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GLOBALISATION, TRANSNATIONAL LEGAL ORDER AND THEIR IMPACT ON CRIMINAL JUSTICE

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ABSTRACT

This paper explores the impact of globalization and the emergence of a transnational legal order on the administration of criminal justice, particularly focusing on the challenges and opportunities for states in a more interconnected world.The paper begins with a powerful quote from Justice Robert H. Jackson highlighting the need for an international framework to hold individuals accountable for heinous crimes and atrocities, even those committed by powerful figures.It then defines the concepts of globalization and transnational legal order and examines their influence on the traditional notion of state sovereignty in matters of criminal justice.The paper discusses role of NGOs in development of the international criminal justice system, including the establishment of the International Criminal Court (ICC), as a response to the limitations of individual state jurisdictions in addressing crimes with global implications.It analyses the potential conflicts between national criminal justice systems and the emerging transnational legal order, particularly regarding issues of jurisdiction, extradition, and the principle of complementarity.The paper explores various legal doctrines and international instruments used to navigate these complexities, such as the nationality principle, protection principle, and universalityprinciple. The paper concludes thatdespite the challenges, the development of a transnational legal order presents opportunities for improved collaboration and cooperation among states in tackling transnational crime and upholding human rights. It emphasizes the role of the ICC in complementing national justice systems and ensuring accountability for the most serious crimes.

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BACKGROUND

"Common sense demands of mankind that law should not stop with punishment of petty crimes of little people. It must also reach people who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched. Their personal capacity of evil is forever past. Merely as individuals, their fate is of little consequence to the world. What makes this inquest significant is that these prisoners represent sinister influences that will lurk in the world long after their bodies have returned to dust. They are living symbols of arrogance and cruelty of power, of racial hatreds, of terrorism and of violence. They are symbols of fierce nationalisms and militarism, of intrigue and war making which has embroiled Europe, generations after generations, crushing its manhood, destroying its homes and impoverishing its life. They have so identified themselves with the philosophies they conceived and the forces they directed that any tenderness to them is a victory and encouragement to all evil that is attached to their names… the real complaining party is civilization".

-Justice Robert H. Jackson[2]

A crime is supposed to be a wrong against the whole society. The offender is answerable not just to the victim, but also to the whole community through its criminal courts as the victim is considered a fellow citizen by the community. The trial of an offence is between the whole society, that is, the state or the people on one hand and the offender on the other hand. It's the prerogative of a State to prosecute a criminal who has wronged its citizens. The principle of state sovereignty says that it's an internal matter of a state and other states are not entitled to intervene. But in this era of globalisation, not only states but also the citizens of the states are connected to each other and hence the criminal acts of the national of a state also may affect the nationals of another state, in which case it's not fair to call it an internal matter of any particular state. Especially in the case of crimes against humanity, etc, where the whole international community is affected, and is interested in preventing future occurrences, there has to be comity and co-operation among nations and for a successful endeavour at dealing with the crimes at global level, there have to be legal framework and structures at the global level wherein the whole international community participates.

[2] Chief American Prosecutor in his opening statement for the Prosecution, at the Nuremberg Trials

REVIEW OF LITERATURE

The researcher will examine the encyclopaedias, books and scholarly articles to elucidate the meaning of globalisation and the concept of transnational legal order and to analyse these concepts in light of criminal justice. The researcher will examine the literature available on the theories of globalisation and the evolution of transnational legal order. The researcher will analyse the international statutes and other literature available on the international criminal justice system to analyse the changes occurred in the criminal justice system in wake of globalisation and transnational legal order.

RESEARCH PROBLEM

The trial of an offence is between the offender and the whole society, that is, the state or the people on one hand and the offender on the other hand. But, generally, one State cannot exercise its criminal jurisdiction over another, like it can do in civil cases. This is because criminal laws are coercive in nature and crimes are connected to the moral structure and social values of the concerned State. Due to this reason, foreign criminal jurisdiction is perceived as a threat to a state's sovereignty. But globalisation has made it possible for organised crime groups to form global alliances. Therefore, what was formerly a local issue for some nations has now turned into a worldwide issue. It is to be seen whether states are justified in asserting sovereignty and exclusive jurisdiction over a matter even when it affects the whole international community just because the offender is their national or just because the offence was committed ontheir territory.

