LEX SCRIPTA MAGAZINE OF LAW AND POLICY
ISSN- 2583-8725

VOLUME-2 ISSUE-2
YEAR: 2023

EDITED BY:

LEX SCRIPTA MAGAZINE OF LAW AND POLICY

LEX SCRIPTA MAGAZINE OF LAW AND POLICY, VOLUME-2: ISSUE-2

LEX SCRIPTA MAGAZINE OF LAW AND POLICY, VOL-2, ISSUE-2
ISSN-2583-8725

INTERNATIONAL CRIMINAL COURT'S (ICC) PART IN REDUCING ATROCITY CRIMES THROUGH QUICK ACTION

Author: Shivam Kumar Pandey

(*Research Scholar, Rashtriya Raksha University)*

Co-Author: Kashyap Umesh Vandariya

(B.A.-ILSS., Rashtriya Raksha University)

ABSTRACT

The harsh consequences of the 20th century reveal the severe shortcomings of global establishments and the significant inadequacies of individual nations in fulfilling their most fundamental and obligations. Considering the profound and as atrocity crimes have long-lasting consequences for a society, bolstering preventative action becomes crucial. The growing idea of the "responsibility to protect" emphasises this.

Early in the seventeenth century, Jesuit Francisco Suarez—a prominent figure from the School of Salamanca—emphasized that men had the right to defy the extent of overthrowing an unfair political system since political power stems from the agreement of free wills. To transform sovereignty into its modern form, John Locke, Hugo Grotius, and the eighteenth-century contract theorists established the idea of sovereignty as responsibility.

KEYWORDS: Inadequacies, Sovereignty, Bolstering, Atrocity, Obligations, Disobey

INTRODUCTION

The 1990s witnessed the production of multiple worldwide tribunals having authority over pre-existing atrocity crimes, either directly or indirectly through the United Nations. These courts were distinguished by their ephemeral character, their superiority over national authorities, and the fact that their authority is only applicable in times of extreme crises, like the dissolution of the ex-Yugoslavia or the murderous act in Rwanda. Michael Scharf and Leila Sadat clarified that their main objective was to facilitate state reconciliation as part of a larger post-conflict UN strategy. It was untenable to expand the legal framework for judicial involvement while upholding an international framework that, by doing nothing, permitted atrocity crimes. Consequently, the humanitarian intervention ideology enjoyed its greatest development in the 1990s and its application to circumstances like those that occurred in Kosovo in 1999 and Somalia in 1993.

The foundation of this philosophy is the comprehension of sovereignty as accountability, that dates returning to Bartolomé de las Casas and Francisco de Vitoria. Theirs theories produced the Indies' New Laws in 1542, that ended local first-ever slavery in the history of European colonisation. In the early 1700s, Francisco Suarez, a Jesuit—a prominent figure from the School of Salamanca—emphasized that men had the right to defy to the point where overthrowing an unfair political system since political power stems from the agreement of free wills. To transform sovereignty into its modern form, John Locke, Hugo Grotius, and the eighteenth-century theorists of contracts established the notion of sovereignty as responsibility. The theory of humanitarian assistance was initially created by Following World War II, Hersch Lauterpacht, is predicated on this idea and defends the legality of using force to enter a state that is unable or unwilling to defend its own citizens opposing horrific crimes. Advocates claim that the UN Charter's ideals of sovereignty and territorial integrity are upheld by UN humanitarian intervention or state-led or state-independent approval. They contended that these principles safeguard state residents, not the states themselves. They therefore do not apply to States that commit atrocity crimes or otherwise do not take appropriate action to prevent them.

INTERNATIONAL CRIMINAL COURT (ICC)

Following an international diplomatic meeting that took place on July 17, 1998, in Rome within the framework of the United Nations (UN), The International Criminal Court's Statute was approved. First of July, 2002, the Following its ratification by sixty states, the Rome Statute went into force. Along with the appointment of the Prosecutor, early March, judges and the registrar 2003, The Hague, Netherlands is home to the Court's headquarters, where it was established. 124 States had approved the Rome Statute as of October 2023. Nonetheless, two nations have left the ICC: Burundi (whose removal took effect in October 2017) and the Philippines (whose retreat took effect on March 17, 2019). Two more nations had announced their intention to leave the ICC but then withdrew it: South Africa (notification) The Gambia (notification issued on 10 November 2016 and revoked on 10 February 2017) and made on 19 October 2016 and revoked on 7 March 2017.

