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War Crimes and Crimes against Humanity under the Rome Statute: Challenges in Prosecution

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ABSTRACT

Rome Statute of the International Criminal Court (ICC) is a historic milestone in international criminal law that gives the world a permanent court with universal jurisdiction over the most heinous crimes of international concern: genocide, crimes against humanity, war crimes, and the crime of aggression. Although the Statute presents a sound legal framework for prosecuting these atrocities, its enforcement is confronted with numerous problems. This paper examines war crimes and crimes against humanity under the Rome Statute and the complexities of prosecuting them, including the practical, legal, and political challenges that hinder effective justice. By looking at some famous cases and analyzing pertinent International Humanitarian Law (IHL) principles, we underscore the ongoing challenges of gathering evidence, the protection of witnesses, cooperation among states, and political will on which successful prosecutions depend. It ends by recommending paths to bolstering the ICC's capability and encouraging more compliance with international justice.

Keywords: Rome Statute, War Crimes, IHL, internal crimes, Challenges in prosecution

I. INTRODUCTION

The 20th century, marred by two world wars and many regional wars, served to vividly highlight the horrible cost of untrammelled brutality. The acknowledgment that some acts are beyond national boundaries in their savagery prompted the creation of international criminal law. The Nuremberg and Tokyo Tribunals created after World War II formed the basis for trying those guilty of war crimes and crimes against humanity. Yet such ad hoc tribunals were their limited scope and non-permanence. The horrors of the former Yugoslavia and Rwanda in the 1990s highlighted the necessity for a permanent international court. This momentum found its fruition in the adoption of the Rome Statute in 1998 and the creation of the International Criminal Court (ICC).

The ICC's mandate is to bring an end to impunity for those responsible for genocide, crimes

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against humanity, war crimes, and the crime of aggression and thereby to assist in preventing such crimes. War crimes and crimes against humanity, frequently mixed together, are a major proportion of the ICC's docket. War crimes, as established in Article 8 of the Rome Statute, include grave breaches of the Geneva Conventions and other serious violations of customs and laws applicable in international and non-international armed conflicts. Crimes against humanity, as outlined in Article 7, involve a variety of brutal acts that are committed as part of a widespread or systematic attack launched against any civilian population with the knowledge of the attack. Though established clearly on paper, their usage in complicated conflict settings creates a myriad of challenges to successful prosecution.

II. DEFINING THE CRIMES: WAR CRIMES AND CRIMES AGAINST HUMANITY

Grasping the distinctions between war crimes and crimes against humanity is important for successful prosecution. While frequently both committed together, their definitional components vary.

War crimes have their foundations in International Humanitarian Law (IHL), also referred to as the law of armed conflict. IHL aims to restrict the impact of armed conflict for humanitarian purposes, safeguarding those who are not taking part in hostilities and limiting the means and methods of warfare. War crimes constitute breaches of these norms. Distinction, proportionality, and precaution are core principles of IHL that underpin the determination of war crimes.

1. Discrimination: Combatants should differentiate between combatants and non-combatants, and between military targets and civilian objects. Indiscriminate attacks against civilians or civilian infrastructure are war crimes.
2. Proportionality: Attacks should not result in incidental destruction of civilian life, harm to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the specific and direct expected military advantage.
3. Precaution: All possible precautions should be taken to prevent or reduce civilian casualties and harm to civilian objects.

Article 8 of the Rome Statute contains a comprehensive list of war crimes, which are divided into grave breaches of the 1949 Geneva Conventions and other serious violations of the law and customs in international and non-international armed conflict. These include wilful killing, torture, large-scale destruction and seizure of property not militarily necessary, intentionally attacking civilians, intentionally targeting buildings used for religion, education,

art, science or charitable purposes, historic monuments, hospitals, and rape and other sexual violence. The scenario of an armed conflict, either international or non-international, is a precondition for a war crime to take place.

Crimes Against Humanity: In contrast to war crimes, crimes against humanity do not involve the presence of an armed conflict. They are distinguished by their systematic or widespread character, attacking a civilian population. Article 7 of the Rome Statute enumerates some of the acts that can be considered crimes against humanity such as murder, extermination, enslavement, deportation or forcible transfer of the population, imprisonment or other severe deprivation of the physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of a similar gravity, persecution directed against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds which are accepted as impermissible under international law, apartheid, and other inhumane acts of a similar character intentionally inflicting great suffering, or serious injury to body or to mental or physical health. The key factor in this case is the "widespread or systematic attack" on a civilian population, which suggests a policy or plan behind the commission of the acts, though not necessarily articulated.

