The Principles of International Criminal Law, Nature, Responsibilities and Approaches in Conducting the International Trials – An Analysis

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Abstract

A. Abstract:

The nature of criminal law is more victory celebrated rather than Justice Oriented. The need of International Criminal Law becomes the need of an hour. International criminal law play a significant role in holding individuals accountable for serious offenses that transcend national borders, such as genocide, war crimes, and crimes against humanity. The most significant branch of Public International law contributes to the development of a rules-based global order and fosters cooperation among nations in combating impunity. The present paper discussed the need of International Criminal Law in 21st Century. The Global nature of International Criminal law makes the study more acquainted with the different system of criminal justice administration. The paper is an introductory in nature wherein overall nature of International Criminal Law tried to examine with the help of few celebrated trials in International Criminal Courts and International Court of Justice.

B. Objectives: The major objectives of the paper are as under.

1. The present paper discusses the need of International Criminal Law.
2. To evaluating individual criminal responsibility.
3. To understand the different pattern of criminal justice administration through International Criminal Law

C. **Working Hypothesis:** The working hypothesis of the paper is as under.

1. International Criminal Law is new and is a developed approach of public International Law which needs to evaluate through different parameters.
2. Broadly International Criminal Law assured the sense of fairness, transparency rather than simply punishing the culprit either state or individual.

D. Synopsis:

1. Introduction:

The interplay between public international law and international criminal law are seems to be the same but truly they are not same in their structure, principle and

execution jurisprudentially or otherwise. Some introductory remarks on the ambit of the area of ICL are warranted as these can inform the further observations and reflections by looking toward the ideology behind the ocean of things.[1] The reflection of the history from different criminal system lies in different countries, the domestic law and its observance of substantive provisions, procedure and implementation can hardly be seen at international forums. International Criminal Law in many context tried to acknowledge domestic laws , but because of the nature of International Criminal Law on many instance one may realised the sense that, the International Criminal Law is bypassing the domestic criminal law of the country. Many jurists believe that, the International Criminal Law is not the law in true senses, reason being that the law is merely a paper tiger created for less work and most celebrations.

Few issues of crimes are very common at International set up. Among the several major issues, the issue of collective violence is the most tremendous and fear raising factor. The states are the major subject of Public International Law. Ethnic Cleansing in resulted in to gross violation of human rights and humanitarian law. But imagining the effect of war crime and even more the trial of that war criminals were impossible without some International Criminal Law.

The question, why there is a need of International Criminal Law may arise with the probable hope of existing system of Public International Law. The existence of public international law may create a question as to it sufficiency. Whether Public International Law satisfy the mandate of sufficiency and accountability of administration of a fair justice or not? Why word population is more addictive about the International Criminal Justice by avoiding the established set up of public international law.

2. Whether Public International Law is Sufficient to meet the Need of International Criminal Justice?

There is voluminous writing as to universalising the jurisdiction for the purpose of ICL. The US President Barack Obama in his Noble Price Ceremony clearly stated that, “War is justified only, if it is waged as a last resort or in self-defence”. The concept of “Use of Force” is relatively old in Public International Law. The Nicaragua is the best example of it. Therefore, action of State on account of self-defence is somewhat excusable and justifiable. The recent incidence of surgical strike by India against Pakistan in 2016 is the result of India’s most active army command. The justification of the act of India no doubt is under cloud of much suspicion. But by way of defensive ground it could be justified to United Nation Security Council. Every war command may not be that much of authoritative and valid. The rise of International Criminal law is derived from those wrong commands and war crimes. The Army Commander does not have that much of luxury to wait and think by wallowing in his own state of mind. He has to set an example by leading from the front. Therefore, comparing his act with the act of state is wrong somewhere. If he is right in command, he must be right in law and if he is wrong in command he must be wrong at trial.

The Nuremberg trial is exactly the result of almost of all wrong commands for Genocide. The overwhelming natures of International Criminal Trials somewhere make difference in the execution of Public International Law. Public International

[1] Larissa Van Den Herik, “The decline of customary international law as a source of international criminal law”, Grotius Centre Working Paper 2014/038-ICL available at SSRN-id2587622.pdf

Law is the result of civil actions of the State. However, International Criminal Law is the result of wrongful criminal acts of the individual as well as state. The shift of responsibility from State to individual is one of the great features of International Criminal Law. Therefore, it demands new set up of rules, new set up for the criminal trials and new set up for the execution of such punishment in humanitarian ways. Therefore, International Criminal Law assures more transparent view as to trial, its procedure as compare to Public International Law. But it's nowhere devaluating the significance of PIL.