The International Criminal Court (ICC) is the first international criminal court with permanent jurisdiction that has the authority to consider instances involving individuals suspected of aggression, genocide, war crimes, and crimes against humanity, as specified in Rome Statute Article 5. Not to be mistaken with the ICC is In order to settle matters involving legal conflicts between States, the UN Charter established the International Court of Justice (ICJ) in 1945 and has its headquarters located in The Hague. Initially, there were discussions about creating a

permanent international criminal court following the 1945-established International Military Tribunal (IMT) overseeing the Nuremberg trials in the wake of World War II. Nevertheless, States were unable to reach a consensus until 1998.

The International Criminal Court (ICC) can only look into instances pertaining to crimes against humanity, war crimes, or genocide if The State where the offence was committed or the State where the accused resides has acknowledged the ICC's jurisdiction (Article 12 of the Rome Statute). Since the accused and the State in which the offence was perpetrated share the same nationality, the Court's ability to look into situations involving non-international armed conflicts has been hampered by the lack of any reference to The nationality of either the accused or the victim.

THE ICC'S ORGANISATION AND STRUCTURE

1. The State Parties Assembly (ASP)

The existence of an additional body, to which each State Party has one representative, reflects the peculiarity of the ICC. The Rome Statute's Article 112 established the ASP, which is crucial to directing and assisting the Court's operations. Specifically, the elements of crimes, the rules of evidence and procedure, and are two important procedural documents that the Assembly, not the Court itself, is in charge of adopting. The ASP is also in charge of approving the budget and choosing the judges and prosecutor. It is also in charge of overseeing the Registry, the Prosecutor, and the Presidency with relation to the management of the Court, particularly its finances; and for looking into any issue pertaining to States' lack of cooperation.

2. The Prosecutor's Office (OTP)

Karim A. A. Khan is the ICC Prosecutor as of February 12, 2021. He took over for the Gambia's Fatou Bensouda. According to Rome Statute art. 42, the OTP is "obliged to receive referrals and any substantiated information on crimes within the jurisdiction of the Court, to examine them, and to conduct investigations and prosecutions before the Court." The Selection of the Prosecutor an overwhelming most of the ASP members to serve a nine-year, non-renewable term. A deputy prosecutor or several of them, who are chosen inside the same manner from a roster of nominees supplied through the prosecutor, may work alongside him or her. The deputy (or deputies) and the prosecutor are completely autonomous and need to be of many nationalities. They must possess a strong moral code, be exceptionally skilled, and have a great deal of criminal justice knowledge. When performing the duties of an ICC prosecutor or deputy, they are not allowed to work as professionals in any other capacity. The personnel

required to carry out the Prosecutor's tasks, such as investigators and consultants, may be appointed.

3. The Judges and Chambers

The ICC's Trial, Pre-Trial, and Appeals Chambers comprise the judiciary, which is made up of eighteen judges. According to Rome Statute article 36, the ASP selects the judges selected from the roster of applicants submitted by the Parties to the Agreement. They are selected from among those with the requirements set forth by each State for the nomination to the highest judicial offices, as well as those with excellent integrity, fairness, and moral character. They need to have the requisite expertise in criminal law and procedure as well as proficiency in pertinent domains of international law, including human rights law and international humanitarian law. Parties States are required to consider the necessity in order to portray the primary legal systems when choosing the judges.

Judges cannot be re-elected and will serve a maximum of nine years in office (with the exception of any time they need to wrap up an appeal or trial they presided over and for which the hearing has already begun). They are prohibited from working in any other professional capacity.