RESEARCH QUESTIONS

The researcher will endeavor to address the following questions in this paper:

1. What is the concept of globalisation and transnational legal order?
2. How has the international criminal justice system changed since the 20th century?
3. What have been the developments in the national criminal justice systems to accommodate in the transnational legal order?
4. How does the international criminal justice system affect the national criminal justice systems?

RESEARCH OBJECTIVES

The researcher will proceed in this paper with the following objectives:

1. To elucidate the concept of globalisation and transnational legal order.
2. To examine how the international criminal justice system has changed since the 20th century.
3. To trace the developments in the national criminal justice systems to accommodate in the transnational legal order.
4. To examine how the international criminal justice system affect the national criminal justice systems.

RESEARCH METHODOLOGY

The researcher will adopt the doctrinal method of research for this paper. The researcher will adopt evolutive, explicative and identificatory research process. The researcher will trace the changes in the international criminal justice system since the 20th century, especially after the second World War. The researcher will also examine the institutional developments in the international criminal justice system and their effects on national criminal justice systems vis-à-vis State sovereignty.

LIMITATIONS OF STUDY

The researcher will examine the various theories and definitions of globalisation and transnational legal order and decipher the difference between the two but will not go into the aspects of globalisation, i.e., social, technological, economical, etc., except the legal aspect. The researcher will examine the international criminal justice system vis-à-vis state sovereignty and the evolution of the system vis-à-vis globalisation but will not go into the details of the provisions of international statutes. Political issues involved in the international criminal justice system are also beyond the scope of this study.

CHAPTER 1: DEFINING GLOBALISATION AND TRANSNATIONAL LEGAL ORDER:

The term 'globalisation' seems to be spatial in nature. Heba Shams[3] argues that globalisation is about change but it's not always about spatial or geographical change alone but also about social change. The process of globalisation is also manifest in the collective consciousness of the world as whole. The complex and wide process of social transformation

[3] Heba Shams, *Law in the Context of "Globalisation": A Framework of Analysis*, 35, THE INT. LAWYER, 1589, 1595 (2001)

ultimately leads to more revolutionary systemic changes. Both, the rise of non-state entities including businesses, criminal organisations, civil groups, and international organisations and the comparative weakening of state authority are crucial stages in the process of globalisation. Similarly, trans-nationalization is a situation in which non-state players, such as businesses, civic groups, or people, are engaging in cross-border connections and states are no longer the sole actors. Trans-nationalisation acts as a transmission belt and the happenings in one state start affecting another.[4]

As per Martin Wight[5], there are three theories of international relations: realism, rationalism and revolutionism. As per realism, an international society cannot exist as there cannot be universality of any reason or idea or ethic. So, there cannot be a universal concept of 'crime'. Moreover, sovereignty ensures the freedom of States and hence the State leaders are morally responsible to its nationals only. Therefore, on a global scale, the state governs its own affairs and relies on the virtue of the statesman to ensure its existence. This theory conceals the States' desire to have unrestricted powers. It argues that the international rules don't have the qualities of 'law' as they are merely an outcome of the whims of a few 'powerful States'. The second theory is the rationalism theory according to which, an international community is necessary to exist and the States' ability to develop that community without losing their own identity depends on 'Law'. Sovereign equality and non-intervention are embedded in the customary international law and state practices. Since individuals surrender their rights to the State, it's the State's responsibility to fulfil its duty of humanity towards them. Therefore, the obligations of a State towards another, cannot be enforced as a 'right' but the State can merely be requested to fulfil those obligations. But if States come together and agree to be bound by the international laws, they can be obliged to fulfil the said obligations towards one another as the social contract will then be formed through this agreement between States.[6]

CHAPTER 2: ADMINISTRATION OF CRIMINAL JUSTICE IN THE GLOBALISED WORLD:

