

# **Screening Disarmament through International Law on the procession of Restorative Justice in the Regime of United Nations**

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## **Introduction:**

War conflict in between neighboring states is common phenomena now a day. Present paper basically deals with the burning international issues of war crimes and misuse of nuclear weapons during war conflicts. The study started with few basic inquiries. Does international law have any provision for disarmament? What exactly the Criminal responsibility of State for illegal use of weapon of mass destruction (Hereinafter WMD) and other explosions? Is there any solution to the burning problem of proliferation etc.?

## **Research Methodology:**

A method of research for this present paper is based on doctrinal method which covered both qualitative and quantitative methodology. The empirical survey on the questions mentioned above showed the path to identify and recognize the need of existing International Criminal Law. However, both these methods are felt to be useful to attain the objectivity of present study.

**Objective:** The study gathered its major attention towards following objectives -

- To know the Criminal responsibility of States for misuse of nuclear weapons, explosion and status of an individual under International law.

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- To know the eminence of restorative justice and therapeutic Jurisprudence under International Criminal Law.

**Description of the research issues including socio-legal analysis of the problem:**

The temperament of revengeful attitude and constant breach of cease fire, really make us think about assessment of non-proliferation policies and its implementation.

According to new figures from the Stockholm International Peace Research Institute (SIPRI) in 2017, total world military expenditure rose to \$1739 billion, a marginal increase of 1.1 per cent in real terms from 2016.<sup>2</sup> Military expenditure in Asia rose for the 29th successive year. China, the second largest spender globally, increased its military spending by \$228 billion in 2017, Saudi Arabia drives increase in the Middle East by 6.2%. United States continues to have the highest military expenditure in the world.

Contrary, there are other unfortunate countries bearing the burden of military in middle east countries including Oman, Saudi Arabia, Kuwait, Jordan, Israel, Lebanon and Bahrain whose total GDP is from the range of 4 to 12 %.<sup>3</sup> It somewhere make it realize that, despite a longstanding taboo against using nuclear weapons, disarmament remains as a matter of aspiration only.<sup>4</sup> The shebaa farms conflict, in between Israel and Lebanon, Indian–Bangladeshi border conflict in between India and Bangladesh, Armenian-Azerbaijani all are few burning incidences which forced to re-evaluate the status of International Criminal law. Under such state of affairs, the situation of an individual and groups of individual becomes really pathetic. The

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<sup>2</sup>Stockholm International Peace Research Institute Military Expenditure Database revealed on May 2<sup>nd</sup> 2018. For more details see <https://www.sipri.org/media/press-release/2018/global-military-spending-remains-high-17-trillion> also see <https://www.sipri.org/> visited on 01/11/2018.

<sup>3</sup>*Ibid.*

<sup>4</sup>United Nation Secretary General, “*The Road to Nuclear Disarmament*”, For more details see <https://www.un.org/sg/en/content/sg/articles/2008-11-19/road-nuclear-disarmament>.

recent instance of Syria and use of nuclear weapon really gave death blow to non-proliferation policies. In this context, the present study highlighted basic aspects of International Criminal Law and International Humanitarian Law covering following points.

**Criminal Responsibility of State/ Non State Actor for breaching the non-proliferation agreement and misuse of nuclear weapon in war or otherwise:**

Under International Law the biological weapons are subject to comprehensive prohibition. The 1972 Biological and Toxin Weapons Convention (Hereinafter BWC) bans the development, possession, and transfer of biological weapons, and obliges States parties to destroy or divert to peaceful purposes all such weapons in their possession or under their jurisdiction or control.<sup>5</sup> We are seeing that, the context of nuclear weapons has shifted from the stabilization of bipolar deterrence to the problem of multipolar proliferation of nuclear weapons technologies and ambitions among states and non-state actors. The proliferation concern has facing two basic weaknesses of the Nuclear Non-Proliferation Treaty<sup>6</sup>: (1) state proliferators either are not bound by the treaty or they violate it without fear of sanction under the treaty regime; and (2) the treaty does not directly address the threat of nuclear terrorism carried out by non-state actors.<sup>7</sup>