4. The Enrolment

The ICC's executive committee is called the List. According to Article 43, it is in the Rome Statute charge of the non-judicial facets of the Court's management and operations. The judges as a whole choose the registrar, who serves a five-year duration and is eligible for re-election once. If necessary, a deputy registrar who is chosen in the same manner may also work for him or her. The president of the Court has the last say over how the registrar carries out their duties. According to Rome Statute article 43(6), one of the registrar's duties is to establish a Witnesses and Victims Unit, which will help victims, witnesses, and anybody else who may be in danger when they appear in court.

5. The Office of the President

For three-year periods, Pres. Obama, together with the first and second vice presidents, are chosen from among the judges by an absolute majority of judges. Once is allowed for re-election. As per Article 38 of the Rome Statute, the Presidency is in charge of overseeing the Court's proper operation and any other duties assigned to it.

THE RESPONSIBILITY TO PROTECT AND THE HUMANITARIAN INTERVENTION DOCTRINE

However, for a number of reasons, the humanitarian intervention theory has gradually been abandoned during the past ten years. First of all, it did not offer clear guidelines outlining the conditions that would give rise to the purported right to armed action. Second, there was disagreement since many claimed that there was no exemption for humanitarian intervention in the United Nations Charter's proscription against the application of power. Third, because the concept of aid work was restricted to responding to actual crimes of horror, States were forced to make one of two unfavourable decisions: either stand by while civilian casualties increased or use military force to defend the populations that were in danger.

Finding new, effective ways to stop atrocity crimes became necessary due to the structural limits of ex-post facto legal institutions and the decline in support for the humanitarian intervention concept. The idea that one has an obligation to safeguard, intended to carry out this function. It was approved by the Assembly of the United Nations at the World Summit in 2005, confirmed by the United Nations Security Council in 2006 expanded upon January 2009, by the UN Secretary-General.

The idea of obligation to defend is based on the idea that sovereignty entails duty, just like the humanitarian intervention doctrine. However, it possesses a number of unique qualities that, as noted by Carsten Stahn, have ensured its swift acceptance and wide acceptance. Initially, it tackles the quandary of intervening from the standpoint of individuals impacted by atrocity crimes, instead of from the standpoint of those claiming a legitimate claim to intervention.

Secondly, it does not restrict accountability and involvement to responding to real atrocity acts. Conversely, the idea of duty to protect is a comprehensive strategy for handling emergency circumstances, predicated on the idea that a successful reaction demands a continuous approach, beginning with the implementation of preventative measures. Reaction to actual atrocity crimes will only be required if such measures fail. Furthermore, in order to achieve durable harmony and assistance competent leadership, the lawfulness and sustainability in development, the need to choose the best course of action, which may involve military involvement, must come first.

Third, the concept of protecting others is predicated on a complementary framework consisting of three primary pillars. States whose people may be at risk are primarily responsible for safeguarding them against the instigation and commission of crimes against humanity. Under Pillar II, other States and the entire global community are required to encourage and help

concerned States where they are not able to accomplish that due to ability deficiencies or absence of territory authority.

If the national leadership is unwilling to provide aid or there is a significant lack of national capacity, the international community is responsible for taking prompt, decisive action under Pillar III, which may include using armed force involvement in the direst situations. Therefore, it can be claimed that the idea of the duty to safeguard locations a special a focus on prevention. As a result, the discussion has shifted from the conditions whereby military intervention—whether UN-sponsored or not approval—may be appropriate or even necessary to the prompt adoption of efficient preventive actions.

THE PREVENTATIVE MANDATE OF THE ICC COMPRISES TWO DIMENSIONS: EARLY INTERVENTION AND GENERAL PREVENTION

In the twenty-first century, the emphasis has shifted from the aid effort theory to the notion of having a duty to defend. Additionally, ex post facto legal institutions have given way to the creation and strengthening of an enduring International Criminal Court. Cherif Bassiouni has highlighted that the International Criminal Court (ICC) a somewhat distinct method for deciding atrocity crime cases since it is not a portion of a larger post-conflict UN strategy, is a permanent, independent international organisation, and was formed by the States Parties to an international convention. The International Criminal Court was specifically established to handle cases of atrocity crimes that occur on the areas inside each of its 114 State Parties after July 1, 2002, as well as outside of those territories in the event of a referral or a substantial involvement of their citizens from the United Nations Security Council (UNSC). Additionally, according to the ICC, its operations are based on a complementarity framework. Hence it can only use its authority when States are either dormant or incapable of conducting their own internal affairs in a genuine manner.

