

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, BANGALORE



**THE INTERNATIONAL CRIMINAL COURT: ITS DOMAIN AND EMERGING
CHALLENGES**

UNDER THE GUIDANCE OF DR. ANUJA S.

**DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS**

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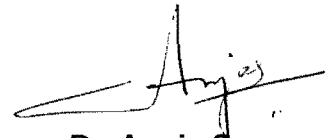
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CERTIFICATE

This is to certify that this Dissertation on “**The International Criminal Court: Its Domain and Challenges**” submitted by Irani Shahiza Cyrus Mahnaz (I.D No. 785) as an integral facet of the requirement for the award of the degree of Master of Laws at the National Law School of India University, Bangalore is the product of bona fide research carried out by the candidate under my guidance and supervision. This dissertation or any part thereof has not been submitted elsewhere for any other degree.



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DECLARATION

I, Irani Shahiza Cyrus Mahnaz, do hereby declare that this dissertation entitled "The International Criminal Court: Its Domain and Emerging Challenges" is the outcome of the research conducted by me as part of the course requirement of the one year LL.M Programme at National Law School of India University, Bangalore under the guidance and supervision of **Dr. Anuja S.**

This dissertation is as per the fulfillment of the course requirements in the final trimester and I hereby declare that the work is original, except for the help taken from such authorities and references that have been sincerely acknowledged at the concerned places.

I further declare that this dissertation in part or in whole has not been submitted to any institute or university for the grant of any degree, diploma, fellowship or any such title.

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

CAR	Central African Republic
Charters	Nuremberg Charter and Tokyo Charter
DRC	Democratic Republic of Congo
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide 1948
ICC/ Court	International Criminal Court
ICJ	International Court of Justice
ILC	International Law Commission
IMT-N	International Military Tribunal at Nuremberg
IMT-FE	International Military Tribunal for the Far East
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
LRA	Lord's Resistance Army
Rome Statute	Rome Statute of the International Criminal Court
UN	United Nations Organization
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
USA	United States of America
UK	United Kingdom

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CHAPTER I

INTRODUCTION

“The establishment of the Court is still a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law.”

Kofi Anan,

Former United Nations Secretary General

The notion of prosecuting war criminals can be dated to the period of the Greeks, and perhaps even prior to their era. There have always existed some general concepts and principles that govern human behaviour especially in situations of brutal and violent conflicts.¹ It is this belief that can be drawn from the ancient texts of religion and morality that were authored during the era of the Romans as well as the Greeks. In the modern times, codification of laws with respect to situations of heinous conflicts leading to large scale massacres and grave deprivations can be taken back to the Lieber Code that was prepared by Francis Lieber,² Professor at the Columbia

¹ WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 6-7, 4th Ed, Cambridge University Press, (2001).

² Dr. Francis Lieber was Columbia University's professor who authored the Lieber Code, that was eventually adopted by President Lincoln and is considered to be the best first set of rules to be adopted pertaining to the regulation of conduct during the occurrence of warfare.

University and that was successfully applied by the then American President Abraham Lincoln during the American Civil War.

However, internationally speaking, the very first occasion when a trial was conducted for commission of atrocities of a pervasive nature can be said to be that of an individual named, Peter von Hagenbach, a military leader who was tried and prosecuted for the crimes committed in the year 1474 as part of the occupation of Breisach.³ When the town was retaken, von Hagenbach was charged with war crimes and upon the proof of his guilt, he was subsequently beheaded.⁴ The evolution of international humanitarian movements for the prosecution of crimes committed during periods of armed conflicts began to grow during the mid nineteenth century when one of the members of the Red Cross movement requested that a draft be pulled up⁵ with respect to the creation of a court of such nature as would be able to address such heinous crimes of an international nature.

Thereafter came a monumental time in history when the Hague Conventions of 1899 and 1907 ("**Hague Conventions**") represented the codification of the laws of war for the first time in an international treaty. However, what these conventions did not provide for was the provision on holding those very individuals liable who committed grave crimes against the very spirit of

³ Breisach was a small town in Germany and a part of its occupation under Hagenbach, a large number of civilians ended up losing their lives. This occurred in the year 1474.

⁴ Schabas, *Supra* 1, at 15.

⁵ *Ibid*

mankind. Certain acts were pronounced as illegal and not as criminal, a void that continued to exist until the occurrence of the barbaric events of the First World War.

Millions of humans have perished over the last few centuries on account of grave atrocities and crimes committed upon, merely because they belonged to a particular ethnic origin, or a minority group or adhered to a particular political ideology. In fact, the twentieth century has very often been associated with being the bloodiest in the entirety of human history.⁶ The memories of the voluminous atrocities that were committed through this era, continue to be etched through our minds and their genesis can be traced to the aftermaths of the twin World Wars, namely, the First World War that was fought for a period of four years between 1914-1918 and the Second World War that spanned across five years between 1939-1945. Even years later, grave atrocities continue to be perpetrated in different parts of the world, either in the name of religion, gender, ethnicity, race, nationality or political ideologies.⁷ In fact, the consequences following these Wars created public outrage and outcry demanding the prosecution of those who were responsible for the commission of these acts.

⁶ ROGER O'KEEFE, *INTERNATIONAL CRIMINAL LAW* 529, The Oxford International Law Library, (2015).

⁷ Usha Ramanathan, *India and the ICC*, *Journal of International Criminal Justice*, 627, (2005).

The rationale behind the establishment of the United Nations Organization (“UN”) was the strong determination and conviction on the part of the founding fathers thereof:

“to save succeeding generations from the scourge of war, which twice in [their] life time [had] brought untold sorrow to mankind”.⁸

However, despite the eight decades that have expired since ensuring this task is achieved and the consequential establishment of the UN, the world community at large continues to witness war and armed conflicts coupled with the sorrows and woe that tend to follow as repercussions of these occurrences. In fact, the Human Rights Committee had also observed at its sixteenth session that was held in the year 1982 that:

“war and other acts of mass violence continue to be a scourge of humanity and take lives of thousands of innocent beings every year”.⁹

Thus, it became a great endeavor on the part of the international community to ensure that these atrocities and crimes are eliminated, and hence it called upon for a framework involving robust investigation, and a strong effective mechanism for the prosecution as well as the punishment of those individuals who are responsible for the commission of these evils. It is with

⁸ Charter of the United Nations, Paragraph 1 of the Preamble.

⁹ Human Rights Committee, Paragraph 2 of General Comment No. 6 on The Right to Life, Apr. 30, 1982, (Apr. 23, 2018 10:19 PM) <http://hrlibrary.umn.edu/peace/docs/hrcom6.htm>).

this context that the story and journey began in this young and constantly evolving field of International Criminal Law (“ICL”) that an analysis can be made.

1.1. HISTORICAL EVOLUTION

The events of the Holocaust, especially the events that took place at the Auschwitz camp wherein the Jews were gassed, continue to bewilder millions of people across the world today as to the extent to which our ancestors and forefathers of our very human race, that we are all a part of, could go to for the purposes of causing ethnic cleansing and extermination, merely on the grounds of a group of people belonging to a particular race.¹⁰ Children, women and men, elderly and disabled were all barbarically attacked upon, merely on the grounds of certain factors, despite the larger picture being that they all belonged to the world community at large and were a part of our very own human race.

Nuremberg Trials: In a lot of ways, the process of international criminal justice can be rightly said to have begun with the conclusion of the Second World War, with the setting up of the International Military Tribunal at Nuremberg (“IMT-N”) in reaction to the overwhelming horrors of the Nazi

¹⁰ BBC History, World Wars: A View of the Holocaust, Feb. 17, 2011, (May 17, 2018, 6:54 PM) http://www.bbc.co.uk/history/worldwars/genocide/holocaust_overview_01.shtml.

genocide in Europe.¹¹ The trials conducted before the IMT-N were in the aftermath of the extreme repercussions of the Second World War that had jolted the international community and made them aware of the atrocities that were committed at that time. The German war criminals were tried for the massacre of civilian populations, large part of which comprised of innocent women and children as well as the attempted ethnic cleansing and persecution of the Jews.¹² The “*Big Four*” i.e. the United States of America, the United Kingdom, the Union of the Soviet Socialist Republics and the Provisional Government of the French Republics convened the London Conference in order to decide the way for prosecuting the high ranking Nazi war criminals.

Thus, the IMT-N was established pursuant to its resultant charter (“**Nuremberg Charter**”)¹³ to prosecute and try those persons who were responsible for the commission of “*crimes against peace*”, “*war crimes*” and “*crimes against humanity*”. The Nuremberg Charter was formally adopted on August 08, 1945 after it had been annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis. The trials against those Nazi leaders, who were indicted, also known as the

¹¹ ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 319-320, Oxford University Press, 2nd Ed, (2008).

¹² Schabas, *Supra* 1, at 18.

¹³ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, Aug. 8, 1945, (Apr. 23, 2018, 10:23 PM, <https://ihl-databases.icrc.org/ihl/INTRO/350?OpenDocument>).

"Trial of the Major War Criminals",¹⁴ began on November 14, 1945 within a period of six and half months of Germany surrendering in the Second World War and the same concluded on October 01, 1946. Several accusations had been levied against these trials on the ground that they led to *ex post facto* criminalization of the offences. The IMT-N rejected these arguments by indicating towards the already existing provisions of the Hague Conventions. Thereafter, the Big Four also adopted an altered model of the Nuremberg Charter in the form of Control Council Law No. 10¹⁵ that served as a platform for trials to be conducted by the successful Allied powers before military tribunals. These primarily focused on the trials committed for the prosecution of judges, bureaucrats as well as the doctors.

Tokyo Trials: The Second World War saga would be incomplete without changing tides and looking towards the Pacific region wherein once again large number of lives had been taken and atrocities had been committed upon the people. The Hiroshima and Nagasaki moment cannot be forgotten by generations for a long period of time as the people in the areas concerned are still witnessing the repercussions. On July 26, 1945, the Big Four established the International Military Tribunal for the Far East ("IMT-FE") for trying the leading Japanese officials who were accused of perpetrating the

¹⁴ Cassese, *Supra* note 11, at 26.

¹⁵ Trials of War Criminals before the Nuremberg Tribunals under Control Council Law No. 10, between Oct. 1946 and Apr. 1949.

Second World War.¹⁶ Thereafter, on January 19, 1946, General Douglas MacArthur, the Supreme Commander for the Allied Powers in Japan, approved the Charter for the establishment of the IMT-FE (“Tokyo Charter”) that set forth the jurisdiction and the functions of the IMT-FE.¹⁷ The IMT-FE was functional for a period of two years commencing from May 1946 to November 1948. The primary difference between the Nuremberg Charter and the Tokyo Charter was with respect to the structure of each of these Tribunals and the charges that could be brought against the defendants. An interesting feature of the IMT-FE was the appointment of judges from countries such as India.

Thus, it can be rightly said that the IMT-N and IMT-FE have contributed greatly to the jurisprudence of International Criminal Law, which was at that point in time at the stage of its infancy. These Tribunals collectively broke the monopoly over the jurisdiction exercised by the states in respect of criminal matters; as it was for the first time that institutions were specifically set up for prosecuting and punishing crimes having an international character. Secondly, these Tribunals also saw the mentioning of various new crimes in their respective Charters; be it crimes against peace and crimes against

¹⁶ Cassese, *Supra* note 11, at 29.

¹⁷ Special Proclamation for the Establishment of an International Military Tribunal for the Far East, Jan. 19, 1946, (Apr. 23, 2018, 10:25 PM) http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.3_1946%20Tokyo%20Charter.pdf.

humanity.¹⁸ It also marked the first time when high-ranking military officials and leaders as well politicians and civilians were tried. Lastly, the Charters as well as the case laws of these Tribunals contributed significantly to the development of new legal norms, as for instance, in the elimination of the defense of obedience to superior orders. A symbolic connotation was derived from these experiences with respect to their moral legacy.

Though the aforesaid Tribunals were established in a specific regional context, the thought of establishing a permanent, international, criminal court soon started floating in order to ensure justice and uprightness for the sufferers of unimaginable barbarisms that were committed upon the inhabitants of the world. In fact, the trials at IMT-N saw the trial of the Nazi war criminals with an offence known as "*genocide*", a word devised by Raphael Lemkin¹⁹, although the phrase did not appear in the text of the Nuremberg Charter and these crimes were mainly prosecuted under the pretext of crimes against humanity. It was with this thought in mind and with the assertion of the principles forming part of the Nuremberg Charter that the UN General Assembly ("**UNGA**") was driven to have an international code dealing with this crime which eventually led to the adoption of the Convention

¹⁸ O'Keefe, *Supra* note 6, at 531.

¹⁹ Raphael Lemkin coined the word in his book *Axis Rule in Occupied Europe: Laws of Occupation* that was published in the year 1944.

on the Prevention and Punishment of the Crime of Genocide 1948²⁰ (“**Genocide Convention**”). Article VI thereof provides that instead of granting the State parties universal jurisdiction for the trial and prosecution of the crime of genocide, provides for the trial of those persons who have been accused of having committed the said crime by a qualified tribunal to be established in the geographical boundary of the State concerned where the act has been alleged to have been committed or by such a competent penal tribunal having the necessary jurisdiction to try people belonging to those States who have accepted the jurisdiction of the tribunal concerned.

Role of the International Law Commission (“ILC”): Following the request made by the UNGA on November 21, 1947, the ILC commenced with the preparation of a draft document containing a list of offences that were being committed against the security and peace of mankind, in consonance with the principles of the Nuremberg Charter.²¹ At the same time, the ILC also received a report on the postulations of international criminal jurisdiction from a special rapporteur who was assigned the task of preparing a draft statute for the establishment of an international criminal court. The ILC followed up with its observations and stated that the setting up of an international court to conduct proceedings and to try any person who has been charged with

²⁰ Convention for the Prevention and Punishment of the Crime of Genocide 1948 adopted on Dec. 09, 1948 as an annex to the UNGA Resolution 260(III) that entered into force on Jan. 12, 1951.

²¹ ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 67-68, Ed by William A. Schabas and Nadia Bernaz, Routledge Publications, (2011).

committing genocide or any other crime of equal enormity was not only required and desirable but also achievable. Accordingly, the UNGA formulated a committee to make propositions for the setting up of such a court in order to transform this mere illusion into a reality.²² Thereafter, in 1951, the ILC made a preliminary draft of the statute that it eventually revised in the year 1953.²³ However, due to the looming lack of clarity over the definition of the term “*aggression*” and the failing synchronization, the draft statute was not considered by the UN which led to the delay in the establishment of an enduring criminal court.

Ad Hoc Tribunals: Following the close of the Second World War, especially in the Former Yugoslavia and Rwanda, once again an outrage was felt across the world due to the looming humanitarian crisis that prevailed in these regions. Thereafter, the UN Security Council (“UNSC”) established two important ad hoc tribunals; namely, the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) in 1993 and the International Criminal Tribunal for Rwanda (“ICTR”) in 1994.²⁴ The ICTY was set up to exercise jurisdiction in respect of the crime of genocide, the crimes against humanity, the violations of the Geneva Conventions and of the laws of war committed in the Former Yugoslavia since January 01, 1991 whilst the ICTR was set up to adjudicate the crime of genocide, crimes against humanity and the breaches

²² *Ibid*

²³ O’Keefe, *Supra* note 6, at 141-142.