The continuing crisis of North Korea's pursuit on nuclear weapon reflected well uncontrolled approach's dominance in WMD initially. But because of the strong actions of Security Council and boycotting of Qatar by seven Arab Countries collectively in 2017, aftermath, the pursuit of Korea dominance feels to be over. Irrespective of that, few countries like India, Pakistan, Israel, Iran, Libya and Syria are not too much interested in non-proliferation

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<sup>5</sup>ILPI Publication 2016 available on <http://nwp.ilpi.org/?p=5739> also refer Article 1,2 and 3 of Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (usually referred to as the Biological Weapons Convention).

<sup>6</sup> The Treaty on the Non-Proliferation of Nuclear Weapons, known as the Non-Proliferation Treaty 1968 or NPT, is an international treaty whose objective is to prevent the spread of nuclear weapons and weapons technology. For more detail see <https://www.un.org/isarmament/wmd/nuclear/npt/>

regime. Under such situation how to enforce the non-proliferation treaty for the shake of global peace is really wretched task.

Breaching the non-proliferation agreement and misuse of nuclear weapon in war or otherwise may fall under the domain of International Criminal Law. Specially, genocide, crimes against humanity and war crimes. Investigations and trials of leaders who have committed crimes and caused mass political or military atrocities is a key demand of victims of human rights abuses. Prosecution of such criminals can play a key role in restoring dignity to victims, and restoring trusting relationships in society.<sup>8</sup> However, what exactly the nature and scope of International war crimes are is also another are of inquiry.

### **A. International War Crimes:**

War Crime simply means, willful killing, torture, or inhuman treatment etc.<sup>9</sup> The term “war crimes” refers to serious breaches of international humanitarian law committed against civilians or enemy combatants during an international or domestic armed conflict, for which the perpetrators may be held criminally liable on an individual basis. Such crimes are derived primarily from the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 1977, and The Hague Conventions of 1899 and 1907. Their most recent codification can be found in article 8 of the 1998 Rome Statute for the International Criminal Court (ICC)<sup>10</sup>. However, it covers three basic crimes under it, which are as under.

### **B Genocide under International Law:**

According to article 2 of the Convention defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:<sup>11</sup>

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm;

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<sup>8</sup> Criminal Justice, International Center for Transitional Justice for more details see <https://www.ictj.org/our-work/transitional-justice-issues/criminal-justice>.

<sup>9</sup> Article 8 (2) of Rome Statute of International Court of Criminal Justice also see Article 8 (2) (b) (i) to (xxvi)

<sup>10</sup> United Nations Human Right Commission info note 2 on War Crimes, For more details see [https://www.ohchr.org/Documents/Countries/CD/FS-2\\_Crimes\\_Final.pdf](https://www.ohchr.org/Documents/Countries/CD/FS-2_Crimes_Final.pdf).

<sup>11</sup> Article 6, Rome Statute of the International Criminal Court, 1 July 2002.

- (c) Deliberately inflicting 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.<sup>12</sup>

### **C. Crimes against Humanity:**

The term Crime against humanity has been developed from the Petersburg's Declaration in 1868.<sup>13</sup> As per Article 7 of Rome Statute of International Criminal Court, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack and which cause murder, extermination, enslavement, Deportation or forcible transfer of population, Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, sexual slavery, enforced prostitution, etc.<sup>14</sup>

As far as war conflict is concern, the use of excessive force from the instrumentality of United Nations or through Security Council on innocent state or on an individual cannot be tolerated. Use of force by state is not valid under International law. However, this is a general rule which has two major exceptions. First is the right to self-defense by State and secondly the enforcement actions of the Security Council. However, the excessive use of force has been controlled by the principle of proportionality. Many commentators on International law demanding that, humanitarian interventions are possible for use of force by State in exceptional circumstances.<sup>15</sup> By resorting to armed force, states can violate any of the rights that are part of international human rights law except right to be free from torture and right to life as these rights has been protected under UN Convention against Torture and Other Cruel, Inhuman or

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<sup>12</sup> Article 3 and 4, Rome Statute of the International Criminal Court, 1 July 2002.