The idea of The International Criminal Court's duty to protect and its mandate are closely related since they both centre on potential atrocity crime scenarios and are predicated on the states in question bearing the primary blame. United Nations Secretary-General Ban Ki-moon described the ICC Statute as "one of the key instruments" last year.

It is imperative to emphasise that the International Criminal Court, like post-facto legal establishments, is dedicated to putting an end to impunity in order to foster two main goals: (i) negative general prevention or deterrence, which comes from informing world leaders that those who commit atrocity crimes will not escape punishment; and

(ii) constructive general precaution, which consists of upholding the application respecting the core societal principles safeguarded by international criminal law. This promise is fulfilled by integrating a variety of outreach, public information, and external relations initiatives with court processes. UN representatives and other stakeholders may find it helpful to highlight, within Pillars II and III of the principle of duty to defend, the ICC's efforts on general prevention both the advantages of desertion and the expenses of committing atrocity crimes.

However, the preventive purpose of the ICC has an additional component, unlike ex post facto judicial organisations. It involves promptly intervening in circumstances where there are real risks of atrocity crimes occurring in the future or where they are now occurring. It may include a wide range of situations and is mostly carried out by means of his initial investigations and inspections by the ICC Prosecutor. The Prosecutor has received 9000 communications from people located in over 140 countries, demonstrating this. Additionally, since 2003, Initial assessments or inquiries have been started in a number of different countries, such as Afghanistan, the Central African Republic, Colombia, Darfur, the Democratic Republic of the Congo, Georgia, Guinea, Iraq, the Ivory Coast, Kenya, Sudan, Uganda, and Venezuela.

Since the idea of responsibility to protect emphasises prevention by prompt action, the ICC's prompt action can uniquely aid in enforcing the global community's obligations within Pillars II and III of the mentioned idea.

THE INTERNATIONAL CRIMINAL COURT'S PROMPT ACTION IN RESPONSE TO CONCRETE RISKS OF NEXT ATROCITY CRIME

Atrocity offences can be prevented. They require extensive organising and setup, since they "Collective effort" and "Organisational context" are needed. Furthermore, there is typically enough knowledge about upcoming atrocity crimes, which is unfortunately downplayed or disregarded by powerful political goals at odds among national and international decision-makers. Therefore, laws pertaining to organising, preparing, motivating, and attempting are extremely important for ensuring that pre-emptive measures are effective when implemented on time.

So, it should not be shocking that the ICC Statute's methodology differs somewhat from the ex-post statutes, with the exception of the concept some genocidal acts, which have historically derived directly from the Genocide Convention of 1948 judicial institutions in facto. As William Schabas has elucidated, in the latter case, the inclusion of laws pertaining to planning, preparation, provocation, and attempt would have been unnecessary.

Under Article 25 of the International Criminal Court Statute, attempts to commit any atrocity crime—not only genocide—are punishable by law. This responsibility is associated with "action that commences the execution of a crime by means of a substantial step." Even so, this explanation necessitates greater than simply preparation, the issue is where to indicate the distinction between actions that are merely preparatory and actions that constitute a significant step towards the commission of atrocity crimes. There is no precedent from international tribunals or the ICC Statute that offers advice on this issue.

Certain national systems, like the German system, have adopted a more stringent stance and demand that the offence be completed directly. Others, like the United States, support a more expansive idea by tying attempt culpability to the ownership, gathering, or creation of the tools of the crime, in addition to the victims' tracking.

Should the ICC case law therefore take a less stringent stance? Situations like the one that took place sixteen months in Rwanda straight beginning in January 1993, where over 500,000 people were under the pretence of a self-defence programme, grenades, guns, and machetes were brought and dispersed.