[4] *Ibid. at 1599*

[5] Quoted by Jason Ralph in *International society, the International Criminal Court and American foreign policy,* 31, REV. INT. STUD. 27, 33, (2005)

[6] Jason Ralph, *International society, the International Criminal Court and American foreign policy,* 31, REV. INT. STUD. 27, 31, (2005)

Crimes are public wrongs as they harm the whole community. They endanger social order and create social instability. The offender is answerable not just to the victim, but also to the whole community through its criminal courts as the victim is considered a fellow citizen by the community. The trial of an offence is between the whole society, that is, the state or the people on one hand and the offender on the other hand.[7] But, generally, one State cannot exercise its criminal jurisdiction over another, like it can do in civil cases. This is because criminal laws are coercive in nature and crimes are connected to the moral structure and social values of the concerned State. Due to this reason, foreign criminal jurisdiction is perceived as a threat to a state's sovereignty.[8]

After the end of WWII, Human Rights issues gained significance at international level. National sovereignty, until then, was always placed above human rights concerns. 'Sovereignty' was translated into 'non-intervention', i.e., one state should not interfere into the matters of another. But after the end of WWII, human rights became the concern of the whole international community and did not remain merely an issue of domestic jurisdiction of sovereign States. The Holocaust shocked the entire human race and accelerated the efforts of protecting human rights at the global level. The international community started holding the states accountable for the abuse of internationally recognised human rights. Additionally, liability began to be imposed on individuals too in case of some of the gravest violations of human rights, and war crimes, as can be seen in the prosecutions after WWII in the various tribunals and as per the Geneva Convention on Humanitarian Law, the Genocide Convention, etc. Similarly the 9/11 attacks in the United States and the numerous responses taken in the years that followed to stop the spread of random and indiscriminate acts of terrorism once again underlined the necessity for cooperative and multilateral ways to deal with world concerns.[9] In the current international legal regime, persons are the right holders and States are responsible to them but in case of heinous criminal acts, the individuals are responsible to the whole international community as per the international Criminal Laws.

[7] 'Legal Punishment', section 8, Stanford Encyclopaedia of Philosophy, first published Tue Jan 2, 2001; substantive revision Fri Dec 10, 2021
[8] Supra note 2 at 1617
[9] Steve Freeland, Educating Lawyers for Transnational Challenges—The Globalization of Legal Regulation, 55, J. LEGAL EDUC., 500, 500 (2005)

The necessity for a permanent international criminal court, according to Hannah Arendt, as quoted by Patrick Hayden[10], was fundamental. In the trial in 1961 of Adolf Eichmann, for the Nazi genocide of the Jews, in Jerusalem was a tragic example of how national interests may sometimes trump calls for international justice. According to Arendt's perspective, the Eichmann trial was defective for a variety of reasons, but chief among them was the Israeli government's rejection of the idea of setting up an international criminal tribunal and assertion that it had the authority and jurisdiction to try Eichmann. According to Arendt, the Israeli court ultimately failed because it only represented "one country" and incorrectly saw Eichmann's crimes as being essentially against the Jews rather than against humanity. The expansion of international humanitarian and human rights principles has corresponded with the understanding that interfering in a state's domestic affairs is acceptable to stop or lessen widespread human rights abuses and suffering. In short, a model of humanitarian aid motivated by individuals' concerns for human rights protection and security is replacing the conventional claims to sovereignty and non-intervention on the side of governments in international affairs. In addition to military intervention, food distribution, and medical help, such humanitarian support may also involve post-conflict societal rebuilding, police protection, and the apprehension and prosecution of offenders.[11]

- **RISE OF THE INTERNATIONAL CRIMINAL COURT AND ITS JURISDICTION:**

The number of NGOs addressing global human rights concerns increased since the fall of the Soviet Union, and their fields of focus expanded. Transnational and domestic NGOs have contributed immensely in the birth of the ICC. The Coalition for an International Criminal Court (CICC), an NGO, was established as a "broad-based network of NGOs and international law specialists" in 1995to promote the establishment of an effective, just and independent International Criminal Court.[12] During the preparatory committee sessions of the UN General Assembly for the establishment of the ICC, the NGOs attended them and provided requisite inputs. The ICC was established by the Rome Statute in 1998 and the sittings began in 2002.