²⁴ Schabas, *supra* note 1, at 11-16.

of common Article 3 to the Geneva Conventions and of the Second Additional Protocol that occurred in Rwanda between January 01 and December 31, 1994.²⁵ The establishments of the ICTY and the ICTR laid down the framework for a more robust judicious institution. These ad hoc tribunals so formed were joined at the hips, in the sense, that they shared virtually identical charters leading to their establishments as well as the similarities in their functional aspects.

Although the ICTY and the ICTR were temporarily created for addressing the conflicts in specific geographical areas, their success provided the impetus that was much required for the setting up of a criminal court having global outreach with the potential and the requisite mandate to respond to situations involving the violations occurring against humanity and mankind anywhere in the world.

En-route Rome: In December 1989, towards the conclusion of the Cold War, based on a request made by Trinidad and Tobago, the ILC was once again asked by the UNGA to resurrect work on an international criminal court having special attention on drug trafficking cases. In 1994, the ILC concluded upon a draft of the statute for international court and submitted it to UNGA. For the purposes of resolving any concerns arising from the same, the UNGA

²⁵ M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW, 644-650, 2nd Ed., ISBN 1-57105-019-1, (2012).

appointed a “*Preparatory Committee on the Establishment of an International Court*” that met on two occasions in 1995. Discussions conducted by the said Committee were with respect to a diverse set of issues including the core elements to be included within the categories of crimes as well as the jurisdiction and the powers of such a court along with deliberations on the question of complementarity with respect to the national jurisdictions of the states becoming parties of it.²⁶ Eventually, states gathered in Rome in the year 1998 to attend the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court wherein a more modified and reformed international criminal court was perceived and the result of which was the adoption of the Rome Statute (“**Rome Statute**”) of the International Criminal Court (“**ICC**”) on July 17, 1998.²⁷

The Rome Statute came into force on July 01, 2002 and currently has one hundred and twenty three States²⁸ who are parties thereto who meet annually or as and when circumstances require. Thus, the dream of having a permanent robust international criminal court has indeed been transformed into a reality and not after taking a long period of time, it has formed an indispensable part of the international criminal setting.

²⁶ Schabas & Bernaz, *Supra* 21.

²⁷ O’Keefe, *Supra* 3, at 524.

²⁸ The State Parties to the Rome Statute, as on Apr. 21, 2018, (Apr. 21, 2018, 10:06 PM), https://asp.icc.cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

1.2 IMPORTANCE OF THE PROBLEM

Crime of aggression, crimes against humanity, genocide and war crimes are international crimes that are bemoaned by all members of the world community. Tracing this historically, these brutal acts have resulted in the slaughter of innocent children, women and men of all age groups across the globe, merely because they belonged to a particular race, religion, or community or had a particular political belief or ideology. All of this shocked the conscience of humankind in general and called for strong affirmative action upon the world community to undertake necessary measures to eradicate these inhumane acts. The Preamble to the Rome Statute recognizes how for numerous years, people of the world have become victims to unthinkable mayhems and that the ICC has been set up in order to ensure respect and adherence of principles of international criminal justice. Despite the formulation of the ICC and its being in existence for over fifteen years, there is growing concern over its enforcement mechanism and the quest of possibly expanding its jurisdiction to include other crimes such as terrorism and torture. Thus, it becomes important to explore the kind of impact and contribution that ICC has achieved and to also analyse the emerging obstacles it faces pertaining to the effectual operation and delivery of justice and fairness in the international criminal sphere.

1.3 STATEMENT OF THE PROBLEM

Aspirations of the optimists of achieving true criminal justice was transformed into reality when the ICC was set up as a permanent international criminal court with the primary objective of investigating into, trying as well as prosecuting individuals who have committed some of the most grimmest serious crimes the world has ever witnessed, as is envisaged in the Rome Statute. Ever since its inception year of 2002, the ICC has no doubt been considered to be a milestone achievement in ensuring criminal justice at the world level and in punishing the authors of the identified categories of crimes. However, the journey towards Rome and the eventual establishment of the ICC is merely a constructive move in the right direction towards curbing various international crimes of grievous nature. With the constantly changing times, the ICC has been struggling from many challenges and limitations that may impair the realization of the main objectives of the Rome Statute, pursuant to which it was set up.

The western developed nations of the world are skeptical about the restrictions that would be imposed on their ability as well as freedom to act according to their own accord whereas the developing and less developed nations of the world feel that the ICC is euro-centric and as such has been established for the promotion of vested interests of the developed nations only. Additionally, it is also felt that the extent of jurisdiction of the ICC is

limited and that its enforcement is not reasonably effective. Even with its establishment, the world continues to witness very grim crimes and hence, questions regarding the successful functioning of the ICC need to be carefully examined and analysed to pave a strong way towards its sustainable future.

1.4 SCOPE AND LIMITATIONS

Every study has certain limitations and the present work is no exception. This study aims at analysing the kind of role that the ICC has played in respect of meeting the mandate for which it was established through the Rome Statute. This study also seeks at understanding the functional as well as practical ways through which the ICC has been able to work towards its objectives. The case studies undertaken and the judgments referred to as in this study pertain exclusively to the four categories of crimes over which the ICC has jurisdiction, particularly the crime of genocide, war crimes and crimes against humanity since the jurisdiction of the ICC over the crime of aggression is yet to be exercised by it. Although there exist many challenges that the ICC is subjected to, the present study is being undertaken to understand the emerging contemporary challenges that pose a big hurdle to the effective functioning of the ICC.

1.5 AIMS AND OBJECTIVES

The main objective of this study is to analyze, understand and explore:

- 1.5.1 the rationale and necessity for the establishment of the ICC;
- 1.5.2 the historical background and framework pursuant to which the ICC came to be established;
- 1.5.3 its functional aspects including the jurisdiction as well as its structure;
- 1.5.4 the four categories of crimes over which it exercises jurisdiction and the practical way in which it has attained the same;
- 1.5.5 the steps that it has taken to bring about peace as well as justice through various judgments and examinations;
- 1.5.6 the kind of emerging challenges that the ICC faces which may impair its ability to efficiently perform the core functions for which it has been established; and
- 1.5.7 the limitations that the ICC may suffer from on account of countries such as the United States of America and India keeping away from its ambit.

1.6 REVIEW OF LITERATURE

The researcher has selected a few books and articles for the review of literature in order to present a small nutshell of the areas that the dissertation intends to analyze and explore.

Antonio Cassese in the book **“International Criminal Law” (Oxford University Press, 2008)** expounds on the substantive as well as procedural aspects of International Criminal Law and more particularly makes his analysis on the crimes that fall within the purview of the ICC jurisdiction. Cassese elaborates on the jurisdiction of the ICC, the complementarity principle and the different types of crimes that the ICC deals with. Cassese provides a concise introduction to both International Criminal Law as well as the procedure that is used while dealing with categories of international crimes. Cassese also covers the structure as well as functioning and proceedings of all international courts working in the field of criminal law, including the ad hoc tribunals. An analysis of the various categories of international crimes has also been made along with the forms as well as the modes of criminal responsibility. He has also highlighted the various general principles that come to occupy an indispensable position in the field of law along with a comprehensive analysis of how the same have come to be codified in the Rome Statute.

Bantekas I, has through the book, **“International Criminal Law” (Hart Publishing, 2010)** made an endeavor to distil from the limited number of international treaties that are available with respect to this field, as well as from the judgments and array of cases available, a set of principles that identify conduct that may amount to international crimes. Bantekas has made

a systematic analysis of these principles and has from time to time cited the cases and judgments wherever they have become applicable in the book, with respect to a particular point in question. Through the book, the author also traces the evolution of the field of International Criminal Law and strongly asserts that the origin, growth and development of this field may perhaps be the only branch of law that can be traced to wickedness as well as folly on parts of human beings while attending to the darkest attributes of human nature.

Bantekas I and Susan Nash, have through the book, "**International Criminal Law**" (Cavendish Publishing, 2003) provided an introduction to the diverse procedural as well as substantive elements that are involved in this emerging field of law. The book also deals with cross-border cooperation that is shown between the nations with respect to the questions of crimes of an international character. The authors have also dealt with aspects with respect to terrorism as an international crime and the growing concerns on the non-inclusion of this category of crime in the Rome Statute. The authors have also made analysis of the hybrid tribunals as well as of the ad hoc tribunals and the ICC in the said book.

Bartram S. Brown has edited the book called "**Research Handbook on International Criminal Law**" (Edward Elgar Publishing Limited, 2011) that comprises a comprehensive guide to this young area of International Law.

The book goes on to exhaustively cover the challenges that the field of International Criminal Law is currently facing along with how it can make the most of the opportunities that persist. Analysis has been made by various authors with respect to principles of complementarity of the ICC along with an analysis of the different categories of international crimes as well. It also raises questions in the minds of the readers on whether the crimes with respect to women and other gender based crimes need to be separately dealt with by the ICC or whether the current framework, the way it has been provided for, would suffice keeping in account the staggering number of atrocities and gender based crimes that are being committed upon women. The debate with respect to peace v. justice has also been elaborately dealt with by one of the authors in this book, as to whether the two can co-exist with each other in harmony or whether there really exist any challenges, especially when dealing with post conflict areas while discussing the concepts of forgiveness and amnesty.

Dr. jur. h. c. Hans-Peter Kaul, former second vice president of the ICC, had delivered a lecture on August 08, 2011, and a memo note of the same had been prepared by the ICC titled "**The International Criminal Court: Current Challenges and Perspectives**". This note records the lecture given to the students of International Criminal Law at the Salzburg Law School in Austria. Dr. Kaul brings across his practical experience of having worked with the ICC and brings to the forefront the various challenges that the ICC has faced ever

since it began operation. These challenges range from those related to its administrative framework along with the funding related challenges that the Court faces. Likewise, Dr. Kaul goes on to explain how the inefficient bifurcation of powers between the Pre-Trial and Trial Chambers can cause adversities vis-à-vis the functioning of the ICC. Towards the end, Dr. Kaul also lists down certain recommendations that he thinks will help and contribute towards a more efficient working of the ICC.

Hans Kochler, through the article "**Global Justice or Global Revenge? The ICC and the Politicization of International Criminal Law**", puts across the drawbacks and the challenges that are embedded not just in the Rome Statute but also asserts on the struggles that ICC would face in discharging its duties given that some of the most powerful countries of the world are not part of Rome Statute. Kochler also raises questions on the compromise of doctrine of separation of powers within the ICC since the Rome Statute links the ICC to the UNSC.

Kenneth S. Grallant in his article "**Individual Human Rights in a New International Organization: The Rome Statute of the International Criminal Court**" describes the linkage between the subject matter of the ICC and human rights norms. Grallant explains about the human rights of the victims as well as the witnesses and the measures that are to be undertaken by the ICC in tackling with the same.

Robert Cryer, through the book **"Prosecuting International Crimes"** (Cambridge University Press, 2005), investigates the regime with respect to the enforcement of International Criminal Law that has existed since the period marking the end of the 1980s. The work begins with an introduction to this particular field of law while also critically evaluating the challenges and problems that the field has faced with respect to the growth and development. It thereafter moves towards the legitimacy of this field of law with respect to the principle of rule of law, especially with regards to prosecution as well as punishment of the various categories of international crimes. Substantial part of the book is dedicated towards analysing the contributions made by the IMT-N and the IMT-FE alongside the ICTY and ICTR as well as the ICC. An analysis is also made with respect to the structure as well as the functioning of the ICC.

Ronald C. Slye and **Beth Van Schaack**, have, in the book named **"International Criminal Law (Aspen Publishers, 2009)"** offered a precise introduction on the different categories of international crimes that exist in International Criminal Law, and have also provided an analysis of the different principles that come to occupy an important place in this field of law. The authors have also collaborated upon the possibilities of collaborating between the principles of peace and justice, on the necessity of truth and investigatory commissions and the necessity of amnesty as well as trials as

far as this field of law is concerned. They also elaborate upon how the field may be at the peak of its codification, but at the same time is undergoing an evolving phase with a large number of important judgments being issued by the *ad hoc* tribunals as well as the ICC from time to time.

William A. Schabas has in the book titled "**An Introduction to the International Criminal Court**" (Cambridge University Press, 2001) endeavoured to introduce and put forward to the reader a brief summary of all the provisions of the Rome Statute starting from the brief evolution of how the ICC came into existence and thereafter into functioning. The book explores the four categories of crimes over which the ICC exercises jurisdiction and the manner in which the jurisprudence of the ICTY and ICTR have greatly influenced the drafters of the Rome Statute while defining the categories of crimes over which the jurisdiction was to be exercised. Schabas has also made an in-depth analysis of the principles that have come to be codified in the Rome Statute that belong to the larger pool of International Criminal Law and how the codification in the Rome Statute is different from that followed under the Nuremberg Charter and the charters of the other *ad hoc* tribunals. An analysis has also been made with respect to the provisions of the Rome Statute on the ICC's admissibility as well as jurisdiction, its structure and administration, the provisions with respect to the rights of the victims and those of the defendants, thereby making a summary of almost all the important provisions of the Rome Statute.

William A Schabas and **Nadia Bernaz** have edited a book, namely, **“Routledge Handbook of International Criminal Law” (Routledge Publications, 2011)** that comprises of significant essays that have been written by various notable people in the international criminal legal field. Essays highlight the constituent core as far as the different categories of crimes are concerned over which the ICC exercises jurisdiction, along with several other sensitive topics such as the role of the ICC with respect to terrorism as an international crime and the association between the field of human rights and international crimes. Some of the essays also cover the issues that are currently playing an important role in the field of international criminal law as for instance the issues of universal jurisdiction, and the immunities and amnesties that are available therein.

1.7 Hypothesis

The ICC was established for the righteous objective of ensuring enforcement as well as respect for the principles of international criminal justice. In the years that it has been in existence, the ICC has played a significant role towards the same. Nevertheless, with the passage of time, several challenges have emerged in the ICC’s functioning requiring a revisit to the provisions of the ICC Statute in order to bring it in consonance with the contemporary world’s requirements.

1.8 RESEARCH QUESTIONS

1. Whether the functioning of the ICC is in consonance and in furtherance of the objectives for which it has been established pursuant to the Rome Statute?
2. Has the ICC carved a niche for itself in the sphere of delivering international criminal justice?
3. Whether the practical working of the ICC has been able to transform its promise into a reality?
4. Are there any emerging challenges and hurdles that the ICC faces in the effective exercise of its jurisdiction?