International Criminal Law is one of the mother branches of Public International law which need to sever from the common access of law for law learner. It's nowhere mean that, PIL does not fulfil the mandate's that are requires for the criminal trials. However, it is that much of effective which created a new space for new set of rules which could be working in special spare of international crimes.

However, it opens a faze for another argument as to whether States are under an international legal obligation to prosecute international law crimes or not? Because if International Criminal Law is searching for individual criminal responsibility, then whose responsibility it is to try? Probably, the burden has taken by International Criminal Courts to try it. But is the primary responsibility lies toward it? Or does the state have to play any role in the trial of International Crimes?

The International Criminal Law is the sign of State actions altogether.[2] However, in Cassese's view, a position to qualify given crime as an international law crime, one should ask what values are to be protected by a given legal rule and whether those values are considered important for the whole international community.[3]

The value of International crimes is much depends on the International agreements and ascertainment of conduct as an offensive. Ascertainment of criminal conduct does not itself make the person liable unless the rules satisfy the mandate of *Nullum Poena Sena Lege* i.e no penalty without a law and Nullum Crimen Sina Lege i.e a person must not be subjected to punishment except for an act that was criminalized by law before he/she committed the act. These are the two basic principles on which the criminal trials and their validity are based. The development of principle of legality and its validity are the major area of concern today.

2.1 Nullum Crimen Sena Lege:

In fact, there is to outline the abstract principles of international criminal law. The principle of *Nullum Crimen Sena Lege*designed to keep out ex post facto law.[4] The context of ex post facto law is not only covered under European convention for the protection of Human Rights and Fundamental Freedoms, but it's an inherent part of almost all democratic set up countries constitutional mechanism.[5]The Principle of *Nullum Crimen Sina Lege* goes with the principle of *Nullum Poena Sena Lege* which requires that, law does not punish unless the law does not prescribe the punishment

[2]WoutersJan, "The Obligation to Prosecute International Law Crimes", for more details see https:// www.law .kuleuven.be/iir/nl/onderzoek/opinies/obligationtoprosecute.pdf visited on 29/12/2018

[3]A. Cassese, International Criminal Law (OUP, 2003), 23-25.

[4] International Criminal Tribunal for Rwanda, Rutaganda Trial Chamber 96-3 on 6 Dec. 1999

[5] In Indian Constitution, the ex-post facto law is the principle itself introduced under Art. 20 (1) . It clearly prohibits to have the trial for those unprecedented offences which were not included in to law on the date of its commission

for the same. The cogent requirement of pre-established law for punishment it the foremost requirement of International Criminal Law. There are few reasons behind. First, it provides effective safeguard to the person charged. It carved the path for rule of law. In Punk Vs Estonia , the European Court of Human Rights rightly observed by saying that, the guarantee enshrined under European Convention on Human Rights comes with the essential elements of rule of law. The principle of *Nullum Crimen Sena Lege* should be contrived and applied by considering the purpose and object of it.

As regard to International Criminal Substantive law also, the principle of *Nullum Crimen Sena Lege* is known for the principle of legality of international crimes. By applying this principle, International Criminal justice system must respect to the rights and guarantees enshrined through such principle. The above principle is already played a significant role in Nuremberg trial which has been affirmed by International Criminal Tribunal For Rwanda and International Criminal Tribunal for former Yugoslavia.[6] The Statute of International Criminal Court provides for one umbrella legislation to cover all aspect of international criminal law.[7]

2.2 Nullum Poena Sena Lege:

The major principle that firmly stands with international criminal law is *Nullum Poena Sena Lege.* The International Criminal Tribunal for former Yugoslavia recognised this principle in Tadic Trial stating that, "No body may be held criminally responsible for the act in which he has not been engaged or in some other way participated". The standard of individual criminal responsibility must have to be handling by microscopic eyes. The careful observation of the rules and procedure for avoiding the inadequate attribution is the foremost responsibility of International Criminal law executors. The principle of *Nullum Poena Sena* Lege reflects the degree of offender's responsibility and suitable punishment for the same.

However, through these principles we can have only the rough idea as to the nature of guilt and the quantum of punishment which need to fix at or before commencement of the individual criminal responsibility.

