permanent international criminal court. There were certain efforts made to that effect as well. However, these efforts were rather weak and the progress made was gradually dissolved. One important establishment during this time was the formation of the **Geneva Conventions**- which included four treaties and three

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additional protocols. The time frame of this codification was between 1939 to 1945.[xxxiv] While the conventions are more so related to international humanitarian law, that is, the governance of law during war time, their application to international criminal law is also important. These conventions, along with their protocols have around 600 articles. These articles are considered extremely important for a couple of reasons. The first and foremost is that it is accepted by the international community at large. Therefore, it is considered effectively to be a part of customary international law today. Despite this, there was no permanent body which was made to ensure the codification and application of international criminal law.

d) The Period after the Cold War

Post the end of the Cold War, the development of international criminal law would have taken place had it not been for the notorious atrocities occurring in former Yugoslavia and Rwanda. The complications remained the same- states being primary authorities for the implementation of international criminal laws. However, revolutionary changes came in this field with the advent of communication technology, as **territorial criminal jurisdiction** no longer applied to crimes committed across continents, overriding the theory and practice of sovereignty and border security. The criminal's ease of movement gave rise to **extraterritorial jurisdiction**, which permitted states to exercise effective jurisdiction beyond their territories to prosecute individuals they considered responsible.

This mode of jurisdiction, however, proved to challenging[xxxv] as the practice of extradition never materialized into a uniform custom. The failure of this mode often resulted in unlawful attempts by states to bring the criminals to their effective jurisdiction, as can be seen with the practice of United States in abducting and assassinating such individuals accused of committing international crimes.[xxxvi] Thus, came the importance of international co-operation to establish a global framework that would make prosecution and punishment of such criminals possible. The beginning of this important development can be marked by first, states' law enforcement agencies which sought co-operation through cooperative agreements and collaborations[xxxvii] and second, the concurrent involvement of the UN addressing the growing concern of the negative impact of transnational crimes.[xxxviii] This is when the world witnessed the support of the US and the Soviet Union in establishing an international tribunal to address crimes such as terrorism and drug trafficking.[xxxix] A landmark development came in 1989 when

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18 Caribbean and Latin American states expressed their support and requested the UNGA for a permanent international criminal court with jurisdiction over drug-trafficking crimes.[xl]

Codification of international literature came into being with the collaborative working of the UN General Assembly, the International Law Commission and the International Institute of Higher Studies in Criminal Sciences, an NGO, to draft a Code of Crimes against the Peace and Security of Mankind in 1988[xli] and the Draft Statute of International Criminal Tribunal in 1990,[xlii] at the Eighth United Nations Congress on Crime Prevention and the Treatment of Offenders.[xliii] This brought the world to an important standpoint in terms of the evolution of international criminal law because the early 1990s saw the creation of the two ad-hoc international criminal tribunals to address the massive killings in the former Yugoslavia and in Rwanda.

Acknowledging the seriousness of the problem in the former Yugoslavia, on October 6th, 1992, the Security Council established a Commission of Experts to collect evidence into the atrocities arising out of the civil war.[xliv] The work of this commission resulted in a 65,000 pages of documents and over 300 hours of videos with innumerable analytical records[xlv], which when submitted as an interim report,[xlvi] led to UNSC Resolution 808 of 1993, to establish and international tribunal for prosecution of persons responsible for serious violations of International Humanitarian Law.[xlvii] It should be noted that creation of this tribunal was an important landmark in the context of improving international criminal jurisdiction. A glaring discovery was that this tribunal remained inactive for one year after its establishment because of the lack of administrative actions taken to appoint any prosecutor till 1995.[xlviii] However, the lessons learned from the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) helped in the establishment of the International Criminal Tribunal for Rwanda (ICTR), serving as a precedent.[xlix]

Nevertheless, the tribunals were not a true success due to the differences in opinion between the governments and the Council, where the Governments wanted to include death penalty in the possible penalties, but the council was opposed.[l]

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FORMATION OF THE ICC: IS IT A CONCLUSION YET?

Many believe that the four stages mentioned above met effective conclusion with the formation of the International Criminal Court. It was no less than 50 years ago when the UN for the first time recognised that there existed an imminent need of an international criminal court which can act as a permanent body. After the four stages mentioned above and the formation of international tribunals such as the ICTY, the International Law Commission successfully submitted a draft for the International Criminal Court in 1994 to the General Assembly. At the fifty second session of the UN, the General Assembly convened the UN Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Law. Due to the fact that this conference was held in Rome, from the 15th June 1998 to the 17th July, 1998, it is more commonly known as the Rome Conference.[li] The rationale behind the establishment of this court was to achieve justice, end impunity and conflicts, ensure that the deficiencies caused by ad hoc tribunals were all remedied and most importantly, to deter future war criminals. However, critics have noted that ICC has not met with the requirements its founders had envisioned. It is contended by many that the court proceedings are too lengthy, many accused such as Omar al-Bashir[lii] are at large and there only have been three convictions in nearly twenty years for core international crimes. Keeping in mind these criticisms, it is difficult to say that the codification of international criminal law has met with its conclusion. Therefore, in conclusion, the codification of international criminal law is still in process.

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