1.9 METHOD AND METHODOLOGY

Methods of data collection: The researcher has adopted analytical, doctrinal and descriptive style of writing in preparing this study. The research in this dissertation is founded on primary and secondary sources. The primary sources comprises of the Rome Statute, the UN Charter, the Nuremberg Charter, the Tokyo Charter and the Genocide Convention. The secondary sources materials comprise of books, articles, online database materials, papers published in various academic journals, practitioner's

notes, articles published in several newspapers and reports of various governmental as well as non-governmental organisations. Findings, decisions and judgments of the ICC, the ICTY and ICTR have been cited for the purpose of describing and analysing various facts that have an impact on this dissertation. Concepts have been explained wherever found necessary and an earnest effort has been made to maintain the lucidity and flow of language and ideas in this dissertation. A detailed bibliography has also been provided which indicates the list of all the sources referred to in this dissertation.

Mode of citation: Harvard Bluebook 19th Edition mode of citation has been adopted throughout this dissertation.

1.10 CHAPTERISATION

This study has been divided into the following six chapters:

Chapter one: This chapter is an introduction that traces the historical evolution with respect to the ICC and briefly records the iconic events that led to the eventual establishment of the ICC. It also contains the research methodology adopted for the purposes of this study.

Chapter two: This chapter deals with the functional and structural aspect of the ICC including its composition and structure as well as the kind of crimes over which it exercises jurisdiction. In this chapter, the researcher will also deal with its administrative aspect and rely upon certain cases to elaborate jurisdictional nature of the crimes.

Chapter three: In this chapter, the researcher has made an analysis of the unique features of the ICC as far as its functioning is concerned. It also explores how the fundamental principles of the international criminal legal system have come to find place in the Rome Statute and how this molds the work of the ICC.

Chapter four: Focus in this chapter moves towards examining whether the ICC has been able to live up to the expectations that have surrounded it since its inception. In this chapter, the researcher will deal with case specific conflict situations and will refer to the decisions of the ICC in order to understand how international criminal justice has come contributed to by the ICC.

Chapter five: This chapter moves towards analyzing the emerging challenges that the ICC faces in the contemporary world. The researcher will specifically deal with the current hurdles the ICC faces and will also attempt to understand the limited nature of the Rome Statute given that transnational

crimes such as terrorism and torture are not included within the purview of the ICC and will also analyze the implementation limitations that the ICC suffers from on account of countries such as USA and India not being a party to the Rome Statute.

Chapter six: The dissertation ends with a chapter on conclusion and includes certain recommendations that the researcher has made towards a more effective and efficient functioning of the ICC. The recommendations are based after analysing the various emerging challenges that the ICC is faced with and an honest endeavor is made towards suggesting a few measures that will leave the Court better equipped to address and deal with the same.

CHAPTER II

FUNCTIONING OF THE ICC VIS-À-VIS THE ROME STATUTE

The Rome Statute is the international treaty that is responsible for the establishment of the ICC and is a product of a large round of drafts, negotiations, discussions that involved a lot of compromise in terms of the codification of various provisions of International Humanitarian Law as well as International Criminal Law.²⁹ In fact, the said Statute can be rightly said to have transformed the soft provision of International Law and rightly put in place an enforcement mechanism that is efficient enough to hold the perpetrators of heinous crimes accountable. With the coming into effect of the Rome Statute from July 01, 2002, the ICC began exercising jurisdiction over three categories of crimes and from July 17, 2018, the ICC will also start exercising jurisdiction in respect of its fourth category of crime i.e. aggression.³⁰

However prior to analysing the various provisions of the Rome Statute, it becomes imperative to understand the driving factors that formed the rationale basis for the adoption of the Rome Statute and the establishment of a court of the stature of the ICC.

²⁹ RESEARCH HANDBOOK ON INTERNATIONAL CRIMINAL LAW 178-179, Ed. Bartram S. Brown, Edward Elgar Publishing Limited, (2011).

³⁰ ICC, *Assembly activates Court's jurisdiction over crime of aggression*, Press Release Dec. 15 2017, (Apr. 15, 2018, 10:15 PM) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1350>.

2.1 RATIONALE FOR INCEPTION

The journey towards Rome has not been an easy one to be achieved and a large number of factors have contributed towards its inception, some of which have been discussed hereinafter.

2.1.1 *Bringing an end to barbaric conflicts*

The ICC aims at bringing an end to bloodied wars and conflicts and thereby calls upon the States to take more humane approaches during prevalence of situations of violent clashes.³¹ Thus, it looks at promoting peaceful resolution and settlement of conflicts as well as disputes in order to bring to an end the barbaric slaughter of humans on account of any factor, be it race, religion, ethnicity or political ideology.

2.1.2 *Ending impunity*

When no kind of accountability is attached, it may lead to an increase in the rate of crimes that are committed. Granting impunity to diplomats, consular agents and heads of states may have followed a similar approach.³² Consequentially, the ICC intends at bringing about an end to the shield of protection available to these categories of persons by snatching away their

³¹ Bartram, *Supra* 29, 37-38.

³² *Ibid*

power to be excused from individual criminal responsibility and thereby ensuring that people pay for their own deeds.

2.1.3 *Remedying deficiencies of ad hoc tribunals*

Ad hoc tribunals like the ICTY and the ICTR were incorporated with a specific mandate and within particular geographic territories to address specific situations of conflicts in those areas. Thus, the justice delivered by these tribunals may take the nature of being selective instead of holistic since limited perpetrators were tried for selected crimes. The ICC on the other hand is permanent and hence, its reach is infinite whilst the tribunals are more of a temporary nature.³³

Additionally, there is no certainty on the establishment of ad hoc tribunals, as for instance, despite the prolonged civil war that was ongoing in Sri Lanka or with respect to the refugee crisis of the Rohingyas in Myanmar and Bangladesh, no such tribunal is set up but recommendations with respect to them have been received from various UN bodies as well as organs.

³³ Daniel D. Ntanda Nsereko, *The Role of the International Criminal Tribunals in the Promotion of Peace and Justice: The Case of the International Criminal Court*, Criminal Law Forum, 373-393, Springer (2008).

2.1.4 Principle of Complementarity

This principle has been identified in the Rome Statute³⁴ and accordingly, the States are in the first instance required to investigate and punish those crimes that are provided for therein in their respective domestic jurisdictions.³⁵ In the event the State is unable to investigate into the crimes, then the ICC exercises jurisdiction thereby ensuring complementarity with the domestic courts of the States concerned. Therefore, this implies that the ICC is complementary to the national courts of the respective States.

2.1.5 Filling in the lacuna left by the International Court of Justice ("ICJ")

A prime reason for the conception of the ICC was to bring about international peace and security and to foster co-operation as well as friendly relations between States with a will to promote human rights for all. This has been achieved by bridging in the gap that was left behind by the ICJ. Whilst the ICC has been established for prosecuting certain specific categories of crimes as identified in the Rome Statute, the ICJ was established as a civil court to hear and adjudicate upon matters between the countries and not

³⁴ This principle has been provided for in paragraph 10 of the Preamble to the Rome Statute as well as Articles 18, 19, 20 and 53 thereof.

³⁵ *Supra* note 5, at 342.

amongst individuals.³⁶ Thus, if justice were to be truly achieved, then the same would not be possible without prosecuting the individuals who are the real perpetrators of crimes.

The conference at Rome was attended to by one hundred and sixty countries who are part of the UN family, several other non governmental organisations and international organisations. During these discussions, the parties at discussions were divided into three main groups; first group being led by Norway and Canada³⁷ and consisting of other middle power countries who believed in the removal of veto powers, prohibition on the concept of reservation and the *proprio motu* model of the Court. The second group comprised of the five, permanent members of the U.N who were joined by other likeminded countries who believed in granting the UNSC a greater role and voice in participation of ICC. With regards to *proprio motu* model, the USA explained great concern with a view of restricting and limiting the ICC's jurisdiction to the UNSC.³⁸ The third group so formed consisted of those who were non-aligned and strongly believed that aggression should also be enlisted as a category of crime that could be tried and prosecuted by the ICC.

³⁶ Amnesty International, U.S.A, Fact Sheet 2007-2008, (Apr. 21, 2018, 10:15 PM), https://www.amnestyusa.org/pdfs/IJA_Factsheet_1_International_Criminal_Court.pdf.

³⁷ Michael Schitt and Richards, *Uncharted Waters, The International Criminal Court*, Naval War College Review, Vol. L111, No. 1, (2000).

³⁸ *Ibid*

Eventually, following the conclusion of the negotiations and discussions, the Rome Statute was adopted with one hundred and twenty states in favour thereof, whilst twenty-one abstained from voting and seven votes against it. The countries that did not vote in its favour include Iraq, Israel, Libya, the Peoples Republic of China, Qatar, the USA and Yemen.

2.2 Bird's Eye View of Rome Statute

One understands that it comprises of a total of ***thirteen parts*** along with its ***Preamble*** right at the start. The Preamble sets out the recognition that has been afforded with respect to ICC's jurisdiction over the four categories of crimes that threaten the survival of worldly peace and global security. It also emphasizes on international co-operation and the duty of every state in preventing and punishing the authors of these crimes for ending impunity in the world.

Part 1 makes provisions with respect to the setting up of the ICC as a permanent criminal court for the purpose of prosecution of and punishment of those responsible for extremely serious crimes. **Part 2** contains provisions with respect to its admissibility, jurisdiction and the applicability of law. This part deals with the four categories of crimes over which jurisdiction may be exercised by the ICC. It also contains provisions for jurisdiction to be *ratione temporis* i.e. only with respect to those crimes that have been committed only

after the coming into effect of the Rome Statute. Provisions with respect to jurisdiction have been discussed in detail later in this study.

Part 3 entails the general principles that exist under ICL such as the principles of legality of crime or *nullum crimen sine lege* i.e. there can be no criminal liability unless the conduct or the act in question has been specifically mentioned as a crime within the jurisdiction of the ICC. Another important principle mentioned is *nulla poena sine lege* i.e. the punishment to be accorded has to be in accordance with the provisions of the Statute. **Part 4** deals with the four principal organs of the ICC, namely, the Presidency, the Chambers, the Office of the Prosecutor and the Registry and their respective functions. Detailed analysis of the four organs has been done hereinafter.

Part 5 comprises of the rules and provisions with respect to investigation and prosecution to be followed by the ICC whereas **Part 6** deals with the provisions for the conducting of a trial. **Part 7** provides for penalties and determination of sentences while ruling out capital punishment and restricting the years of imprisonment to thirty years or ordering life imprisonment depending upon the gravity of the crime. **Part 8** provides for appeal and revision from judgment and the rulings of the court. **Part 9** deals with the provisions with respect to international co-operation and judicial aid by calling upon States to co-operate with ICC during an arrest, for surrendering of

accused person and reaching holistic co-operation in the process of criminal justice for an efficient functioning of the ICC.

Part 10 deals with the role of the States in the enforcement of the sentences that have been pronounced by the ICC. Given the absence of the prisons of its own, it calls upon the States to be more willing to take convicts and ensure the appropriate sentence is served in their respective prisons. **Part 11** deals with the Assembly of States and provides for every State party to have one representative therein. **Part 12** contains finance related provisions of the ICC whilst **Part 13** deals with residuary clauses on *inter alia* settlement of disputes, amendment and bars reservations to the Rome Statute.

While discussing and deliberating upon the draft of the Rome Statute, one major issue that arose was with respect to the ICC jurisdiction and the class of crimes over which it will exercise the same. The ICC has jurisdiction over four major categories of crimes; namely, genocide, crimes against humanity, war crimes and the crime of aggression. These crimes have either directly or indirectly been mentioned in various other international conventions and documents such as the Genocide Convention, the Additional Protocols of 1977 and also in various customary rules of International Law.³⁹ The rationale for the unanimous incorporation of these crimes in the Rome

³⁹ Cassese, *Supra* note 11, at 30.

Statute was the growing pressure on the international community to prevent a third world war and the avoidance of looming crisis from the same.

Thus these instances indicate the intention on the minds of the drafters of the Rome Statute to leave no stone unturned for the commission of any of the four categories of international crimes. Additionally, the other advantage that the drafters had was the availability of various models with respect to the administration of criminal justice at the global level, as for instance, the ICTY had jurisdiction in respect of crimes that were committed within the territory of Rwanda in the year 1994 as well as over the nationals of Rwanda in respect of the crimes committed by them during the aforesaid period, in the territories surrounding Rwanda. The ICTY had only territorial jurisdiction for those crimes that were committed on its territory, subsequent to the year 1991.⁴⁰ What sets the ICC apart from these other tribunals is the fact that it has adopted a model that allows territorial as well as personal jurisdiction and also gives the power of referrals to the UNSC.

2.3 TRIGGERING THE JURISDICTION OF THE ICC

Three ways have been incorporated within the Rome Statute for the purpose of initiating its authority. In the first instance, a ***State may refer a particular***

⁴⁰ Schabas, *Supra* note 1, at 54.

*matter*⁴¹ or a situation to the ICC as long as it is in connection with its nationals or its geographical territory. With respect to a State that is not a party to the Rome Statute, there has to be acceptance of jurisdiction as is provided for in the Rome Statute.⁴² Secondly, referral of a particular matter or situation can be made ***before the ICC by the UNSC***.⁴³ The UNSC is a principal organ of the UN and comprises of the five permanent members, namely, USA, UK, China, France and Russia and the ten non-permanent members who are elected by UNGA. Lastly, the Prosecutor may initiate investigation and charges in the *proprio motu*⁴⁴ mode i.e. as per his or her own initiative.

2.4 SUBJECT MATTER OF JURISDICTION OF THE ICC

Initially, towards the end of the nineteenth century, only war crimes were punishable. At that time, even piracy was considered to be an international crime. It is only since the Second World War concluded and ended, when the Nuremberg Charter as well as Tokyo Charter were adopted that certain other categories of international crimes came to be identified. Thus, in the year 1945, crimes against humanity and crime against peace came to be recognized followed by the crime of genocide in the year 1948 which

⁴¹ Article 14 of the Rome Statute.

⁴² Article 12(3) provides that a State that is not a party may accept jurisdiction in respect of the crime concerned by lodging a declaration to that effect with the Registrar.

⁴³ Article 13 of the Rome Statute.

⁴⁴ Article 12 of the Rome Statute.

received its own autonomous recognition with the adoption of the Genocide Convention. Eventually, when the Rome Statute came to be adopted, the ICC was entrusted with jurisdiction over all four categories of crimes. The Rome Statute describes the same as "***the most serious crimes of concern to the international community as a whole.***"⁴⁵

2.4.1 *Crime of Genocide*

Raphael Lemkin incepted the expression "*genocide*" in the year 1944 in a book he authored wherein he captured the atrocities that were committed by the Nazi in Germany.⁴⁶ Lemkin was strongly of the view that the international treaty framework that addressed the protection and interests of minorities in respective nations that prevailed in the span prevailing between the two wars had shortcomings, the most important one being that the same failed to address powers for prosecution of crimes that were committed against a group of people. It is this lacuna that Lemkin attempted to fill in, after witnessing the horrors that swept through Nazi Germany in the form of attacks on the Jewish minority populations therein.

The ICC which was framed against the backdrop of the Genocide Convention exercises jurisdiction over the crime of genocide, more specifically five types of genocide, and is considered to be a blatant violation

⁴⁵ Article 5, Part 2 of the Rome Statute.