<sup>13</sup> Muskan, "The Conceptual Framework of Crimes against Humanity in Historical Context and Indonesian Law", Indonesia Law Review, Issue 2 Vol. 3 Dec. 2012.

<sup>14</sup> Article 7, Rome Statute of the International Criminal Court, 1 July 2002.

<sup>15</sup> Knottnerus Abel S, "International Law and the Use of Armed Force by States", For more details see <https://www.springer.com/cda/content/document/cda.../9783658111809-c1.pdf?>

Degrading Treatment or Punishment.<sup>16</sup> However, the question whether the use of chemical weapon is allowed in war conflict or not is also interesting one.

The Rome Statute of International Criminal Court (Hereinafter ICC) does not provide direct provision prohibiting the use of chemical weapon. This reason forces the ICC not to try the matter of use of chemical weapon initially. However, Article 8 (2) (b) I to XXVI introduced to cope up with the problem. Under Article 8 of Rome Statute of International Criminal Court, there are two indirect provisions for the prohibition of poisonous weapon.<sup>17</sup> Para xx makes it a war crime to employ “weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict.”<sup>18</sup> However, the ICC is lacking the jurisdiction to try the matter of war conflict in which the use of chemical weapon has been done. By virtues of Kampala Amendment it’s now possible to exercise the jurisdiction of ICC on it, but unless and until the amendment is not rectified by following its proper procedure, the ICC is unable to try the matter of those countries<sup>19</sup>. In order to curb over the problem, there is need to show the common interest for the protection of human dignity during war conflict. There is need to accept the global jurisdiction by all countries to try the matter under the roof of one shelter.

### **Peaceful and Amicable Resolution of Intra and Inter War Conflict: Whether possible?**

Whether peaceful settlement of the dispute is possible under International Criminal Law or not is really an issue of serious concern. The question what it requires to settle the dispute amicably? John Braithwaite called the restorative justice with the list of priorities. In his work, “Restorative Justice and Therapeutic

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<sup>16</sup>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted and by General Assembly resolution 39/46 of 10 December 1984.

<sup>17</sup> Article 8 (2) (b) xvii stands for employing poison or poisoned weapons and xviii stands for Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices.

<sup>18</sup> Akande Dapo, “*Can the ICC Prosecute for Use of Chemical Weapons in Syria?*”, EJIL Talk. For more details see <https://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/>”.

<sup>19</sup> Article 12 ,13 and 14, Rome Statute of the International Criminal Court, 1 July 2002.

Jurisprudence,”he stated that, it needs to take considerable number of restorative values seriously. He ordered restorative values in to three preliminary groups. He stated, in order to value restorative justice, respect of all fundamental right of an individual must be at priority. Similarly, non-discrimination, respectful listening, honoring specific upper limits of sanction, equal concern for stakeholders, applicability also need to care primarily. Secondly, the trial court must trace on Restoration of human dignity, property loss, damaged human relationship, communities, environment, emotional restoration, freedom, social support to develop human capabilities and prevention of future injustice.

Thirdly, he stated that, the court must assure that, there must be a sense of apology on the part of wrongdoer, sense as to consensus of the act, forgiveness of the person and mercy must grant if possible.

By preferring these three sets of list, the court may move toward the restorative justice. However, there is a needshave a mindset of World for restorative justice and therapeutic jurisprudence by leaving revengeful attitude. The state executive must promote the non-proliferation policy on one hand and the Court machinery must promote the agenda of peaceful settlement of dispute. Similarly, there is need to maintain the pressure on some aggressive countries by using eroding methods to suppress their unlawful demand and actions.

### **Impact and implications:**

1. In the syndrome of disarmament, by the special efforts of Germany,an important step was achieved in Colombia on 25 September 2017 when mission to disarm FARC successfully achieved.<sup>20</sup>
2. Further, due to negotiations by the United Nations on a legally binding ban on nuclear weapons, 120 UN member states adopted a Treaty on the Prohibition of Nuclear Weapons on 7 July 2017. <sup>21</sup>

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<sup>20</sup>FARC stand for Revolutionary Armed Forces of Colombia. On 27 June 2017, FARC ceased to be an armed group, disarming itself and handing over its weapons to the United Nations. For more details, see Report of the Secretary-General on the United Nations Mission in Colombia (S/2017/801).