[10] Patric Hayden, *Cosmopolitanism and the Need for Transnational Criminal Justice: The Case of the International Criminal Court*, THEORIA: A JOURNAL OF SOCIAL AND POLITICAL THEORY, 69, 69 (2004)
[11] *Ibid.*
[12] Cenap Çakmak, *The International Criminal Court in World Politics,* 23, INT. J. WORLD PEACE, 3, 25 (2006)

Before the establishment of the ICC, the States and individuals were prosecuted for international crimes and crimes against humanity by *ad hoc* international courts, set up by the United Nations security Council, separately for prosecution of each offence. For example, the International Criminal Tribunal for Rwanda, established in 1994 for the trials of the Rwandan genocide, and the International Criminal Tribunal for the former Yugoslavia, in 1993 for trial of crimes committed by military forces during the Wars. The UN General Assembly had asked the International Law Commission to prepare a draft for the establishment of an International Criminal Court (ICC) after the WWII only but it could not become a reality due to the cold war. Finally, the draft was submitted by the commission in 1994. Several conferences were held by the UN as an effort to form a treaty that would act as the statute of the ICC. Finally, in the conference of Rome, in 1998, the Rome Statute of ICC was adopted.

The International Criminal Court ("ICC") was established only in 1998 by the Rome Statute and its sittings began only in 2002, until then, there was no international mechanism to deal with the perpetrators of heinous crimes at the international level. States were hesitant in discussing up until 1998 for fear of attack on sovereignty.[13] It was one of the most significant steps toward guaranteeing the globalization of justice. The Rome Statute was required to be signed by at least 60 States for the ICC to have come into existence and the same was obtained in 4 years.

The ICC's jurisdiction can be invoked by the UNSC by a referring a case to it[14], or by any State Party by reporting a case to the Court[15], and also by the independent prosecutor by launching an investigation into the case if the chief prosecutor believes that the national authorities of the concerned State resist, are unwilling or incapable to adequately address them.[16]

Rome Statute defines 'Core Crimes' to include genocide, crimes against humanity and war crimes[17]. The definition of 'core crime' in the Rome Statute along with the provisions like an independents Prosecutor with the authority to investigate into a crime and the

[13]*Ibid. at 3-6*
[14]The UN Charter, Ch. VIIandThe Rome Statute of International Criminal CourtArt. 15*ter*
[15]The Rome Statute of International Criminal Court Art. 14
[16]The Rome Statute of International Criminal Court Art. 15
[17]The Rome Statute of International Criminal Court Art. 5

automatic jurisdiction of the ICC, legally aid in creating a global society that goes beyond the society of nation states.[18]

The ICC can transcend the domestic justice systems in order to pursue justice for victims of heinous human rights abuses. These victims might not otherwise have a remedy for the injustices they have suffered. Prior to the Court, international criminal justice depended on whether the states would uphold their duty towards humanity or not. States were required to extradite or punish persons accused of committing a core crime under the laws and norms of international society. If that failed, the society of nations might use the UN Security Council to establish international tribunals that would take over in cases where governments were either unable or unwilling to carry out their responsibilities. Justice was subject to the issue of "selectivity," depending on the decisions of the Security Council, in particular the permanent members. The establishment of a permanent court that is independent of the society of states was strongly encouraged. The formation of the ICC allows for the prosecution of criminals with the least amount of state participation. But the Court, though, can theoretically transcend the international order and the society of nations, in practise it will continue to be reliant on them for funding and the actual detention and incarceration of people. Even if the prosecutor can pursue a case using information from NGOs, it's probable that he'll need state intelligence to get a conviction.[19]