⁴⁶ *Supra*, note 19.

against an entire group or community of people, be it in the guise of ethnic cleansing, which involves the slaying of the members belonging to a group or by bringing them to some kind of destruction. It could also involve the destruction of a group on the basis of its national or racial or religious reasons.⁴⁷

Prior to the ICC being incorporated, the ICTY and the ICTR had already dealt with this category of crime in various early cases. In ***Prosecutor v. Jean Paul Akayesu Case***,⁴⁸ the ICTR held that “*Genocide is a very distinct category of crime for which mens rea i.e., mental element forms one of the requirements.*” The said Tribunal went on to observe that it was this element that gave uniqueness to the crime and distinguishes it from other ordinary crimes. Likewise, in ***Prosecutor v. Jelusic***,⁴⁹ the ICTY observed that the intention to kill only some members of a particular group that has been destroyed must be a “*substantial part*” of the crime.

Very often it has been asserted that what distinguishes genocide from the other categories of crimes is the requirement of *dolus specialis* or what in other words means the special intent that particularly lies in the act itself, since it is required that in order to amount to genocide, the act in question ought to have been committed with a special intent to destroy the group,

⁴⁷ Article 6 of the Rome Statute and Article II of the Genocide Convention.

⁴⁸ Prosecutor v. The Jean Paul Akayesu, ICTR, Case No. ICTR-96-4.

⁴⁹ Prosecutor v. Jelusic, ICTY, Case No. IT-95-10-T.

whether in part or in its entirety.⁵⁰ Thus, the definition adopted in the Rome Statute offers a quantitative element as well.

Killing is at the core of the definition and takes precedence over the other acts that have been listed in the definition, as the same is synonymous with acts such as murder. The other act is the causing of serious injury and involves causing violent acts that may probably fall short of the act of homicide.⁵¹ The third category deals with imposition of such conditions to life that leads to the eventual destruction of the group. The act of forced marches of the minority Armenian groups that took place in the year 1915 in Turkey could be an illustration of imposing the conditions of life leading to the group eventually being destroyed.

2.4.2 *Crimes against Humanity*

Despite the fact that a large number of international instruments have been drafted and adopted since the Wars ceased, not a single document or instrument is exclusively dedicated to the problem of this crime. However, the earliest origin of the word can be located back to the massacre of the Armenian population of Turkey that was termed as "*a new crime against humanity and civilisation*". As far as the Rome Statute is concerned, Article 7 thereof deals with this crime and there is nothing express in the Rome

⁵⁰ MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES 403-405, School of Human Rights Research, Hart Publishing, (2001).

⁵¹ Ibid

Statute that indicates the commission of this crime in the absence of international armed conflict.

A number of crimes have been included in the definition of crimes against humanity in the Rome Statute, including systematic or planned attacks that is to be carried out in furtherance of a State or an organization policy to commit the same and includes crimes such as enslavement, deportation, extermination, murder, sexual slavery, torture, or other inhumane acts causing serious suffering or injury to bodily or mental health.⁵²

A significant challenge that was faced when the trials before the IMT-N were conducted was the question on the legal basis with respect to which Nazi officers could be tried for the atrocities committed against the German Jew population within the borders of Germany.⁵³ It was only following the growing pressure that mounted on those conducting the trials that it was decided to try these officials under the tune of crimes against humanity. This however led to several concerns that the Allies had with respect to the treatment that they themselves subjected their own local minority populations to, within the borders of their colonies.

⁵² Article 7 of the Rome Statute provides for an inclusive list of all the acts that would be included within the ambit of crimes against humanity.

⁵³ Bartram, *Supra* note 29, at 63-65.

In the *Tadic case*,⁵⁴ the ICTY had observed that this category of crime could be committed on behalf of any entity that exercises de facto control in a particular territory without any kind of international or formal recognition of a state or endorsement by any terrorist group. These views have been reflected in Article 7 thus implying the kind of impact the decisions of ad hoc tribunals have come to have upon the drafters of the Rome Statute.

Article 7 of the Rome Statute that provides for the crimes against humanity contains a total of eleven acts that would amount to it and this has evolved with the growth of the provisions of International Human Rights Law and International Law in general. Concepts such as forcibly transferring the population have also been included to larger acts such as deportation thereby expanding the kind of acts that in the long run may amount to crimes against humanity.⁵⁵ The Rome Statute has successfully addressed the absence of crimes with respect to gender from the Nuremberg Charter since offences such as rapes and sexual slavery have now all been included within its ambit.

In *Prosecutor v. Jean Paul Akayesu Case*,⁵⁶ the ICTR has also observed that cruel acts such as forcefully causing the nakedness of the Tutsi women in the warring areas of Rwanda would be including within the category of

⁵⁴ Prosecutor v. Tadic, ICTY Case No. ICTY-94-1-T.

⁵⁵ Boot, *Supra* note 50, at 477.

⁵⁶ ICTR-96-4.

other inhumane acts that is provided for in the definition thereby ensuring that wide interpretation is given to the term as is possible.

2.4.3 *War Crimes*

War crimes are serious acts that lead to contravention of the principles of customary international law as well as obligations contained under various international treaties concerning International Humanitarian Law.⁵⁷ War crime, as a concept, is not of recent origin and can be dated to the trials before the IMT-N and the IMT-FE. It was also provided as a subject matter of jurisdiction for the ICTY and the ICTR.

Article 8 of the Rome Statute, probably the lengthiest one in terms of dealing with the offences, provides an elaborate list of war crimes also containing a notable difference between those, which are punishable within the ambit of international armed conflict, and those that are punishable within the scope of non-international armed conflict. These kind of war crimes include⁵⁸ the conscription of children under the age of fifteen into the military of the nation concerned or involving them in the participation of hostilities; intentionally attacking hospitals, schools, colleges, monuments of historic significance and the torture as well as killing of persons not actively participating in the conflict, be it as civilians or as prisoners of war.

⁵⁷ MALCOLM N. SHAW, *INTERNATIONAL LAW*, 433, 6th Ed., Cambridge University Press, (2008).

⁵⁸ Article 8 of the Rome Statute provided for an inclusive list of acts to be included within the ambit of war crimes.

A major difference as far as between war crimes on the one hand and the other two categories of crimes is concerned is that while crimes against humanity requires the attack to be widespread and genocide requires the special intention, war crimes are capable of covering even the most isolated cases that may be caused by individual soldiers acting without any kind of external assistance, thus giving this category a greater perspective.⁵⁹

2.4.4 *Crime of Aggression*

The crime of aggression had always been included in the Rome Statute but the definition thereof had not been provided. This is on account of the fact that the delegation that met at Rome was unable to reach a consensus on what would be the best approach to define this category of crime or to elucidate the manner in which the Court would be able to adjudicate upon with respect to the commission of this offence. The challenges that the drafters faced when they met in Rome was the role to be played by the UNSC in determining whether an act would amount to aggression or not and also the issue with respect to aggression and self-determination.⁶⁰ The Preparatory Commission for the ICC was given the mandate for the preparation of crucial documents such as the rules of procedure and the elements of crime. Whilst this Commission was successful in preparing most of the documents that it had been entrusted with, yet again the definition of

⁵⁹ Schabas, *Supra* 3, at 43-44.

⁶⁰ Schabas & Bernaz, *Supra* 21.

crime of aggression had been left out, as only a draft paper for discussion was prepared.

Crime of Aggression is the last category of crime over which jurisdiction can be exercised by the ICC. The said term is very often used interchangeably with "*crimes against peace*". It includes within its ambit the illegal use and deployment of the armed forces by a State against another.⁶¹ The London Charter gave the IMT-N jurisdiction over "*crimes against peace*" that was defined as the "*planning, preparation, initiation, or waging a war of aggression, or a war in violation of the international treaties, agreements or assurance participation in a common plan or conspiracy for the accomplishment of any foregoing.*"⁶²

However, during the discussions over adoption of the Rome Statute, there was no agreement between the States on the definition of the crime of aggression, but this shortcoming had been addressed at the **2010 Kampala Review Conference** of the Rome Statute that was held in Uganda on June 11, 2010. Three new articles had been inserted; namely **Article 8 bis**, **Article 15 bis and Article 15 ter**. Whilst Article 8 bis deals with the definition of the crime of aggression, the latter Articles deal with the exercise of jurisdiction over the same with respect to matters referred by the States

⁶¹ Bartram, *Supra* note 29, at 159-161.

⁶² M. Cherif Bassiouni, *Establishing an International Criminal Court: Historical Survey*, Vol. 149 *Military Law Review*, 55, (1995).

themselves and by the UNSC respectively.⁶³ As stated hereinbefore, exercise of jurisdiction by the ICC over this crime has been delayed for a substantial period of time. The ICC's jurisdiction of this crime will be activated from July 17, 2018.⁶⁴ Thus, one will have to wait to understand the practical way in which this category of crime will come to be dealt with and adjudicated upon.

Miscellaneous Offences: Other categories of offences over which the ICC has been given jurisdiction is with respect to the "***offences against the administration of justice***" with respect to proceedings ongoing with the ICC and include offences such as perjury or presentation of false or forged evidence or interfering with the victims as well as the witnesses.⁶⁵ The ICC is also equipped to call up cases of misconduct such as disrupting proceedings or deliberately refusing to comply with the directions that have been given by it.⁶⁶

Thus, as can be seen, a wide array of other categories of offences that are brought within the ambit and purview of the ICC that enables to effectively deal with the situations of atrocities as and when they arise from time to time.

⁶³ Bartram, *Supra* note 29, at 164.

⁶⁴ *Supra* note 36.

⁶⁵ Article 70 of the Rome Statute.

⁶⁶ Article 71 of the Rome Statute.

2.5 PRINCIPAL ORGANS

The ICC is a distinct organisation having its seat at The Hague, in the Netherlands, although it may sit elsewhere. The Netherlands was the one country that offered help, despite there existing rumours of help coming in from Lyon, Rome and Nuremberg.⁶⁷ It is worthwhile to note that The Hague is also the seat of other international organizations such as the ICJ as well as the ICTY.

The ICC comprises of **four principal organs** that are:

- ❖ THE PRESIDENCY
- ❖ THE CHAMBERS
- ❖ THE OFFICE OF THE PROSECUTOR
- ❖ THE REGISTRY

2.5.1 ***The Presidency***

The Presidency is one of the organs of the ICC and comprises of the President, the First and Second Vice-Presidents. Each one is elected by an out and out majority of the judges for a renewable term of three years. Their main areas of functions are administration, legal as well as judicial work and

⁶⁷ Frank Jarasch, *Establishment, Organization and Financing of the International Criminal Court*, 6 *European Journal of Crime, Criminal Law and Criminal Justice*, 18-19, (1998).

handle external relations as well.⁶⁸ With respect to the legal and judicial functions, the Presidency is responsible for the assignment of cases, including reviewing the decisions of the Registrar and is also responsible for the co-operation with the States.⁶⁹ With regard to the administrative responsibilities, the Presidency undertakes the proper administration of the functioning of the ICC and also supervises the work done by the Registrar. As far as the scope of external relations and matters are concerned, this office undertakes co-operation with all States and plays a crucial role in spreading awareness of the ICC.

2.5.2 *The Chambers*

The Chambers is the next main organ consisting of eighteen judges and is further classified into the Pre-Trial Division, the Trial Division and the Appeals Division. Judges of each of these Divisions are entrusted with the duty of conducting proceedings for specific situations. The ***Appeals Chamber*** of the ICC comprises of all five judges whilst the Pre-Trial Chamber and the Trial Chamber consists of three judges each from their Divisions respectively.⁷⁰ With respect to the Presiding Judge for a Chamber, the appointment is made vide an election that is made by the judges of the Chamber in question.

⁶⁸ Schabas, *Supra* note 1, at 151-152.

⁶⁹ ICC, *Structure of the Court*, (Apr. 27, 2018, 10:15 PM) <https://www.aba-icc.org/about-the-icc/structure-of-the-iccl>.

⁷⁰ Cassese, *Supra* note 11, at 50.

The *Pre-Trial Chamber* is entrusted with the first phase of judicial proceeding in determining as to whether the charges made against a potential accused are to be confirmed and proceeded with or not. Once this determination is made and the charges are confirmed, it is the *Trial Chamber* that primarily determines the guilt or innocence of the concerned accused as well as the sentence that the convicted person would be required to serve.⁷¹ Furthermore, in the event an appeal is to be made by the convicted person or by the Prosecutor against the decision of the Trial Chamber, then it is the duty of the *Appeals Chamber* to look into the facts and decide whether the decision ought to be reversed or amended or it may altogether direct a fresh trial to be conducted before a differently constituted Trial Chamber.

2.5.3 *Office of the Prosecutor*

The Office of the Prosecutor received referrals and any other significant information relevant to the crimes that form a part of the Rome Statute. It is thereafter responsible for examination of all information so received, undertaking investigations into matters concerned and conducting prosecutions.⁷² This office comprises of three divisions, namely, the complementarity and co-operative division, the prosecutions division and the

⁷¹ *Supra*, note 33.

⁷² Article 42(1) of the Rome Statute.

investigations. The **Prosecutor** is responsible for making final decisions with respect to investigations and prosecutions whilst the **Deputy Prosecutor** supervises all of the aforesaid Divisions.⁷³

This office is responsible for conducting an initial analysis on the information and referrals it has received in order to decide if the same meets the requirement with respect to jurisdiction as mentioned in the Rome Statute. Once the question of jurisdiction has been settled then it is responsible for conducting an investigation into a given situation after which it decided on the way forward by issuing arrest warrants, summons, etc.⁷⁴ Once these charges are confirmed, it is responsible for conducting the prosecution when the trial is held.

2.5.4 ***The Registry***

The other organs of the ICC received different kinds of administrative and judicial support from the Registry. This is not just restricted to the ICC headquarters at The Hague but also in the field where a matter pertains. Other specific responsibilities that it carries out are with respect to defense, witness protection, and detention. The Registrar leads this office and he is the officer who is the chief in charge of the administrative work and

⁷³ *Supra* note 69.

⁷⁴ Schabas, *Supra* note 1, at 154.

supervises the offices that are responsible for administrative work.⁷⁵

The Registry is also responsible for providing all forms of support to the victims as well as to the witnesses and is also responsible for co-ordination of all those who are serving detention as per the mandate of the ICC.

Assembly of States: Although not a principal organ, the Assembly of States Parties is primarily given the responsibility for an expansive array of administration related work such as providing the officers with guidelines to be followed, matters with respect to the budget allocation, and other such similar matters. It is also through this body that the amendments to the Rome Statute are adopted.

Each nation that is a party to the Rome Statute has one representative in this body.⁷⁶ This body is required to meet at least once in a given year, although they can meet on more frequent occasions if the conditions so require.

As can be seen, the ICC is cohesively structured and each of its principal organ has been given a systematic set of functions that is required to duly discharge under the mandate of the Court. Such a structured approach helps ensure that the ICC is able to efficiently discharge all the functions entrusted upon it under the Rome Statute.