3. Boycotting of Qatar by seven Arab Countries collectively in 2017 became possible under International law.
4. The issue of Rohingya is also under consideration of International Law.
5. Formation of Special Criminal Tribunal could also be possible for the trial of Criminal matters under International law.

However, the last point impact and implication is feel to be stranger to above discussion. But this could be clear by the next point of judicial decision.

### **Judicial Decisions:**

International criminal law is a comparatively new and early branch of public international law. The issue of jurisdiction of ICC always be the issue of concern. Pursuant to Art.13 of the ICC statute, there are three modes of triggering the ICC'S jurisdiction: (a) recommendation of a situation to the prosecutor by a state party; (b) referral of a situation to the prosecutor by the Security Council of the UN acting under chapter VII of the UN Charter; (c) initiation of an investigation by the prosecutor his own initiative. However, we have few great incidences of trials under International Criminal Law.

### **Formation of Criminal Tribunal for Nuremberg and Tokyo:**

Nuremberg and Tokyo both trials are famous in the regime if International Criminal Law. Overwhelming horrors of the Nazi genocide in Europe and the Japanese wartime occupation of large parts of the many South East Asian nations have been tried accordingly.

### **Formation of International Criminal Tribunal for Rwanda and Former Yugoslavia:**

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<sup>21</sup> United Nations, "Report of Disarmament Commission for 2017".

The International Criminal Tribunal for Rwanda (ICTR) was set up by UN Security Council Res. 955 of Nov.8, 1994, in response to genocide along with other systematic, widespread, and blatant violations of international humanitarian law which had been committed in Rwanda.<sup>22</sup>For the period of time approximately 800,000 people were killed in the genocide of Rwanda.In the first week of the genocide, it is estimated that 10,000 people a day were killed.<sup>23</sup>Contained by two weeks after the genocide started some 250,000 Tutsis were massacred. It has been held that, the trial by tribunal for Rwanda is valid. It can prosecute the persons responsible for the gross infringement of humanitarian law.

The said tribunal has been created for the former Yugoslavia to deal with war crimes commented in the conflict of Balkans. It irreversibly changed the landscape of international humanitarian law from 1993 to 2018. However, there is need to have co-operative method of criminal conflict resolution.

### **Possible Outcomes:**

1. By following co-operative methods for conflict resolution, many small groups of nations mayevolve to work on the peace agenda from two folded sides. Few nations mayuse reasonable forceagainst aggressive state and few may busy to resolve the dispute amicably. In this context, G 8 could be the good example.Ultimately, international peace is not overnight dream. It's not a math to solve on the tip of fingers. States must help to make the diplomacy more solid to work on peace agenda. Last but not the least, there are few suggestions in the form of solution which are as under.

### **Conclusion and Solutions:**

1. There is need to promote the practical implementation of transparency and confidence-building measures among the nations on peace agenda.

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<sup>22</sup> Kittichaisaree K (International Criminal Law. Oxford University Press 2001)

<sup>23</sup> Melvern L, *The Security Council in the Face of Genocide*, Journal of International Criminal Justice 3: 847-860. (2005)

2. The States need to have collective input for the diminution of on hand stockpiles of nuclear weapons held by all nuclear weapons states and special attention on small nuclear arms.
3. There is need to track the multilateralism on the issue of nonproliferation by security Council, IAEA and NATO without interference in to the sovereignty of other nations unless so requires.
4. There is need to accept the abidingness of fair judgment delivered by International impartial tribunals and International Court of justice.
5. The is need to create global blend of International Humanitarian law and International Criminal Law on the common point of non-proliferation.
6. Rome Statute has changed the status of victims of international crimes in international criminal law and justice, but a restorative justice paradigm must be adopted by the Court to give this regime full effect.
7. There is an urgent need to introduce and execute global peace implementation law.