CHAPTER 3: EFFECT OF GLOBALISATION AND TRANSNATIONAL LEGAL ORDER ON THE NATIONAL LEGAL SYSTEMS

Globalisation has made it possible for organised crime groups to form global alliances. Therefore, what was formerly a local issue for some nations has now turned into a worldwide issue. According to research on organised crime, criminal organisations are forming significant transnational alliances with organisations that are similar to their own in other nations and engaging into informal agreements centred on shared goals. According to others, this has led to the globalisation of black markets for illicit goods including narcotics, weapons, and immigrants. A state may not have any form of jurisdiction over the crimes committed in another state but affecting its interests and values. Even when the affected State’s laws apply to the offence, it may lack enforcement authority due to the offender's

[18] Supra note 5 at 27
[19] *ibid.*

presence, the offender's assets, or even the documentary evidence's location being beyond its borders.[20]Without the establishment of a 'nationality principle' or 'impact doctrine' or 'universality principle', states would not have been able to prosecute offenders of international or global crimes.

Despite the challenges of threats to sovereignty, jurisdictional conflicts, cultural conflicts, the transnational legal order has impacted the national legal systems in a positive way and prosecution of offenders of international crimes has become easier than before. Some illustrations of the same are as follows:

- **INCREASED COOPERATION IN INVESTIGATION AMONGST STATES THROUGH ESTABLISHMENT OF THE INTERPOL:**

The INTERPOL (the International Criminal Police Organization) is an inter-governmental organization with 196 member countries. It focuses on terrorism, drug trafficking, crimes against humanity, war crimes, corruption, crimes against children, environmental crimes, cybercrimes, etc. It facilitates cooperation and collaboration by enabling the police agencies of its member countries to share, disseminate and access information which not only makes it easier to prosecute criminals but also makes it possible to prevent potential commission of crimes. The organisation has National Central Bureaus (NCBs) in each member state which act as mini-INTERPOL offices. The national police agencies interact with their respective NCBs and all NCBs have access to the INTERPOL database. All member countries are connected through the INTERPOL communication system called the I-24/7[21].India is also a member state.

- **EXTRA-TERRITORIAL JURISDICTION OF DOMESTIC LAWS:**

The domestic laws of a state may have extra territorial application based on the Active Nationality Principle and the Protection Principle of jurisdiction.[22]The nationality concept, though historically considered as the foundation for criminal jurisdiction, broadens the reach of state authority beyond its borders and serves as a useful instrument for filling the governance gap brought on by socio-economic mobility. This concept states that a state's residents are subject to its laws and ordinances wherever they may be. This principle's

[20] Supra note 2 at 1619
[21]What is INTERPOL, http://www.interpol.int(Last visited Jan. 09, 2024)
[22]DR. H.O. AGARWAL, INTERNATIONAL LAW & HUMAN RIGHTS 230, 231 (72nd ed. 2019)

widespread popularity stems from the fact that it is based on the fundamental idea of sovereignty. According to this concept, every person who violates a state's laws is subject to prosecution, regardless of where the crime takes place.[23] Another jurisdictional theory known as the protection principle has also been used to establish extraterritorial jurisdiction. This concept states that a state has jurisdiction over a crime even if it doesn't entirely or partially take place there or cause any physical harm there, as long as it poses a danger to the security, integrity, or sovereignty of that state. Terrorism, which is intended against a state's interests outside of its borders, and currency fraud are typical instances of such crimes. The state in which the alleged offence is committed, may not be interested in prosecuting an offence against another state, which is the justification for expanding the jurisdiction in such situations.[24]

- **LAWS OF EXTRADITION:**

The basis of the Universality Principle is that some offences are so destructive of the international legal order and are contrary to the interests of the international community as a whole that they are treated as international crimes.Such offences include piracy, slavery, terrorism, genocide, crimes against humanity, drug trafficking, hijacking and sabotage of aircraft, torture and war crimes, etc. In such cases, as a matter of international public policy, jurisdiction of a state exists irrespective of the place where the offence is committed or the nationality of the offender.[25]Regarding such offences, international law imposes upon any nation on whose territory the accused may be found not only the right to prosecute but also the obligation to do so or, alternatively, to extradite the accused to another nation ready to carry out this obligation. The universality principle is not applicable in case of all offences.[26]