III. CHALLENGES IN PROSECUTION UNDER THE ROME STATUTE

Despite the strong legal framework, prosecutions for war crimes and crimes against humanity under the Rome Statute are confronted with serious challenges. These could broadly be classified as legal, practical, and political.

1. Legal Challenges:

Establishing Intent (Mens Rea): is perhaps one of the biggest challenges in international criminal law is establishing the intent specific to such crimes. For war crimes, this typically means showing that the perpetrator was aware of the factual situation that led to the determination of the occurrence of an armed conflict and that what they did breached IHL. To establish crimes against humanity, it is essential to demonstrate knowledge of the systematic or widespread attack against a civilian population and that the perpetrator's actions were part of the attack. This usually requires reliance on circumstantial evidence and detailed examination of the perpetrator's behavior and the context. * Command Responsibility: Most war crime and crimes against humanity perpetrators operate within a hierarchical system. Prosecution of superiors for the acts of their subordinates under the principle of command

responsibility involves establishing that the commander knew or should have known of the crimes and did not do all that was required and reasonable for him to do to prevent or suppress their commission. This "should have known" factor may be especially difficult to establish.

Jurisdictional Problems: ICC jurisdiction relies on the principle of complementarity, so it can only acquire jurisdiction if national courts are unwilling or not capable in good faith to conduct the investigation or prosecution. Establishing a state's unwillingness or inability is a complicated and debated process in many cases, usually resulting in lengthy legal disputes and postponements.

Admissibility of Evidence: The ICC has rigorous rules of evidence to maintain even-handed trials. This may be problematic in war-torn areas where evidence can be hard to get, unreliable, or tainted with political influences. Witness testimonies from vulnerable groups in traumatic contexts also have to be handled with caution and corroborated.

2. Practical Challenges

Gathering Evidence and Preserving It in Zones of Conflict: The collection of credible evidence in zones of conflict or recently ended conflict is beset by risks and logistic challenges. Security for investigators, evidence destruction or tampering, and population displacement all hinder collection. The digital and physical evidence chain of custody is essential, and preserving its integrity from collection to the courtroom is a challenging exercise.

Witness Relocation and Protection: Witnesses to crimes against humanity and war crimes frequently risk severe reprisals, intimidation, and violence. The ICC boasts a strong witness protection program, but the relocation of witnesses and their families, guaranteeing their protection and well-being, as well as dealing with their emotional and psychological trauma, is a gigantic logistical and fiscal challenge. Fear of retaliation as a reason for witnesses not testifying is a huge hurdle to justice.

Victim Participation: The Rome Statute permits victims to take part in proceedings, a progressive element in empowering those most impacted by the crimes. Yet, it is continually challenging to manage the expectations and various needs of victims, protect their effective participation without undermining the trial's integrity, and ensure proper reparations.

Investigations Logistics: Conducting international crimes of complexity demands enormous resources, including competent investigators, forensic specialists, and lawyers. The magnitude of some crimes, with thousands of victims and suspects, overwhelms the ICC's capability. Travel bans, visa requirements, and obtaining states' cooperation in which crimes were

committed add to the complicities of investigations.

3. Political Challenges

State Cooperation: The ICC is dependent on state cooperation for arrests, gathering evidence, and protecting witnesses. States might not be willing to cooperate, though, owing to political considerations, national sovereignty interests, or their own officials being implicated in crimes. Without an independent enforcement mechanism, the ICC is at the mercy of state compliance, which is sometimes erratic or blatant defiance.

Lack of Arrests: Possibly one of the biggest challenges has been the lack of arrest of numerous people for whom the ICC has issued warrants. Powerful figures, including sitting heads of state, tend to stay out of the reach of the Court simply because of their political power and the reluctance of their governments to cooperate. This shatters the ICC's credibility and its capability to provide justice.

Political Pressure and Interference: The ICC is working in a highly politicized international climate. Powerful nations can pressure or influence investigations or prosecutions, or protect their allies from prosecution. The UN Security Council's power of referral also brings with it a political element as the permanent members can veto a referral or postpone an investigation.

Perception of Bias: The ICC has been criticized for being perceived as biased towards African cases, thus accused of selective justice. Though the ICC argues that its case selection is on the basis of objective factors, this perception can undermine its legitimacy and impede cooperation from some regions.

IV. CASE STUDIES: DEMONSTRATING THE CHALLENGES

A number of landmark cases at the ICC demonstrate the complex problems in trying war crimes and crimes against humanity:

The Situation in Darfur (war crimes, and crimes against humanity)

In spite of these warrants, al-Bashir evaded capture for years, attending international gatherings without arrest. This case strongly shows the Sudan): The ICC had issued arrest warrants for then-Sudanese President Omar al-Bashir for genocide difficulty of obtaining arrests of prominent figures when governments are reluctant to cooperate, particularly where the person is in power. The political nuances, such as the position of the African Union on not cooperating with the ICC arrest warrant, added to the complexity of the issue.