⁷⁵ Cassese, *Supra* note 11, at 383.

⁷⁶ Schabas, *Supra* note 1, at 157.

Such a coherent structure and each organ having multifaceted functions drives the Court to smoothly work towards achieving the aspirations of the people of the world to work towards international harmony and preserving peace.

CHAPTER III

ICC AND INTERNATIONAL CRIMINAL JUSTICE

ICC and its uniqueness have emerged over a period of time by way of a gradual process involving interpretation of the core provisions of the Rome Statute. It makes detailed provision for due process rights not only of those who are accused but also of persons who are under an ongoing investigation. Of all the existing legal framework pertaining to international criminal courts, the one pertaining to ICC can be rightly said to be the most solicitous as far as the rights and interests of the victims are concerned while also affording certain safeguards to the victims concerned.⁷⁷ Such a unique approach renders the ICC capable enough to be established as a principal organ in the arena of international criminal justice and concurrently, taking initiatives to promote peace.

Thus, the ICC not only takes into consideration the interests of the witnesses as well as the victims from the point of view of ensuring their well being but also works towards ensuring that the basic principles of natural justice are afforded upon those who have been accused and are under going investigations with respect to the crimes that have been committed by them.

⁷⁷ Bartram, *Supra* note 29, at 265-267.

Thus, it creates a hallmark as far as balancing between the victims' rights as well as the rights of the accused and convicted persons are concerned.

The Nuremberg Charter and the Tokyo Charter along with those of ICTY and ICTR are comparatively thin when it comes to appropriately capturing the principles of ICL, something that the Rome Statute has remarkably achieved. Once the crimes had been defined in the former documents, it was left up to the discretion of the judges to decide with respect to elements of crimes as well as the evidence and the assessment of guilt and such other factors.⁷⁸ However, the Rome Statute leaves no way for such discretion to the judges as it is an exhaustively documented treaty that covers various principles from common law, the Romano-Germanic system as well as other systems of penal justice.

3.1 KEY FEATURES OF THE ICC

3.1.1 *Holding fair trials*

Speaking in respect of the trials before the IMT-N, Robert Jackson, who was the prosecutor thereof observed that:

⁷⁸ Schabas, *Supra*, note 1, at 71.

"History would assess the trials that were to be conducted before the said tribunal, in light of the element of fairness that were adopted at the time when the trials were conducted".⁷⁹

Fair trials i.e. those held without any kind of bias or prejudice have great value and contribution to make as far as the functioning of an efficient criminal justice system is concerned. The result of a successful conclusion of a fair trial is the neutral application of the principles of international criminal law accompanied with the resultant respect for the observance of rule of law.⁸⁰ There can be no question for the successful functioning of the ICC and the effective delivery of criminal justice if the trials conducted before the ICC is not fair and impartial.

Given the dangerous circumstances under which criminal justice is to be delivered, the ICC looks at providing uncompromising justice through the provisions contained in its Rome Statute. Article 64(2) of the Rome Statute provides for the right to a fair trial amongst other provisions by calling upon the Trial Chamber to *inter alia* ensure that a "*trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses*".

⁷⁹ *Supra* note 15, at 219.

⁸⁰ Several international conventions such as the Universal Declaration of Human Rights 1948 and the International Covenant on the Civil and Political Rights, 1966 insist on fair trials and the same has been recognised as a core requirement as far as procedural justice is concerned.

Thus, having a statutory provision which guarantees a right to a fair trial will not only help identify the fundamental rights that are associated with this kind of protection, but will also ensure more responsibility on the organs of the ICC to contribute towards achieving the goal of holding fair and expeditious trials that will help decide the truth.

3.1.2 *Independence of the Prosecution*

Once the provisions with respect to right to fair trial are enshrined, it becomes imperative to ensure that the Office of the Prosecutor is impartial and non interfered with to truly achieve the objective of the ICC in delivering justice.⁸¹ Certain attributes have been accorded upon the Prosecutor with respect to impartiality, independence and ensuring the highest standard of integrity as far as the staff is concerned.⁸² Thus, impartiality and independence become two vital qualities that help the Prosecutor in deciphering the truth on the basis of the evidence that has been collected with respect to the particular matter at hand.

3.1.3 *Victim and Witness Protection*

In accordance with the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the Rome Statute provides that the

⁸¹ Peter De Jong, *Towards Stability and Lasting Peace*, (Apr. 20, 2018, 11:25 PM) <https://www.icc-cpi.int/about>.

⁸² *Ibid*

ICC and the principal organs are to treat the victims of the heinous crimes with compassion and ought to respect their dignity; that they are informed about the stage of the proceeding that has been reached, and offer them with compensation for the loss and harm that has been caused to them on account of the crimes inflicted upon them.⁸³ Participation and reparation are two fundamental mechanisms by which the ICC protects the victims. The ICC calls for voluntary participation of the victims concerned and enables them to do so by making available to them forms and other documents required to be submitted. As far as reparations are concerned, the ICC provided the same to victims who are recovering from the traumas and atrocities to which they have been subjected. This helps play a vital role in rebuilding the lives of the victims as well as reshaping the communities.

In fact, the ICC's Victim and Witnesses Unit ensures that victims are safe, receive appropriate support and assistance from trauma experts that are appointed.⁸⁴ The confidentiality and safety of all the victims as well witnesses and their respective families are protected and maintained by the ICC at all stages of the trials conducted before the ICC. Additionally, the Rome Statute also provides for a Trust Fund for "*the benefit of victims of crimes within the jurisdiction of the Court, and the families of such victims.*" Thus, ICC makes a careful attempt at ensuring that the victims are not subjected to any kind of

⁸³ Schabas & Bernaz, *Supra* note 21.

⁸⁴ *Supra* note 81.

victimization again and that the victims are not merely rendered to the status of passive observers, as would be the case in various national systems of criminal justice.

With regards to the *Darfur referral case*,⁸⁵ the Pre-Trial Chamber, *suo motu*, appointed two amici curiae to make recommendations on the kind of protective measures to be taken into consideration for ensuring the safety of the victims,⁸⁶ and they went on to make the same for stronger and enhanced protection as far as the victims of these crimes are concerned.

3.1.4 ***Safeguarding rights of the defendants***

The Rome Statute provides the defendants certain specific rights, *inter alia*, the right of trial without any unnecessary delay, the right to freely choose a lawyer and be represented in a trial, the right to not be compelled to testify or confess guilt, the right to prepare their defense, and the right to follow the proceedings in a language that he or she completely understands and the right to seek an interpreter and translations, as and when required.

Furthermore, the Prosecutor is also required to disclose the substance that comprises of the proof and that tends to absolve the individual accused of a

⁸⁵ ICC, Case Information Sheet, Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09.

⁸⁶ Professor Antonio Cassese who was the head of the UN Commission of Inquiry and Louise Arbour, the UN High Commissioner for Human Rights had been appointed.

crime.⁸⁷ The charged person also has the right express objections with respect to the charges levied against him and to challenge the evidence that is being presented by the Prosecutor. Thus, the Rome Statute makes a holistic attempt at safeguarding some of the most basic rights of the charged persons.

3.1.5 *Crime of Aggression*

As has been discussed hereinabove, the ICC exercises jurisdiction over four categories of crimes; aggression being one of them. This crime has been outside the mandate of the other ad hoc tribunals and hence, took a long time to be brought in force on account of lack of unanimity with respect to the definition.⁸⁸ The common notion that often exists is that genocide is the crime of all crimes. Nevertheless, aggression is also a crime of equal stature if not more. In fact, the IMT-N had observed aggression to be "*the supreme international crime different from other war crimes in that it contains within itself the accumulated evil of the whole.*"⁸⁹ This becomes particularly important given that once a war breaks out then it is likely to create a situation that culminates in the commission of other crimes such as genocide, war crimes as well rape, plundering of resources and abuse of children and women.

⁸⁷ *Supra* note 81.

⁸⁸ Bartram, *Supra* note 29, at 119.

⁸⁹ Judgment of the IMT-N for the Trial of German Major War Criminals, 1 Trial of Major War Criminals Before the IMT-N 171, 186 (1946).

Thus, it is this uniqueness that the ICC has been able to provide as far as the field of international rules and regulations is concerned that makes it stand out from its contemporaries and other international entities.

3.2 GENERAL PRINCIPLES PRESCRIBED IN THE ROME STATUTE

3.2.1 *Transition from state responsibility to individual responsibility*

The IMT-N had observed with respect to the offences that it was trying:

“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁹⁰

Before the trials before the IMT-N had been conducted, there was no such concept of making the individual responsible. However, with the convening of the Nuremberg Trials and the Tokyo Trials this concept has come to be established in International Criminal Law when individuals and not states were held responsible for the crimes that were being committed by them. Article 5 of the Nuremberg Charter conferred jurisdiction on the IMT-N:

“To try and punish the Far Eastern War Criminals, which as individuals, or members of organisations are charged with the offenses.”

⁹⁰ Ibid

Only when these individual men are prosecuted and punished for the crimes committed can the true objective of international law be achieved and enforced.⁹¹ In fact, during the drafting of the Rome Statute, questions on the aspect of corporate criminal liability had also been strongly discussed but on account of paucity of time, no consensus had been reached as a result of which the same had to be dropped. Thus this notion found way in the Rome Statute in the form of Article 25 thereof. The Article further goes on to provide for participation in the commission of the offences and provides for liability in this regard wherein it pertains to the case of an attempted crime. Thus, if the ultimate objective of the Court is to prevent atrocities from occurring, it becomes imperative to ensure that situations of attempted crimes are not forgotten.

3.2.2 *Heads of State not immune*

The Rome Statute does not provide any immunity to the heads of State as is enshrined in Article 27 of the Rome Statute. No special treatment is afforded upon any person merely on account of governmental or official capacity and even where national legislations grant immunity to a person, the same does not prohibit the ICC from taking action against such an individual.⁹² The best

⁹¹ *Supra*, note 5, at 33.

⁹² Bartram, *Supra* note 29, 375.

illustration would be of the case of ***Charles Taylor***⁹³ who was the head of state of Liberia when the crimes had been perpetrated and could not be immune from the crime he had committed.

Thus where any individual commits a crime, irrespective of the political or any other official office the person concerned holds, will not preclude the person from being liable in respect of the crime that the individual is accused to have committed. Thus, this ensures the universal approach adopted by the drafters of the Statute as the context against which it was brought it were the offences committed by the perpetrators in uniforms. This ensures preventive measures are taken to bring all to justice.

3.2.3 *Principle of the superior order*

Regarding war crimes, an important dilemma to be faced with is the challenge of associating the crimes with the respective commanders that are perpetrated by their junior officers and subordinates.⁹⁴ This doctrine of superior order generally refers to the defense of immunity that is claimed by the person of the inferior rank who owes the duty of the obedience to a superior giving the order.⁹⁵ If this doctrine is applicable, then the agent may

⁹³ Charles Taylor is the former head of Liberia and is currently serving a sentence of imprisonment for a period of fifty years on account of aiding the rebels who committed various atrocities in the neighbouring region of Sierra Leone.

⁹⁴ Schabas, *Supra* note 1, at 83-85.

⁹⁵ *Supra*, note 15, at 231-233.

claim immunity for his action on the ground that it was only the minister and was done in the pursuance of a command by his lawful superior.

Further, under Article 33 of the Rome Statute, it has been recognized that superior order is no defense at all unless three important conditions are cumulatively fulfilled, namely:

- (a) Person concerned was legally obliged to abide by the governmental or superior orders and commands;
- (b) Person concerned was unaware with respect to the legitimacy of the orders; and
- (c) The command was not noticeable unlawful.

Such a provision contributes towards the acceptance of the principle as a positive legal norm in the field of international law.

3.2.4 ***Mens Rea/ Mental element***

Criminal law is different from the other branches of law in so far it requires the presence of specific intention in order to be liable for a wrong cause. The word intent is derived from the Latin word "*mens rea*" or what is otherwise known as guilty mind and more particularly, taken from the phrase "*actus non facit reum nisi mens sit rea*".⁹⁶ The Rome Statute establishes an extremely

⁹⁶ Schabas, *Supra* note 1, at 85-87.

high requirement with respect to the element of intent as it provides that the material constituents of the crime in question need to be committed with specific intent and knowledge.

Moreover, the Rome Statute specifically addresses the two concepts of intent and knowledge in order to avoid any ambiguity. With respect to a particular consequence, a person is said to have intent when he means to cause that particular consequence or knows that the same is likely to be caused in the ordinary occurrence of events.⁹⁷ Additionally, knowledge has been provided to mean awareness of a particular circumstance to exist. As far as the material element of the crime is concerned, what is very commonly referred to as *actus reus*, a corresponding provision to that effect has not been provided in the Rome Statute.

3.2.5 ***Presumption of Innocence***

This principle establishes burden upon the prosecution, under the Rome Statute, to prove guilt of the accused beyond any reasonable doubt, an extremely common notion that has found place in criminal legal systems across the globe. Consequentially, this requires that the public authorities concerned do not engage in the pre-judgment of the outcome of any trial

⁹⁷ Cassese, *Supra* note 9, at 540-543.

thereby giving protection to the individual concerned as being treated as a criminal even before the guilt has been absolutely established.

The European Commission of Human Rights⁹⁸ has recognised the principle of presumption of innocence as:

“It requires, inter alia, that when carrying out their duties, the members of a court shall not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused.”

This principle has also come to be interpreted by the Human Rights Committee in respect of its General Comment on Article 14⁹⁹ of the International Covenant on Civil and Political Rights, 1966 (“ICCPR”) wherein it has observed that this principle requires the public authorities ***“to refrain from prejudging the outcome of a trial”***.

Applying this observation in reality, it will ensure bodies such as the UNSC, UNGA as well as other Offices of the UN do not predict the outcome of a trial or do not function with any preconceived notion thereby ensuring impartiality at the same time. This would also ensure that the decisions that are given by the ICC are unanimous.

⁹⁸ Barbera, Messegue and Jabardo v. Spain, Series A, No. 146, Dec. 6, 1988.

⁹⁹ General Comment 13/21, UN Doc. A/39/40.

3.2.6 *Doctrine of Legality*

The legal systems that are set up domestically within nations tend to premise their criminal laws either on the basis of substantive justice or strict legality. The former asserts the protection of the society against any danger thereby preferring society over the individual, an extreme application of which was observed during Nazi rule in Germany. The latter, in contrast, states that an individual may be held liable only in respect of an act, which at the time of its commission, has been identified as a crime under relevant applicable laws. This takes form in the Rome Statute under the concepts of "*nullum crimen sine lege*" and "*nulla poena sine lege*" that protect individual citizen against the omnipotence of the State and the ruthless diktats of the majority.¹⁰⁰ These concepts imply that offences must be provided for in law and that criminal rules are not to have retroactive operation.

3.2.7 *No statutory limitation*

It has been expressly provided in the Rome Statute that none of the crimes will be subjected to any period of statutory limitation.¹⁰¹ This has been particularly addressed to ensure that the States do not incorporate provisions in their respective domestic legislations that offer any kind of statutory limit

¹⁰⁰ Boot, *Supra* note 50, at 616-620.