Acts of "public and direct encouragement to commit genocide" are likewise criminally charged under Article 25 of the International Criminal Court (ICC) Statute. Even while it only applies to genocide crimes, its range of application could be important in circumstances such to those in Rwanda, where beginning in 1991, the media deliberately encouraged Hutus to commit acts of violence against Tutsis. Similarly, in Cambodia, the Khmer Rouge's radio station called on listeners to "purify" the "masses of the people" of Cambodia for many years.

The concept of the crime of aggression, which was adopted at the first International Criminal Court Review Conference in June 2010, imposes criminal penalties on the "planning" and "preparation" of an aggressive act. This aligns the ICC Statute with the majority of national systems, in which consenting to commit a crime, taking part in the creation of a criminal plot, or helping to provide the prerequisites for its execution can all result in criminal culpability. In fact, while it is widely acknowledged at the national level that criminal responsibility results from these kinds of preparatory actions, there is no reason to argue differently at the global level when it comes to crimes with the scope and severity of atrocity crimes.

Expanding the liability for "planning" and "preparation" to include all atrocity crimes will greatly improve the ICC's preventive role, even though the current rules on attempt and incitement provide the ICC with a strong foundation for its prompt action. This is because Usually, atrocity crime preparation and planning involve senior authorities directly. Moreover,

this will comply with Luis Moreno-Ocampo's objective of concentrating on the "most responsible persons" and the gravity level set by the ICC.

The ICC Prosecutor is required to start a preliminary investigation if there are concrete indications of an attempt or encouragement to commit atrocity crimes in a referral letter or an individual communication. This analysis seeks to differentiate in between:

(i) circumstances that need an official inquiry; and

(ii) other circumstances that are superior handled in a different way.

Even while the Prosecutor cannot currently depend on coercive tactics and not all options for State Party participation are available, it is important to recognise that preliminary exams may be used as a tool to encourage national authorities. As demonstrated by multiple preliminary investigations pertaining to Palestine, Guinea, and Georgia, the Attorney may:

(i) dispatch teams to the pertinent States;

(ii) welcome national representatives of government officials, high court representatives, opinion leaders, and non-governmental organisations in The Hague;

(iii) offer advice on the steps that national action should be done to lessen the danger of atrocity crimes;

(iv) talk about a preventive plan with the UN and other relevant parties;

(v) share details accompanied by both domestic and foreign players; and

(vi) discuss in the media how the situation has developed and how cooperative the national authorities have been.

THE INTERNATIONAL CRIMINAL COURT'S PROMPT INTERVENTION WHEN ATROCITY CRIMES ARE UNDERWAY

The International Criminal Court (ICC) may also act promptly to stop atrocity crimes before they start. In these cases, the goal will be to put an end to ongoing atrocity crimes. Furthermore, giving up on future crimes won't absolve one from responsibility for those previously agreed. Consequently, the Prosecutor could only conclude preliminary exams and investigations based about admissibility or the interests of fairness.

Within this particular context, incentivizing national officials to halt continuing atrocity crimes is closely linked to supporting and enabling them to fulfil their obligations to investigate and prosecute prior atrocities (positive complementarity), and sharing the workload of deciding the offences with the ICC (cooperative complementarity), especially in situations where there are

significant capacity deficiencies. So, a crucial part of the ICC's prompt action is helping willing States to develop their legal frameworks and carry out domestic processes.

According to William Burke-White and Christopher Hall, the Attorney may use the procedures mentioned in the previous section to carry out this task during his initial investigations and exams. Specifically, the Prosecutor could teach national actors how to decide atrocity crimes and could help them set up efficient information management systems, victim and witness protection programmes, and other things. In addition, he has the ability to keep an eye on the progress of national procedures, offer feedback on them, and collaborate with other ICC entities to improve the overall effectiveness of preventive measures.