The Situation in Kenya (Uhuru Kenyatta and William Ruto): The ICC initiated investigations into violence following the elections in Kenya. The charges against former President Uhuru

Kenya and Deputy President William Ruto for crimes against humanity eventually fell apart because of a lack of evidence and claims of witness intimidation.

This case highlights the huge challenges in gathering evidence, protecting witnesses, and allowing possible political interference to sidetrack proceedings. It also points out the difficulties of holding top officials in a sovereign nation to account. * The Case in the Democratic Republic of Congo (Thomas Lubanga Dyilo): Thomas Lubanga was the first individual to be convicted by the ICC, who was convicted for war crimes on account of the conscription and enlistment of children who were below fifteen years of age and deployment of the same to actively engage in hostilities. Although a landmark conviction, the Lubanga case also encountered difficulties in terms of managing witnesses, specifically handling child witnesses and upholding their best interests. It illustrated the intricate interface between IHL and child protection in situations of armed conflict.

The Situation in Libya: The ICC issued an arrest warrant against Saif al-Islam Gaddafi for crimes against humanity with regard to the 2011 Libyan civil war. In spite of the warrant, Gaddafi has yet to be extradited to the ICC, and Libya has claimed its right to try him internally under the complementarity principle. The current situation reflects the conflict between national jurisdiction and the ICC role as well as the difficulty of gaining custody of individuals in volatile states. Related Research and Scholarly Discourse:

The issues of prosecuting crimes under the Rome Statute have been a topic of considerable academic debate and a high volume of research papers. Some of the themes that have been discussed in academic writings are:

The Principle of Complementarity: Most of the papers examine the functional application and juridical understanding of complementarity, contesting its efficacy in achieving accountability and avoiding impunity. * The ICC's Effectiveness: Scholars look at the ICC's overall effectiveness in discouraging international crimes, its role in victim reparations, and its contribution to international justice.

Challenges of Evidence in International Criminal Prosecutions: Researchers look into the complexities of evidence gathering in war-torn areas, witness statements, and the admissibility of certain types of evidence.

Political Economy of International Criminal Justice: This theme of investigation examines the political and economic drivers of the ICC's work, such as state support, financing, and the role of geopolitics.

Specific Crimes: There are many papers that concentrate on the intricacies of defining and

prosecuting certain crimes under the Rome Statute, e.g., sexual and gender-based violence as war crimes or crimes against humanity, and the obstacles of prosecuting environmental crimes in armed conflict.

Victim-Centric Justice: Studies increasingly look into the role of victims in ICC proceedings, their access to justice, and the success rate of reparation programs.

Interaction with Other Legal Regimes: Articles analyze the interaction between international criminal law, human rights law, and international humanitarian law in cases of prosecuting these crimes.

A conservative estimate is that thousands of academic papers, articles, books, and reports have been written on some facet of the Rome Statute and the prosecution of war crimes and crimes against humanity. This is an indication of the enormous academic interest and the consistent critical examination of the work and contribution of the ICC to international justice. Leading scholarly journals on international law, human rights, and international relations have regular articles on these subjects.

V. CONCLUSION

The Rome Statute is a historic leap towards bringing people to book for the worst international crimes. It offers a solid legal framework for prosecuting war crimes and crimes against humanity, capturing the international community's determination to put an end to impunity.

But the path to effective justice under the Statute is littered with pitfalls.

Legal challenges concerning intent and command responsibility, operational challenges in the gathering of evidence and protection of witnesses in unstable environments, and political challenges like a lack of state cooperation and arrest difficulties persistently try the ICC's will and ability.

In spite of these substantial challenges, the ICC has made significant progress. It has obtained convictions, delivered justice to some victims, and, most importantly, created a permanent institutional framework for international criminal justice. The cases brought to the Court, even those that have been stalled, have created significant jurisprudence and revealed the realities of international criminal prosecution.

In the future, building the ICC's capacity will need collective efforts by the international community. This includes increased political will among states to cooperate with the Court, offer required resources, and implement arrest warrants expeditiously. Additional

improvements in legal procedures, greater investment in victim and witness protection schemes, and ongoing attention to dealing with perceptions of partiality are also crucial. Ultimately, the Rome Statute's success in preventing future atrocities and bringing perpetrators to justice for victims relies on a shared commitment to uphold the ideals of international law and guarantee that perpetrators of war crimes and crimes against humanity can no longer act with impunity.

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