¹⁰¹ Article 29 of the Rome Statute.

with respect to the trial and prosecution of the times. Having such a statutory restriction may defeat the very essence of trial of these crimes.

Thus, given the nature of the crimes and the kind of consequences that follow, it may not be logical to have a time limit within which the charges for the crimes need to be brought before the ICC.¹⁰² This however may be successful only if the countries adopt such laws and policies that ensure that the laws are not in contravention with the provisions of the Rome Statute.

Thus, as is the case with every legal order, the Rome Statute has come to incorporate the most basic and fundamental principles of international criminal law within its text, thereby solidifying the approach the ICC can take towards the meeting of the purpose for which it had been established.

¹⁰² Schabas, *Supra* note 1, at 89.

CHAPTER IV

ICC IN ACTION

Perhaps, the best way to ensure that any body or organ that is the product of a treaty, is not restricted merely to the status of a paper tiger is to examine whether the body or the organ concerned has been able to meet the purpose for which it has been established in the practical realm. One such way of examining whether the ICC has been able to achieve any success in meeting with the objectives of the Rome Statute, the purpose for which it was constituted is to peruse through various judgments concerning the decisions of the ICC with regards to some of the most heinous crimes ever to be committed upon mankind. Such an approach ensures that the ICC is not merely conceptualized, as an organ of strong will merely in black and white, but is in fact able to achieve and work to the maximum of its potential in practical situations that require its intervention and work.

The ICC currently has around twenty-six cases in front of it, out of which it has issued warrants of arrest on over thirteen occasions.¹⁰³ This is interesting to note since it has been in operation only for a period of over fifteen years and it has already set precedence by issuing warrants of arrests

¹⁰³ ICC, *Fact Summary*, (May 17, 2018, 9:22 PM), <https://www.icc-cpi.int/Pages/cases.aspx#Default=%7B%22k%22%3A%22%22%2C%22s%22%3A21%7D#2ae8b286-eb20-4b32-8076-17d2a9d9a00e=%7B%22k%22%3A%22%22%7D>.

in cases where evidence has been collected, the individuals have been tried and their guilt has been determined. Out of these cases, the ICC has also delivered the judgment with respect to imprisonment on four occasions, the maximum being eighteen years against Mr. Bemba on account of war crimes committed by him in the Democratic Republic of Congo (“DRC”) and the lowest being nine years against Mr. Al Mahdi¹⁰⁴, for attacking historical sites and other war crimes in Mali. Thus, this shows that the ICC is determined to be strong-willed as far as its approach towards achieving the goals of the Rome Statute is concerned.

With regards to the main functioning of the ICC, the approach that the ICC adopts is two-fold, wherein in the first instance, it has *situations under investigation* and those that are presently undergoing *preliminary examination*.¹⁰⁵ Once a situation is referred to the ICC either by the States or by the UNSC or on its own volition, the Prosecutor commences conducting investigation in the situation in hand, by collecting evidence, analyzing the same, interrogating persons who are under question as well as examining the witnesses and the victims that may be able to bring crucial evidence as far as the trials are concerned. This becomes particularly important in order to establish the suspect’s guilt or innocence. The Office of the Prosecutor

¹⁰⁴ ICC, Situation in the Republic of Mali, The Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, (May 17, 10:36PM) <https://www.icc-cpi.int/mali/al-mahdi/Documents/Al-MahdiEng.pdf>.

¹⁰⁵ *Supra* note 102.

achieves this by seeking co-operation from the States as well as other international organizations and also dispatches teams of expert investigators to examine the situation in areas where the reported crimes may have been perpetrated.

The Prosecutor has been entrusted with the duty of determining whether a particular situation meets the requirement laid down under the Rome Statute for the purpose of initiating an investigation. In order to arrive at this decision, the Office conducts a preliminary examination of all communications and information that have been brought to its notice. It is on the basis of such receipt of information that the Prosecutor takes a decision and thereafter proceeds with the investigation of the situation concerned.

Whilst examining whether the ICC has been able to reach success or not, it becomes important and is indeed worthwhile to mention the case that involves the very first occasion when an individual was arrested and thereafter sent to the Hague for the trial of the offences that he had been charged with. Thus, below is a brief analysis of the historic moment when for the first time ever an individual against whom an arrest warrant had been issued, was sent to the ICC's seat in the Hague for the purpose of his trial.

The Prosecutor v. Thomas Lubanga Dyilo Case: First person to be arrested and sent to The Hague for trial¹⁰⁶

This is a landmark case as far as the working of the ICC is concerned since Thomas Lubanga Dyilo became the first individual who was arrested and sent to The Hague for the purpose of his trial. Lubanga, a citizen of the DRC was the president of an armed group known as the Union of Congolese Patriots (“UCP”) that claimed to be acting for the cause of the ethnic group known as Hema, located in Ituri part of DRC. The UCP was accused of having committed various barbaric acts such as rape, torture, summary executions, persecution and extermination of other ethnic minority group in the region as well as the recruitment and conscription of children as soldiers in its group.¹⁰⁷ The ICC had mostly notably charged Lubanga with war crimes in respect of the enlistment of children under the age of fifteen years as soldiers and procuring them to take direct participation in the hostilities that took place in the years 2002 and 2003.¹⁰⁸ Thus, the trial against Lubanga began in January 2009. On July 10, 2012 the Trial Chamber I sentenced Lubanga to imprisonment for a period of ***fourteen years***. This was a big victory for the ICC as it showed the world that it was indeed capable of

¹⁰⁶ ICC, Situation in the Democratic Republic of Congo, The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, (May 17, 2018, 9:25PM) <https://www.icc-cpi.int/drc/lubanga/Documents/lubangaEng.pdf>.

¹⁰⁷ *Supra*, note 105.

¹⁰⁸ First Verdict at the International Criminal Court: The Prosecutor v. Thomas Lubanga Dyilo, Human Rights Watch, February 2012, (May 11, 2018, 9:04 PM, www.iccnw.org).

making individuals responsible for the crimes that they have committed in their individual capacity.

Some of the situations that have been referred to the Prosecutor's Office are either by States themselves or through the UNSC and the Office has also acted *proprio motu* in a host of situations. The Pre Trial Chambers have on multiple occasions declined to confirm charges against several persons,¹⁰⁹ whilst the Prosecutor has withdrawn charges against others and several individuals against whom arrest warrants have been issued continue to live at large in different countries and have not been able to bring them to justice. This, the ICC largely accounts to the non co-operation that exists between the nations and also in particular, an individual against whom an arrest warrant has been issued happens to be in the territory of the State that is not a party to the Rome Statute.

4.1 SITUATIONS UNDER INVESTIGATION

Currently, as of 2018, and after being operations for years, the ICC has **eleven situations under investigation** including in places such as Sudan, Democratic Republic of Congo, Central African Region, Uganda, Kenya, Mali and Libya. A brief analysis of some of these situations has been made hereinafter.

¹⁰⁹ Schabas, *Supra* note 1, 357-358.

4.1.1 *Situation in Darfur, West Sudan vide UNSC referral*¹¹⁰

Since the year 2003, the remote region of Darfur in West Sudan has witnessed the deaths of over thousands of peoples and displacement of over two million more. In fact in the year 2004, the United States Congress had recognised the atrocities that have been committed in the Darfur region of West Sudan as genocide and had called upon the Government of Sudan to comply with the requirements of the Genocide Convention. However, on account of inaction on the State, the situation has only worsened over the period of years.

For a period of over five years commencing from March 2003 until July 2008, a non international armed conflict was ongoing in the region between numerous warring parties, including the Government of Sudan and several other organized armed groups such as the "*Justice and Equality Movement*" and the "*Sudanese Liberation Army*".¹¹¹ It was during this time that Omar Hassan Ahmad Al Bashir, carried out a systematic attack several ethnic minority groups in the region on the grounds of their proximity to the anti government rebel forces. These atrocities included:

¹¹⁰ *Supra* note 85.

¹¹¹ *Supra* note 85.

- Murdering as well exterminating and torturing several thousands of inhabitants;
- Raping of thousands of women belonging to these minority groups;
- Forcibly transferring large parts of the population of these groups; and
- Contaminating the wells and reservoirs belonging to the people of these ethnic groups.¹¹²

Whilst a brief analysis of the case pertaining to Omar Hassan Ahmad Al Bashir has been mentioned hereinafter, it is pertinent to note that the following are other cases that refer to the catastrophic situation in Darfur, Sudan:

1. The Prosecutor v. Ahmad Muhammad Harun;
2. The Prosecutor v. Bahar Idriss Abu Garda;
3. The Prosecutor v. Abdallah Banda Abakaer Nourain; and
4. The Prosecutor v. Abdel Raheem Muhammad Hussein.

The Prosecutor v. Omar Hassan Ahmad Al Bashir¹¹³

Former UNGA Secretary General Kofi Annan established the International Commission of Inquiry on Darfur pursuant to the terms of the UNSC

¹¹² ICC, Situation in Darfur, (May 17, 2018, 10:20PM) <https://www.icc-cpi.int/darfur>.

¹¹³ ICC, Case Information Sheet, Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, (07 May, 2018, 8:10 PM, <https://www.icc-cpi.int/darfur/albashir/Documents/AIBashirEng.pdf>).

resolution-bearing number 1564. This Commission in turn reported to the UN that it had reason to believe that several international crimes such as war crimes and crimes against humanity have been perpetrated in the region and as part of its recommendations, suggested that the situation be referred to the ICC. The UNSC, in accordance with the provisions of the Rome Statute, referred the situation to the ICC pursuant to resolution-bearing number 1593.

Once the situation was brought before the ICC by the UNSC, a report was received by the Office of the Prosecutor from the International Commission of Inquiry on Darfur. On perusing the same, the Prosecutor's Office requested for additional information and documentation in order to better analyse the situation that was prevailing therein and upon being satisfied with respect to the claims, opened by the Prosecutor on June 06, 2005

After the commencement of the proceedings, on March 04, 2009, the Pre-Trial Chamber of the ICC issued a warrant of arrest for Omar Hassan Ahmad Al Bashir, on account of him having played an important and constructive role along with numerous other Sudanese leaders in coordinating the counter insurgency plan and attack in Darfur, Sudan that led to several atrocities upon the Darfurians.¹¹⁴

¹¹⁴ ICC, Warrant of Arrest for Omar Hassan Ahmad Al Bashir dated 4 March 2009, bearing no. ICC-02/05-01/09, Pre-Trial Chamber I, (May 7, 2018, 8:42 PM, https://www.icc-cpi.int/CourtRecords/CR2009_01514.PDF).

Once again on July 12, 2010, the Pre-Trial Chamber issued a second warrant of arrest for the Sudanese President wherein he was held responsible for having indirectly perpetrated the crime of genocide in Darfur, a charge that was not present in the first warrant issued for his arrest and thus, the same had been included in the second one.¹¹⁵

The trial of the Sudanese President is of notable importance primarily because it marked the very first occasion when a presiding head of any state that was declared wanted by the ICC pursuant to the two arrests warrants it had issued. Additionally, it was for the very first time that an individual had been tried for the crime of genocide under the Rome Statute. However, at the same time, there are challenges with regards to the prosecution of Omar Hassan Ahmad Al Bashir as despite these arrests warrants, the suspects remains at large on account of the non co-operation between the States in surrendering and/ or arresting the Sudanese President.

4.1.2 *Situation in Republic of Kenya vide the Prosecutor's first ever proprio motu investigation*¹¹⁶

The Pre-Trial Chamber of the ICC, on March 31 2010, granted the request

¹¹⁵ ICC, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir dated 12 July 2010, bearing no. ICC-02/05-01/09, Pre-Trial Chamber I, (May 7, 2018, 8:48 PM, https://www.icc-cpi.int/CourtRecords/CR2010_04825.PDF).

¹¹⁶ ICC, Situation in the Republic of Kenya, ICC-01/09, (May 17, 2018, 10:24PM) <https://www.icc-cpi.int/kenya>.

sought by the Prosecutor in investigating and inquiring *proprio motu* with respect to the crimes against humanity committed in Kenya in the period between June 2005 and November 2009. These investigations have primarily concentrated on the alleged crimes against humanity, committed as part of the violence that was ensuing in the region following the contesting of election therein, that have culminated in the death of over a thousand civilians, rape as well as torture of numerous other people.¹¹⁷ The acts of atrocities that these people had been subjected to including setting the victims alive on fire, beheadings and procuring as well as using machetes to kill people. A large number of women had been raped, abandoned thereafter and several of them suffered from sexually transmitted diseases as a result thereof.

The investigation carried out by the Prosecutor had established cases against six suspects, on the grounds of crimes against humanity that involve murder, forcible transfer of population and other degrading acts. However, these charges had not been confirmed or withdrawn concerning these six suspects. The situation in Kenya in fact marked the first such occasion wherein the Office of the Prosecutor had initiated an investigation *proprio motu* without the reference from the UNSC or from any State that is a party to the Rome Statute.

¹¹⁷ Ibid

Amongst other people, Uhuru Muigai Kenyatta, the President of the Republic of Kenya, was accused of having been responsible as an indirect, co-perpetrator for the commissioning of crimes against humanity that included:

- Rape;
- Murder;
- Torture and other inhumane acts; and
- Persecution¹¹⁸

The Prosecutor v. Uhuru Muigai Kenyatta¹¹⁹

On November 05, 2009, the Prosecutor had intimated the intention to submit a request for commencing an inquiry and investigation in the situation in Kenya following the post election violence that had resulted in the death of over a thousand people. Thereafter, the Pre-Trial Chamber allowed the request of the Prosecutor in opening the investigation into the alleged crimes against humanity that were committed in Kenya.

On several occasions, the Trial Chamber had relinquished the commencement date of the trial in the said case on account of which eventually, on December 03, 2014, the Trial Chamber did not allow the request for further adjournment as sought by the Prosecution. Instead, the

¹¹⁸ *Supra* note 115.

¹¹⁹ ICC, Case Information Sheet, Situation in Republic of Kenya, The Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-02/11, (07 May, 2018, 9:22 PM, <https://www.icc-cpi.int/kenya/kenyatta/Documents/kenyattaEng.pdf>).

Chamber directed the Prosecutor to indicate either the withdrawal of charges or the willingness to move ahead with the proceedings. Thereafter, the Prosecutor proceeded with a notice to withdraw the charges against Kenyatta on account of lack of availability of evidence in the said case. The Trial Chamber noted the withdrawal by the Prosecutor of the charges against Kenyatta and terminated the proceedings in the case.¹²⁰

Thus, this is indicative of how the Prosecutor's office has duly acted in spirit of the principles of criminal justice system by acting impartially, without any prejudice and commensurate with the availability of evidence. The Prosecutor also stated of the probability of bringing out a fresh case in the event additional evidence as is required would be available.