National laws related to extradition have been influenced by international treaties and agreements, making it easier to surrender individuals accused of crimes with transnational implications.Existence of a treaty for extradition between the territorial state and the requesting state is essential for extradition, though in exceptional cases an offender may be extradited on the basis of reciprocity. Some states impose absolute condition of existence of

[23]Supra note 2 at 1624
[24]*Ibid.*
[25]DR. H.O. AGARWAL, INTERNATIONAL LAW & HUMAN RIGHTS 233 (72nd ed. 2019)
[26]*Ibid.*

such a treaty which can be seen as an obstacle. The UNGA adopted a Model Treaty on Extradition in 1990 to assist the states interested in entering bilateral extradition treaties.[27]

- **JURISDICTION OF STATES IN THE ROME STATUTE OF ICC:**

As per Article 12 of the Rome Statute, a state party may refer a crime committed on its territory, to the ICC. But as per Article 13, the Prosecutor may *suo moto* initiate investigation too which may be regarded as an inference.It is sometimes claimed that the Rome Statute grants the Prosecutor a broad discretion in the legal actions against accused offenders of the crimes it addresses. It is said that because of how large this position is, national sovereignty is seriously threatened. But the Prosecutor's powers are not arbitrary; he has to obtain sanction from the Majority of the Pre-Trial Chamber comprising of three judges. In the context of stakes involved, this still is a vast authority in the hands of the Prosecutor. But, since all this has the backing of the Rome Statute, it can be said that the States have themselves conferred upon the Prosecutor, such an authority to deal with future crimes.[28] The Rome Statute establishes a system of international justice that supports national jurisdictions, far from overturning either the state system or global society. The court will only exercise its jurisdiction if a state refuses or is unable to fulfil its duty to the human race[29]. In reality, it is asserted that the Court's greatest significant impact will be to force governments to uphold their duties rather than risk the Court interfering with their internal affairs.[30]

- **EXAMPLES FROM INDIAN LAWS:**

1. The Code of Criminal Procedure, 1973 holds provisions for reciprocal arrangements with contracting states under Chapter VIIA. The provisions include provisions for forfeiture of property, transfer of persons. The Code also holds provisions on fairtrial, presumption of innocence, right to legal representation[31], and fair procedures during investigation and trial[32]which reflect an overarching effort to align with international standards of fair trial. Apart from these, the provisions for protection against torture in

[27]Supra Note 24
[28] Supra note 11 at 18
[29]Rome Statute of International Criminal Court Art. 17
[30] Supra note 5 at 28
[31] The Code of Criminal Procedure, 1973,§ 303, 304, No. 2, Acts of Parliament, 1974 (India).
[32] The Code of Criminal Procedure, 1973,§ 316, No. 2, Acts of Parliament, 1974 (India).

custody and protection against illegal detention[33] and victim compensation is also notable.[34]

2. The Information Technology Act, 2000 with corresponding amendments in the Indian Evidence Act, 1872[35] addresses the issues of cybercrimes.

CONCLUSION

Sovereignty is an essential aspect of a State. Every state has the autonomy to deal with its affairs without intervention of others. But in the globalised world, States are connected to each other through technology, trade, and many other elements like environment, law and intellectual property rights etc. concern many states at the same times. In some cases, all states have a common interest in a subject, like environment protection, terrorism, human rights, etc, and in some cases international relations between States are affected by the actions of one State, for example in case of environment protection, intellectual property rights, etc. Any state cannot deal with the challenges of today's world alone. To deal with the issues of common interest, especially in criminal matters, there is an international or global criminal law regime which has to fulfil its purpose of punishing and preventing crimes without unduly interfering with the autonomy of individual states. For this, the UN has established the International Criminal Court, and the regulatory laws like the Geneva Convention, etc. although the establishment of the ICC should not be seen as the end of history. It can be viewed as a significant advancement or perhaps the beginning of the development of international criminal law, and of the fight to put an end to the impunity for the worst crimes against humanity.[36] Apart from this, international laws of extradition, etc. also regulate criminal justice administration in today's transnational legal order.

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[34] The Code of Criminal Procedure, 1973 § 357A, No. 2, Acts of Parliament, 1974 (India).
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