Initially, the practice of independent criminal tribunals to try international crime is one of the fantasy rather than the reality. But it's a part of consisting practice of evolving and digging the path for the development of International Criminal Law. The *Nullum Poena Sena Lege* set out the grounds for legal criminality and consisting material elements. Therefore, if one wants to prove the international crime, he has to face with these material elements which are so requires to prove for the culpability of an individual or state as the case may be.

However, following the rough idea as to elements of crime, there are two broad elements that it requires in every single case of criminal in nature. First, Material Element known as *Acts Reus and* Mental Elements known as *Mens Rea.*

3. ICL and Interplay of Inquisitorial and Adversarial System of Law:

The question as to element of crime does not leave the hands of international Criminal Law. For example, If Mr. X prosecuted for the offence of Genocide. Mr. X

[6] Please refer the Nuremberg trial tried by the International Military Tribunal since 20 Nov. 1945 to 1st oct. 1946.

[7] See Article 77 of Statute of International Criminal Court. popularly known as Rome Statute 1988

must have a clear idea for which he is going to punish. The IQ level of culprit about the crime play greater role. It's not like the strict or absolute liability. The crime must have to be actually committed. It must have to be prohibited. The committed and prohibited act must be intentionally committed. The issue of degree of intention that requires in International war crimes may differ from case to case. But indeed, for international criminal trials, it requires international elements to get it prove in to court of law.

The preamble of International Criminal Court Statute 1988 through its preamble tried to protect peace, security and wellbeing of International community.[8] Therefore, whenever there is a threat to the human values of international community, the provisions of International Criminal Law will effectuate. Therefore, Warle Gerhard rightly observed that, "all crimes under International law have one common characteristic known as International Elements, which generally requires the context of systematic or large scale violence"[9] The violence may be divided, into five sub-elements: an attack; a link or nexus exists between the acts of the accused and the attack; the attack which is directed against any civilian population; the attack which is widespread or systematic; and the perpetrator has the appropriate state of mind or mens rea.[10] How long the element of mens rea play role in International Crime is the issue of concerned as we are largely focusing toward individual responsibility and state responsibility in an international crime. However, without the basic requirements for commission of an act, no one can be subjected to punishment whether it be a State of an individual human being.

4. Mens Rea and International Criminal Responsibility- A Case Based Analysis:

Art. 30 of ICCST. Introduced the rule for existence of mental elements under international crime. The concept of mens rea which requires that, the crime if committed with intent or knowledge.[11] Further Art. 25 provide an appropriate assessment to International customary law on individual criminal responsibility. The mental element of crime is relatively a flexible phenomenon in International Law. But the word intent refers to commission and omission of crime and knowledge refers to probable consequences or circumstances caused due to such crime.

The specific intent for specific International crime can be judge by the dimensional decisions of different international tribunals. International Criminal Tribunal for former Yugoslavia in its first ruling on the intent of Genocide pointed out few intent specific elements. There are three significant judgements interpreting the genocide provisions and intent specific elements. Out of three, the first and foremost is Goran Julisic Trial. In accordance with the principle *nullum crimen sine lege*, the

[8] Clause 3 of ICCSt. Which try to protect the fundamental values of human society.

[9] Warle Garhard, "General Principles of International Criminal Law" also see Mettraux G, "Chapeau Elements of Crimes against Humanity" International Crimes and the Ad Hoc Tribunals available at http:// www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199207541.001.0001/acprof9780199207541-chapter-11

[10] Ibid Mettraux G, "Chapeau Elements of Crimes against Humanity" International Crimes and the Ad Hoc Tribunals available at http:// www. oxfordscholarship.com/ view/10.1093/ acprof:oso/ 9780199207541.001.0001/ acprof-9780199207541-chapter-11

[11] Art. 30 of International Criminal Court Statute 1988

Chamber will examine the legal ingredients of the crime of genocide taking into account only thosewhich beyond all doubt form part of customary international law.[12]

In its para 59 on Genocide , it clearly stated that, Within the terms of Article 4(2) of the Statute, genocide is defined as any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such -

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

The absence of mental element which is requires for the offence of Genocide was clearly reflected and require to be identified.