4.1.3 *Situation in the Central African Republic ("CAR")*¹²¹

Since July 01, 2002, alleged cases of crimes against humanity and war crimes were reported to have been committed in the CAR, with the levels of violence being at peak in the years 2002 and 2003. The situation in CAR worsened on account of an armed dispute that broke out between the forces belonging to the Government and those siding the rebels that resulted in various atrocities such as:

¹²⁰ ICC, Decision on the Withdrawal of Charges against Mr Kenyatta, dated 13 March 2015, bearing no. ICC-01/09-02/11, Pre-Trial Chamber V (B), (May 7, 2018, 9:29 PM, https://www.icc-cpi.int/CourtRecords/CR2015_02842.PDF).

¹²¹ ICC, Situation in CAR I, 01-05, (May 17, 2018, 10:26PM) <https://www.icc-cpi.int/car>.

- Killing and raping of civilians in front of family members and in the open public places;
- Looting of homes as well as stores; and
- Sexual crimes that outnumbered the actual killings.

The Prosecutor v. Jean-Pierre Bemba Gombo¹²²

The investigation conducted by the Prosecutor led to the case against Jean-Pierre Bemba Gombo who was charged with war crimes as well as crimes against humanity. The CAR Government referred the situation of violence in the country to the ICC on December 21 2004 and thereafter provided the office of the Prosecutor with all the requisite documents. After launching the investigation, the crimes that were committed in the region had been disclosed to the public in 2007.

Thereafter, the Pre Trial Chamber issued an arrest warrant for Bemba to the Kingdom of Belgium who was consequently arrested by the concerned authorities in Belgium. He was thereafter surrendered to the ICC and for the very first time appeared before the Pre Trial Chamber on July 4 2008. The Pre Trial Chamber also requested the government of Portugal to trace,

¹²² ICC, Case Information Sheet, Situation in CAR, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, (08 May, 2018, 9:35 PM, <https://www.icc-cpi.int/car/bemba/Documents/bembaEng.pdf>).

identify and seize the property as well as freeze the assets of Bemba. The hearing in respect of confirming whether the charges that were brought against Bemba were true or not took place between January 12 and 15 2009.¹²³ In March 2009, the Pre Trial Chamber requested the Prosecutor to submit a document containing amended charges against Bemba, most particularly incorporating another mechanism of proving liability i.e. in addition to individual responsibility, Bemba's liability as a commander or a superior acting criminally could be proved in consonance and as per the requirements of the provisions of the Rome Statute. Eventually, the Pre Trial Chamber was convinced that there exists sufficient evidence to create a case against Bemba on grounds of war crimes such as rape, murder and pillaging and crimes against humanity as well. The case was eventually referred to the Trial Chamber and it began on November 22, 2010.

After hearing of the parties concerned, the Trial Chamber concluded that Bemba had been found guilty of the charges that had been levied against him and thereby, on June 21, 2016, sentenced him to eighteen years of imprisonment.¹²⁴ Currently, proceedings with respect to the appeal are underway before the Appeals Division of the ICC.

¹²³ Ibid

¹²⁴ ICC, Decision on Sentence pursuant to Article 76 of the Statute, dated 21 December 2006, bearing no. ICC-01/05-01/08, Trial Chamber III, (08 May, 2018, 9:38 PM, https://www.icc-cpi.int/CourtRecords/CR2016_04476.PDF).

4.1.4 *Situation in Uganda*¹²⁵

Reported cases of war crimes and crimes against humanity committed during an armed battle between the national authorities of Uganda and the Lord's Resistance Army ("LRA") had been brought to the notice of the ICC from the referral brought forward by the Government of Uganda itself. Investigations had opened in 2004, in the month of July with respect to the following offences:

- War crimes such as inhumane treatment of civilians and attacking them, murdering and raping them, causing forceful conscription of children in the armed battle; and
- Crimes against humanity such as murder, enslavement and causing grievous bodily injury.

This eventually led to the ICC issuing its first warrant of arrest in 2005 against the top leadership of the LRA including Joseph Kony and Vincent Otti who continue to remain at large and the other leader, namely, Dominic Ongwen had surrendered himself in January 2015.

¹²⁵ Situation in Uganda, 02-04, (May 18, 2018, 10:29PM) <https://www.icc-cpi.int/uganda>.

The Prosecutor v. Joseph Kony and Vincent Otti¹²⁶

The ICC issued the warrants of arrest against the aforesaid leaders of the LRA under the seal on July 08, 2005. However, these individuals continue to remain at large even after the passage of a period of over ten years since the time when the warrants had been issued for their arrest. Cases against the other two members who were also involved in the charges have been terminated on account of their demise. Total of forty-six individuals have been granted the status of victims under this case.

4.1.5 Situation in Libya¹²⁷

Owing to the fact that Libya is not a party to the Rome Statute, the UNSC had referred the situation in Libya to the ICC through Resolution 1970 in the year 2011 that allowed the ICC to exercise jurisdiction in respect of the crimes that have occurred in the territory of Libya from February 15, 2011 onwards. The UNSC in doing so, observed and condemned the kind of violence that had wrecked the country on account of the force used against the civilians that amounted to a systematic violation of their basic rights and expressed concern on the deaths of civilians and the situation of hostility that

¹²⁶ ICC, Case Information Sheet, Situation in Uganda, The Prosecutor v. Joseph Kony and Vincent Otti, ICC-02/04-01/05, (16 May, 2018, 12:50 AM, <https://www.icc-cpi.int/uganda/kony/Documents/KonyEtAIEng.pdf>).

¹²⁷ ICC, Situation in Libya, <https://www.icc-cpi.int/libya>.

they lived in. The man behind these atrocities was **Muammar Mohammed Abu Minyar Gaddafi**, the leader of Libya and arrest warrant issued against him was withdrawn on account of his death, while the case is currently pending against **Saif Al Islam Gaddafi**. The situation in Libya is the second time that the UNSC had exercised the power of referral and also the second territory to be investigated upon that has not become a party to the Rome Statute yet. It started with the outbreak of the civil war in countries like Tunisia and eventually moved on Libya wherein large-scale demonstrations were carried out for the overthrow of the tyrannical rule. On account of the investigations, the following charges were made against Saif Al Islam Gaddafi:

- Murder; and
- Persecution.

The Prosecutor v. Saif Al Islam Gaddafi¹²⁸

After confirming the crimes that were carried out in Libya, arrest warrants had been issued for Muammar Gaddafi (who thereafter deceased) and for Saif Al Islam Gaddafi. However, the Libyan authorities challenged this decision as they were themselves carrying out the requisite procedure against Saif Gaddafi and that the ICC ought to work in consonance with the principle of

¹²⁸ ICC, Situation in Libya, The Prosecutor v. Saif Al Islam Gaddafi, Case No. ICC/011-01/11, (May 18, 2018, 11:00PM) <https://www.icc-cpi.int/libya/gaddafi/Documents/GaddafiEng.pdf>.

complementarity. Thus, after considerations, the case against Saif Al Islam Gaddafi was held inadmissible by the Court in accordance with the principles of criminal justice and rule of law.

Each of these cases signifies the diversities that the ICC has adopted as far as conducting the trials and the passing of sentencing is concerned. However on account of the fact that the ICC does not individuals in their absence, it continues to await for the individuals concerned to be transferred to the Court so that the appropriate criminal procedures can be initiated against them. Thus indicating that almost everything boils down to the level of dedication, commitment and co-operation that is shared between the members of the international community to bring to light true justice.

4.2 PRELIMINARY EXAMINATIONS

The ICC currently has ten situations that are currently under preliminary examinations in places such as Afghanistan, Columbia, Gabon, Guinea, Iraq/UK, Nigeria, Palestine, the Philippines, Ukraine and Venezuela.

Brief analysis of some of the preliminary examinations has been made hereunder.

4.2.1 *Afghanistan*¹²⁹

As recently as last year in November, the Prosecutor sought permission from the Pre Trial Chamber to proceed with investigating into the alleged war crimes as well as crimes against humanity that have reportedly been orchestrated in Afghanistan in respect of the armed disturbance that wrecked havoc in the country since 2003. The ICC commenced with the process of collecting representations from the victims of the alleged offences committed in the country that has ended as of January 2018. A total of six hundred and ninety nine victim representations had been collected by the ICC that include oral interviews of the victims along with details as well as statistics that have been gathered from the transmitted representations. The Pre Trial Chamber will now commence with assessing these representations and thereafter decide upon the request of investigation made by the Prosecutor.

The Prosecutor had reported that the members of military forces of USA might have allegedly committed atrocities amounting to war crimes while maintaining their presence in the country since 2003. It is also reported that the Central Intelligence Agencies' officials may have also subjected several civilians and detainees to torture and other inhumane treatment. Thus, this becomes the first instance wherein the ICC has shifted its focus from a

¹²⁹ ICC, Preliminary Examination, Alleged Crimes against Humanity and War Crimes Committed in Afghanistan since May 01, 2003, (May 07, 2018, 11:10 PM, <https://www.icc-cpi.int/afghanistan>).

region in Africa to the Middle East.¹³⁰ The war torn country of Afghanistan has witnessed several situations of abuse amidst the war that has been ongoing for over a decade now.

4.2.2 *Iraq/ U.K.*

The ICC is conducting an examination and analysis of the situation in Iraq with respect to a conflict that was underway between the forces of the U.S.A in coalition with those from U.K and certain other countries. The examination was terminated on February 9, 2006 and was however reopened on May 13, 2014 after the receipt of certain new information.¹³¹ This focuses upon alleged crimes that have been committed by nationals of U.K as part of the conflict and occupation of Iraq between 2003 and 2008 on grounds of administration of the region. These crimes include torture, murder and several other forms of degrading treatment subjected upon the people in Iraq.

Thus, in the event the examination was to proceed and allow investigation to commence, the same would lead to a large number of military veterans and

¹³⁰ US Army and CIA may be guilty of war crimes in Afghanistan, says ICC, November 15, 2016, The Guardian, (May 7, 2018, 11:16 PM, <http://www.theguardian.com/law/2016/nov/15/us-army-and-cia-may-be-guilty-of-war-crimes-afghanistan-says-icc>).

¹³¹ ICC, Preliminary Examination, Alleged War Crimes Committed by U.K nationals in the context of the Iraq conflict and occupation from 2003 to 2008, (May 7, 2018, 11:30 PM, <https://www.icc-cpi.int/iraq>).

other members face trials for war crimes allegedly committed by them during their occupation of Iraq.

4.2.3 *Palestine*¹³²

On January 16, 2015, the Prosecutor opened the preliminary examination of the state of affairs in Palestine in order to examine whether the requirements of the Rome Statute are met with for the purposes of commencing an investigation. In fact, in April 2018, the Prosecutor expressed concerns over the increasing violence in Gaza strip as a result of which over twenty-seven Palestinians have been allegedly killed and over a thousand injured, by members of the Israeli Defense Forces.¹³³

Violence that is being rendered upon the civilians as well as the usage of civilians for the purpose of shielding activities that are of military nature could invoke the crimes that have been listed under the Rome Statute. Thus, the Prosecutor has stated that the office would continue monitoring the situation and reported cases of violence before seeking an investigation.

¹³² ICC, Alleged crimes committed in the occupied Palestinian territory, including East Jerusalem, since Jun.13, 2014, (May 18, 2018, 10:32 PM), <https://www.icc-cpi.int/palestine>.

¹³³ ICC, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the worsening situation in Gaza, April 8, 2018, (May 7, 2018, 11:41 PM <https://www.icc-cpi.int/Pages/item.aspx?name=180408-otp-stat>).

4.2.4 *Ukraine*

Although not having signed the Rome Statute, the Government of Ukraine had lodged a declaration accepting the jurisdiction of the ICC with respect to the alleged category of offences and crimes that had been committed upon its territory in the period from November 21, 2013 to February 22, 2014.¹³⁴ Once again, another declaration was lodged by the Ukrainian Government for accepting the domain of the ICC with respect to crimes committed after the aforesaid period, with no longstop date. A large number of atrocities had been reported to have been committed as part of protests that ensued in eastern Ukraine, near Kyiv under the garb of crimes against humanity.¹³⁵ Having long faced the criticism that the ICC only works selectively by focusing on African countries, it is worthwhile to note that it is venturing into disputed Asian and European territories as well.

4.2.5 *The Philippines*

The ICC began a preliminary examination with respect to its campaign of war on drugs for the crimes committed in this regard in the Philippines since July 2016. The ICC can exercise jurisdiction over this country after it submitted its instrument of ratification in August 2011. Thus, the ICC is working with the

¹³⁴ ICC, Preliminary Examination in Ukraine, Alleged crimes committed in the context of the "Maidan" protests since 21 November and other events in Ukraine since 20 February 2014, (May 17, 2018, 10:36PM), <https://www.icc-cpi.int/ukraine>.

¹³⁵ Ibid

Government to track the crime of drug trafficking that has been allegedly reported to be on a rise in this nation. It was only in February 2018 that the ICC announced its decision to do so on account of the fact that thousands of people have lost their lives due to drug related incidents, be it the peddling of drugs or the abuse of drugs.¹³⁶

The deaths have largely arisen on account of the clashes that have taken place reportedly between taken or within various gangs that are operational in this field in this country and a large number of cases are with respect to extra judicial killings that have been conducted by the police authorities as part of their anti drugs agenda and campaign. This makes it one of those recent situations that the ICC is dealing with particularly in the domain of crimes related drugs peddling and abuse.

4.2.6 **Georgia**¹³⁷

With respect to the alleged crimes against humanity and war crimes committed in and around South Ossetia, in Georgia, the Office of the Prosecutor had *proprio motu* initiated an investigation with respect to these alleged crimes committed in the territory in the period between July 1, 2008

¹³⁶ ICC, Preliminary Examination in the Philippines, Alleged crimes committed since at least 1 July 2016, in the context of the "war on drugs" campaign, (May 17, 2018, 10:38PM) <https://www.icc-cpi.int/philippines>.

¹³⁷ ICC, Situation in Georgia, 01-15, (May 17, 2018, 10:27PM) <https://www.icc-cpi.int/georgia>.

to October 10, 2008.¹³⁸ This was with respect to the armed clashes that had taken place between the military personnel of Georgia and the anti rebel forces forming part of South Ossetia. It was also observed that this region could not be considered to be an independent country and as such was part of the country of Georgia.

Numerous cases of shelling, pelting and firing had been reported in the documents provided by the witnesses along with allegations of Georgian airspace by the Russian military forces.¹³⁹ As part of the clashes, valuable items have been removed, houses have been destroyed and a large number of people have lost their lives on account of the ethnic clashes reported to have taken place between the minorities of the region.

Thus, keeping all the declarations given by the witnesses in mind and after a careful analysis of the same, the Pre Trial Chamber authorized the Prosecutor to undertake an examination and investigation of the situation in Georgia.

As can be seen from the above, the ICC has began a crusade against prosecuting and trying individuals who have reportedly committed crimes over which it can exercise its jurisdiction. These crimes indicate the

¹³⁸ Pre-Trial Chamber's Decision on the Prosecutor's request for authorization of an investigation, dated 27 January 2016, bearing no. ICC/01-15 (16 May, 2018, 12:38 AM, https://www.icc-cpi.int/CourtRecords/CR2016_00608.PDF).

