Strengthening Enforcement of International Criminal Law

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Introduction

The regulation of control of society by means of the criminal law is more effectively achieved by ensuring that the criminal law is administered fairly and enforced evenly across the community. Respect for the criminal law diminishes in circumstances where the law is rigorously applied to one part of the community but not to another. In democratic societies, there would be a public outcry if special privileges were extended to one group in the State but not to the rest of the community.

It is difficult to imagine a situation where very serious crimes such as murder, rape and torture committed on a regular basis would be tolerated by the government. This is especially so if the government allowed the perpetrators of these crimes to go unpunished. Why then has the breach of international criminal laws which prohibit murder, rape and torture when committed by the State or persons in authority, been treated so differently by the community?

In this paper I will discuss the poor performance of States when it comes to the enforcement of international criminal law. I will illustrate how States have failed to uphold this important area of the criminal law. I argue that the permanent International Criminal Court (ICC) is a weak prosecutorial instrument and easily circumvented by States determined to frustrate its efforts. I then argue the need for international civil society to support the ICC in order to allow it to perform its prosecutorial role. I propose a means whereby international civil society might achieve this objective by using a modified international people’s court.

Why the Standard of Enforcement of International Criminal Law Is Different

At the heart of this issue is State sovereignty. International criminal law poses a threat to the sovereign authority of the State. States will not tolerate interference in how they conduct their internal affairs. Similarly other States are reluctant to interfere in the affairs of another State, lest they themselves be interfered with. This practice of States is not new. It goes back at least as far as the 1648 Treaty of Westphalia.¹

The history of nations is replete with examples of the implementation of this practice. The infamous ‘Bloody Sunday Massacre’ of unarmed civilians at Derry

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¹ I.A. Shearer, Starke’s International Law (Butterworths, 11th Ed, 1994) p 11.
in Northern Ireland in 1972 by the British Army was viewed by the international community as an ‘internal matter’ not requiring an international response. Nor was it viewed by the majority of the British public as a criminal offence. However, if this massacre was carried out without the sanction of the sovereign State there is no question that the criminal law would have been rigorously applied. Similarly, if the massacre had occurred during an international armed conflict, it would have undoubtedly been labelled a ‘war crime’.

In the Tadic interlocutory appeal decision the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, (ICTY) described the different standards in the application and enforcement of national and international criminal law as being ‘sovereignty oriented’. The Tribunal described this double standard as being ‘based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands’. However their Honours noted that since the 1930s there has been a gradual change in attitude and that States have now become more and more inclined to get involved in human rights abuses in other countries. The Court offered a number of explanations for this namely (i) the greater frequency of civil wars; (2) internal armed conflicts have become more and more cruel and protracted; (3) the large-scale nature of civil strife and the increasing inter-dependence of States; (4) the development of human rights doctrines, especially those contained in conventions such as the Universal Declaration of Human Rights of 1948 (one could add the International Covenant on Civil and Political Rights); a fifth category might also be the greater enforcement of international criminal law since the 1930s.

Apart from some notable moments in history such as at the Nuremberg and Tokyo trials and more recently The Hague and Arusha trials, international criminal law has for the most part been enforced by States using their domestic courts and or tribunals. International criminal law is not however the creation of any one particular State. It is the product of the international community of States. International crimes are those crimes which are so serious that the international community of States have set aside the traditional respect for the sovereign rights of individual States in favour of the broader interests of preserving humanity itself. In view of this, it is perhaps not surprising that individual States have not been very active in enforcing international criminal law.

This lack of enforcement activity is not the result of jurisdictional constraints because universal jurisdiction, conferred by both international conventions and customary law, has permitted individual States to prosecute these international crimes.

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3 Ibid par 96.
4 Above (Tadic Appeal) par 96.
5 Above (Tadic Appeal) par 97- 98.
6 Above (Tadic Appeal) par 98.