The Specific Intent (*Dolus Specialis*) Requirement of the Crime is one of the most significant facts for proving the charge. The international community realised the problems in to application of the Genocide Convention through the practice of the ad hoc tribunals at the international level. The idea of *dolus specialis* always works to make the picture of crime more clear. In every democratic country the principle of *solus specialis* uses to follow by legal system. Even, the significance of the practice lies in the interpretation of the elements of the crime of genocide and in the clarification of its substantive content.[13] In the context of International criminal law, everything is complied with war crimes, crimes against humanity, crime of genocide and other associated crime. But generally in the context of piracy and plundering, generally the tribunals face the problems as to application of source for interpretation. The interpretation of crime of genocide is possible because of the existence of the convention on genocide. But in other cases such as plundering and piracy, the tribunal may refer the domestic rules for the purpose of interpretation.

The rules as to interpretation of International law are flexible. Even they could be melded as per the nature of trial. The selected mode of International criminal trials may be moulded as per the requirements. As Art. 51 of the ICCSt give powers to make rules to the united Nation Security Council. The same can be adopted for the purpose of International Criminal Trial. However, the legacy of the rules is always subjected to the challenge. Because ICCTR in the case of Kanyabashi case clearly held that, the rules may be subtracted when they would

[12]A principle recalled by the Secretary-General in his report pursuant to paragraph 2 of Security Council resolution 808 (1993) of 3 May 1993 (UN Off. Doc. S/25704, para. 34): "application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise"

[13] Askar yusuf, "The Specific Intent (Dolus Specialis) Requirement of the Crime of Genocide: Confluence or Conflict between the Practice of Ad Hoc Tribunals and the ICJ", For more details see http:// www. Uidergisi .com.tr / wp-content/uploads/2013/02/the-crime-of-the-genocide.pdf

be in the direction of anti-humanity. It's simply means that, when there is threat to the human values by the existence of the rules created, the human values will be prevailing in it.

Many time people use to discuss about the system under which the crime is tried. In broad perspective, there are two kinds of trials process. Adversarial system and inquisitorial system. Adversarial system found more typical as to collection of the evidence, formation of the charges and hearing of the matters in specialised institution. However, in inquisitorial trial, everything is confined with the jury. Judges have to scrutinise everything from the pre-trial process to the end of trial. However, they have the same powers to ask for the investigation through special agencies. The question, which one is better always, is there in the International Criminal law Trials. But the International law has better answer for it. It created the multifaceted blend of both.

5. ICL and Suitable Pattern of System is a Need of an Hour:

There is no concrete and fully justified model of justice delivery system. Therefore, it would be more appropriate to think of three separate models of International Criminal Procedures, rather than a single model applicable across all the international courts and tribunals, as each of the three courts displays unique characteristics with no precise uniformity in each court's rules.[14]In order to understand the degrees of power shifts that has taken place at the ICTY, ICC and ECCC.

The impartial judge will rely primarily on direct evidence. There is a very little chance to have the leading question. Therefore, B. H. Hale rightly observed stating that, the adversarial system must point out that, the question must not be asked always in the interrogative mood.[15] The question to the witnesses must have to put in such a way that, there must not be any chance to have impeaching the credit of witness unless so permitted. The impartial judge or the authority officially recognized must set the agenda of asking the question in such manner that not break the link between the relevancies. The questions are the accepted means of determining what is true and what is untrue, with the justification of inquiries and investigations. It nowhere represents the typical conversation between the parties, moreover through these questions parties digging the truth. The question of merit will always be there either to accept or not purely depend on the discretion of the judges. However, law expects that, while exercising the desecration, just must use the legal justifications behind. It must not be arbitrary and must be due, reasonable and well explained through reasons. Such control is principally required to be maintaining not only by the parties but by the due actions of administrations including the police mechanism. No doubt, the burden of proof will lies on the prosecution to prove the offence beyond reasonable doubt, but the questions and answers thereto are the means to reach to the truth. It involves the supra-segmental features sometime articulated sometime seems very dramatic but are based on some realities.

[14] Peack Jassika, "A Spectrum of International Criminal Procedure: Shifting Patterns of Power Distribution in International Criminal Courts and Tribunals" , Pace International Law Review, Val.26 Issue 2 2014
[15] Ibid

6. Conclusion:

International criminal law has been developed by combining the two major Western legal systems of the contemporary world. It represents both Continental and Anglo-American traditions. The terms 'accusatorial' and 'inquisitorial' distinguished based on the procedural feature, manners of recording the evidences, the rules of burden of proofs and do not necessarily correspond to the denomination related to their geographic or legally systematic and historical background. In that ways, it may create a blended model for world community. The Rome Statute of International Criminal Court has taken care of the same to balance the domestic interest and international expectations together by keeping in mind the probability and chances to accommodate the domestic needs at International level.