It is important to emphasise that, even with other stakeholders' international collaboration, national authorities in receptive States seem to strongly prefer receiving advice and direction directly from ICC personnel. Since the International Criminal Court (ICC) will be reviewing national authorities' attempts to adjudicate atrocity crimes, the ICC's counsel and guidance are deemed crucial to the success of these efforts. Because of this, the ICC has a significant potential to enhance good governance in States that are open to its influence and reinforce the rule of law through prompt intervention. Certain indications of this possibility are provided by the early analysis conducted in Colombia.

Not until May 2006, when the Peace and Justice Law, the focal point of the demobilisation process, was approved by the Constitutional Court, did investigations begin into those paramilitary members who had been demobilised in Colombia since 2003. Subsequently, the ICC the prosecutor released the results of his preliminary investigation, and he made two in-person trips to Colombia in October 2007 and August 2008.

Since then, the Colombian Supreme Court has emphasised how crucial it is to concentrate the Peace and Justice Law's inquiries into the pattern of atrocity crimes against civilians' populations as well as the composition, membership, and outside backing of the paramilitary groups that were used to carry out the crimes. The 16-page Protocol for the presenting of proof, released by the Bogota Peace and Justice Trial Chamber on August 23, 2010, completely reflects this. In addition, the Colombian Supreme Court has been in charge since the end of 2007. looking into and prosecuting nine people as well as thirty percent of the Colombian Parliament's members for alleged connections to paramilitary groups. Based on admissions by demobilised paramilitary leaders, these processes have resulted in eighteen convictions so far, the majority of which have been against people who belonged to political parties that supported the government of Colombia in 2007. These admissions additionally prompted inquiries into

several hundred public servants, municipal politicians, military personnel, and police officers in lesser courts.

Based on the prosecutor's initial investigation, it seems that have played a role in the current state of affairs in Colombia, as evidenced by the trips to the ICC in 2010 by the Attorney General of Colombia and a sizable team from the Colombian Supreme Court. Nevertheless, because of a number of additional influencing elements, including

(i) the requirements set authorised US military assistance by the US Congress, and favourable trade conditions for Colombia, and

(ii) the rulings Colombia's paramilitary violence case before the Inter-American Court of Human Rights, it is challenging to gauge how it affects the national authorities in Colombia. In this situation, more cooperation between the prompt intervention of the ICC and those other contributing variables will make the actions done in Colombia more successful by the global community in accordance with the idea of duty to protect.

CONCLUSION

The preventive mandate of the International Criminal Court (ICC) is a crucial tool for the international community to uphold the idea of having a duty to defend. Currently, the emphasis is on the ICC's attempts to promote broad prevention by removing impunity for previous horrors. However, the International Criminal Court has the potential to make an even bigger impact by intervening in time to prevent future atrocity crimes.

To fully realise this potential, the various ICC institutions must acknowledge the preventive function of the organisation and take prompt action. In order to supply the necessary materials and broaden criminal culpability for all atrocity preparation and planning for crimes, States Parties must also acknowledge this role. On the basis of this idea, improved cooperation between the ICC, the UN, and other parties involved holders will boost the timely intervention's preventative effect.

Ultimately, the question is whether the ICC continues to serve as one of many systems for accountability that a narrow mandate for broad prevention, or whether it properly understands its capacity to stop atrocity crimes, uphold the rule of law and enhance effective leadership by acting promptly.

REFERENCES

- Lee, Roy S., ed. *The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, Results.* The Hague: Kluwer Law International, 1999.
- *The Emerging Practice of the International Criminal Court* . Leiden: Martinus Nijhoff, 2009.
- *An Introduction to the International Criminal Court* . Cambridge: Cambridge University Press, 2004.
- United Nations Peacekeeping, *CAR Special Criminal Court (SCC) now fully operational* , 9 June 2021, Available at https://peacekeeping.un.org/en/car-special-criminal-court-scc-now-fully-operational
- "Not Just a War Crimes Court: The Penal Regime Established by the Rome Statute of the ICC." *Singapore Academy of Law Journal,* 321 (1998): 321-369.
- *Judging War Criminals: The Politics of International Justice* . London: Palgrave, Macmillan, 1999, 186-199.