¹³⁹ Ibid.

wickedness and shallowness that fills the minds of the very individuals who are responsible for large-scale massacre, displacements of hundreds of thousands of people as well as the destruction and damage of the property. However it is not to say that the ICC has been absolutely successful in bringing out justice as it has struggled from various challenges, an analysis of which has been made in the succeeding chapter.

CHAPTER V

CHALLENGES TO THE ICC

Until the end of the Second World War, provisions contained in International Law were primarily concerned with the relations that existed between the sovereign states and did not particularly take into consideration the manner in which the States treated their own citizens. Nor were the courts able to take into consideration complaints against individuals for the atrocities committed by the representatives of their own states and their military leaders into consideration. This process nevertheless underwent a paradigm shift with the occurrence of the tragic events of the Holocaust, the trials conducted before the IMT-N and the IMT-FE that paved a step in the right direction.

The crimes committed by the Nazis sent a shockwave all throughout the world and called upon the conscience of the people to no longer be quiet towards the atrocities that had been committed. Thus, it came to be recognised that when human rights are violated to such a grave degree and extent as was evident from the barbarities of the Holocaust, it became particularly imperative for the world community at large to intervene and to afford protection upon those who had been subjected to grave violations of their basic human rights in the name of race and religion.

Irrespective of how benevolent the idea of criminal justice appears to be, the same has been compromised on two points right from its inception: **First**, the ICC can exercise jurisdiction in accordance with the Rome Statute only against those citizens belonging to States which have ratified the Rome Statute or against persons who have committed crimes in the territories of the States that are a party to the Rome Statute. Consequentially, given that the ICC is constrained to exercise only the principles of selective justice, a large number of military powers such as China, India, Israel, Russia, the USA and Turkey have not yet become party to the Rome Statute. Such a functioning of merely a selective nature may restrict the ICC in discharging its functions to the maximum of the opportunities available all across the territory of the globe.

Second, questions have very often been raised with respect to the independence and impartiality of the ICC. This is particularly in light of the fact that although the ICC does not sit under the UN system, as a result of Articles 13(b) and 16 of the Rome Statute, it gets tied to the UNSC to the extent that it condenses the paramount doctrine of separation of powers and makes ICC susceptible to political intrusion. This in turn could render the ICC's jurisdiction to be dependent upon the various moods, needs and demands of the international super powers. Thus, this may once again impair the ability of the ICC to function independently and impartially, which is a pre-

requisite towards the attainment of international peace and security that is a long wished goal of various international organs. Thus, while these two may be issues that have challenged the ICC right from the start, it becomes pertinent to make a careful evaluation and analysis of various other challenges that may prevent the ICC from functioning effectively and from meeting with the objectives for which it has been established. In addition to the aforementioned issues, the ICC also suffers from several other challenges, an analysis of which has been made hereinafter.

5.1. *Selective Justice: Focus mainly on African region*

Currently, the ICC has ten active situations under investigation and it becomes extremely crucial to note that all of these situations are predominantly with respect to the African region, including CAR, Libya, Kenya, Sudan, Uganda and the DRC.¹⁴⁰ Thereby, leading to several voices accusing the ICC of having adopted a selective approach by having restricted itself only to the African region, that is not as developed as its American and European counterparts.

Moreover, several countries such as India, Israel, China, Russia, Sri Lanka and U.S.A have refrained from coming within the purview of the ICC, despite some of these nations being active military superpowers. These States that

¹⁴⁰ J. L. Brierly, Do We Need An International Criminal Court? 87, Year Book of the International Law.

are not yet part of the Rome Statute can be brought within the purview of the ICC only through a referral made by the UNSC. At the same time it is worthwhile to note that the UNSC is an extremely powerful political body that has not displayed consistency as far as its referrals are concerned. For instance, the UNSC has not yet referred the situation and crisis in the Syrian Arab Republic (“**Syria**”) to the ICC. Syria as a country has been witnessing turmoil since the outbreak of its civil war in the year 2011 and has seen the death of a large number of its innocent civilians, in the form of women as well as children. The situation in Syria follows a series of armed conflict that broke out between the government forces of Bashar Al Assad and the rebel forces. With respect to the situation in Syria, the OCHR had observed that innocent civilians are being pounded to death and extermination and had strongly called upon those who had committed war crimes in Syria would be liable to face their own faith.¹⁴¹ However, since Syria is not a party to the Rome Statute, not much has been achieved in this regard in order to try those who are responsible not just for war crimes but various other categories of international crimes.

Practically speaking, countries that are protected by the permanent members of the UNSC that in fact have a right to veto the UNSC resolutions, are not likely to be referred to the ICC. Historically speaking, it is specifically in the

¹⁴¹ Assadullah Amin, UNHCR, *Those responsible for war crimes in Syria 'will be held accountable for what they have done,' says UN rights chief*, UN News, (15 May 2018, 5:29 PM, <https://news.un.org/en/story/2018/03/1003981>).

background of an armed conflict that situations dealing with humanitarian crisis, abuse and atrocities surface. Having been confronted with the situation of this nature, the ICC, as it currently appears, is capable of taking action largely against the developing and less developing countries and would have to simply let go off the military powers, a situation that may truly impede with the effective performance of the ICC in meeting with the objectives of international peace and security.

Since a large number of countries enjoying support of political powers as well as strong allies have been shielded from the ICC, its reach has not been effectively universal and has in fact been uneven and limited. Therefore, achieving universal justice may not be possible if powerful countries keep away from the ICC, as it would be rendered to only delivering selective justice. However, on the other side of the coin is the argument with respect to the statistics that indicate the kind of lingering humanitarian crisis that the people of Africa face with respect to several conflicts that have wrecked the lives of the ordinary civilians in these African countries.¹⁴² Then the question arises whether the ICC should not take into consideration the victims of these crimes in the African regions.¹⁴³ Thus, the allegations with respect to the practice of polarization that are alleged against the ICC are not baseless and

¹⁴² Jack Healey, We are all Africa: The ICC and Selective Justice, the Huffington post, Jun. 23, 2013, (May 17, 2018, 10:43PM), https://www.huffingtonpost.com/jack-healey/we-are-all-africa-the-icc_b_3128864.html.

¹⁴³ ICC, (May 17, 2018, 10:47PM), <http://africanarguments.org/2013/04/16/is-the-international-criminal-court-really-picking-on-africa-by-stephen-a-lamony/>.

hence, a careful approach ought to be taken by the ICC to deal with the cases of abuse and atrocities both in African regions as well as elsewhere.

5.2 Superpower myth: The absence of the USA from ICC

The notion that war crime and other categories of serious international crimes can be done away with the establishment and effective functioning of a criminal court such as the ICC may appear to be an illusory thought hopeful of the belief that war could be more or less humanized by law.¹⁴⁴ USA is one of those few countries that has kept away from the purview of the ICC, despite it vociferously supporting the need to establish a permanent criminal court, under the Clinton led administration. Its dissent from the initial approach is largely on account of certain objections and dissatisfaction it had towards the draft of the Rome Statute, most particularly with respect to the power vested in the Prosecutor to investigate into cases at his or her volition and the ability of the ICC to prosecute persons who were citizens of non-State parties in the event they allegedly committed crimes on the territories of countries that are parties to the Rome Statute.¹⁴⁵ Thus, while the Clinton administration did sign the Rome Statute, it was made blatantly clear that the ratification by the USA would indeed be difficult.

¹⁴⁴ *Supra* note 139.

¹⁴⁵ Jane Onyanga Omara, What is the International Criminal Court and Why are Countries Bailing?, USA Post, (May 17, 2018, 10:50PM) <https://www.usatoday.com/story/news/world/2016/11/17/whats-international-criminal-court-and-why-countries-bailing/94017990/>.

Under the Bush administration, USA's concern and dissent over the Rome Statute barely changed and fears continued to persist that cases could be brought against individual citizens of USA before the ICC. Ultimately in May 2002, the Bush government informed the then UNGA Secretary General Kofi Annan of USA's decision to withdraw from the ICC. Although questions arose with respect to the legal ramifications of such an act, it did make a strong political statement.

Probably the most notorious anti ICC policy adopted by the USA was in the form of the enactment of the American Services Members Protection Act of 2001 ("**ASPA**") by the American Senate. Some of the important features of the ASPA are as hereunder:

1. Enables the President of USA to use the American veto at the UNSC to ensure that the ICC does not prosecute the members of the American armed forces when they participate as part of any UN peacekeeping force;
2. Ensuring that USA is prevented from participating in any UN peacekeeping mission unless the American President certifies to the US Congress that the UNSC has exempted the American armed forces from prosecution; and

3. No country that has ratified the Rome Statute can receive military assistance from the USA.¹⁴⁶

Thus, both Clinton as well as Bush administrations indicated an anti-ICC approach as far as becoming part of Rome Statute is concerned. Moreover, such an association had largely undercut USA's credibility as a defender of human rights, and upholder of the principles of rule of law and accountability. Despite USA's absence from the Court, it has been able to take into consideration a large number of disturbing situations across the globe.¹⁴⁷ Moreover, over the years, especially under the presidency of Barack Obama, the American approach towards the ICC was undergoing a gradual change and it was hoped that there would soon come a time when USA and ICC would both foster a constructive partnership as far as the field of international criminal law is concerned. Now, with USA being led by Donald Trump, questions once again have been raised with respect to the future and prospects of fostering a strong bond between ICC and the USA. This is something that only the forthcoming time will tell.

¹⁴⁶ C Jayaraj, *The International Criminal Court and the United States: Recent Legal and Policy Issues*, Vol. 42, Indian Journal of the International Law, 496-497, October December (2002).

¹⁴⁷ Human Rights Watch, *The United States and the International Criminal Court: The Bush Administration's Approach and a Way Forward Under the Obama Admn*, Aug. 2, 2009 (11 May 2018, 11:00 AM <https://www.hrw.org/news/2009/08/02/united-states-and-international-criminal-court-bush-administrations-approach-and-way>).

5.3 *Victim/ Witness: Level of protection*

While it is a welcoming step that the Rome Statute makes provisions for protecting the rights and interests of the victims as well as the witnesses and also makes available all principles of justice as far as those who have been accused of the commission of international crimes are concerned, the Prosecutor's office may be posed with the challenge of approaching as well as coordinating with the concerned witnesses and victims without revealing their identities i.e. by maintaining confidentiality. Interference with the witnesses in the form of bribery, or coercion is something that the ICC has been dealing with for a long period of time.¹⁴⁸ In fact, a large part of the judgment given by the Trial Chamber I in the case of *The Prosecutor v. Thomas Lubanga Dyilo*,¹⁴⁹ addresses this issue of meddling and influencing the witnesses wherein it observed that three intermediaries were likely to have been induced or caused the witnesses to lie in return for money, regarding their involvement with child soldiers within Lubanga Dyilo's armed forces that were actively involved in the Democratic Republic of Congo.

Problems may also arise with respect to identifying safe places and locations where the interviews with these witnesses as well as victims may be

¹⁴⁸ Danya Chaikel, Recent Advancements and Remaining Gaps in Addressing the Witness Protection Challenge at the ICC, Apr. 17, 2014, (11 May 2018, 11:33 AM, <https://www.international-criminal-justice-today.org/arguendo/recent-advancements-and-remaining-gaps-in-addressing-the-witness-protection-challenge-at-the-icc/>).

¹⁴⁹ ICC, Situation in the Democratic Republic of Congo, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06.

conducted and the exigency of moving these witnesses to safe havens without any unwarranted attention. This becomes particularly important to ensure that the victims and key witnesses are protected so that they can contribute effectively to the course of the trials that are to be conducted by the ICC's various organs. A classic instance of this challenge would be with respect to protecting the interests of the witnesses involved in the investigations with respect to the situation in Darfur, Sudan. With specific reference to this, the Prosecutor Luis Moreno Ocampo had informed the Council on Foreign Relations in New York in October 2008 that since July 2005,¹⁵⁰ the Office of the Prosecutor had carried out an investigation under different circumstances. Thus, the issue and challenges pertaining to the physical as well as the mental and psychological well being of the victims as well as the witnesses would be of particular importance and concern to the ICC.

Given that the identify of the witnesses is not to be disclosed, the Office of the Prosecutor has to take the mammoth task of ensuring that the details of the identity of the witnesses are kept synonymous by way of redactions that involves the blacking out of all the relevant particulars, including names, age and address that have been given by them. On the one hand, it has been argued that such a move may hinder the due rights that are available with the

¹⁵⁰ ICC, The Office of the Prosecutor, The Darfur Case, Council for Foreign Relations, New York, Oc. 17, 2008, (May 17, 2018, 10:57PM) <https://www.icc-cpi.int/NR/rdonlyres/B8A3B99C-C9CC-4151-8BA6-35C2868BF60F/278840/CFRS2008.pdf>.

accused and at the same time, they may lead to increased administrative burden upon and a huge problem not only for the Office but also for the Chambers to ensure indeed that these details are never really disclosed in order to ensure the safety of the victims.

Thus, though the protection and welfare of the witness and victims is of prime importance to the ICC, it may well face possible challenges in effectively implementing the same and addressing the concerns that arise.

5.4 *Bridging the Gap: Distance between the location of the ICC and the areas of investigation*

In terms of accessing the facilities of the ICC, a huge hurdle that may impair its efficient working is the distance between the location of the ICC that is at The Hague, the Netherlands and the locations of investigation. A large part of the investigations conducted by the ICC currently focus in the African regions and hence disparities may arise as far as accessing the ICC and the facilities that it provides is concerned.¹⁵¹ A similar criticism was also levied against the ICTR that is head quartered at Arusha, Tanzania despite the events of Genocide having occurred in Rwanda. Thus, the distance between the Court

¹⁵¹ Judge Dr. jur. h. c. Hans-Peter Kaul, Second Vice President of the ICC observed this in a lecture delivered by him on Aug. 8, 2011 on The International Criminal Court – Current Challenges and Perspectives, (May 17, 2018, 11:00PM), <https://www.icc-cpi.int/nr/rdonlyres/289b449a-347d-4360-a854-3b7d0a4b9f06/283740/010911salzburglawschool.pdf>.

and the areas of atrocities is something that needs to be worked upon, in order to ensure that the victims are appropriately represented and are able to participate in voicing their opinions, atrocities and concerns to have them successfully addressed.

Even the organs of the ICC may suffer from the challenge of being located thousands of kilometers away from the conflict area in concern. The prevalence of armed conflicts coupled with the volatility in these areas may hinder and prevent the officers of the ICC from visiting these areas, sunk in conflict, collect evidence, interact with the victims and provide information to the best of the abilities as may be possible.¹⁵²

Thus, achieving criminal justice through the framework of the ICC may become tedious and difficult for the communities that have become victims of some of the most heinous crimes and atrocities that have come to be committed upon them. Thus, the challenge of physical location and hurdles may pose a challenge while efficiently dealing addressing the principles of international criminal justice is concerned.

5.5 Separation of Powers: USNC and ICC

As stated above, the Rome Statute has another challenge with respect to the

¹⁵² *Supra* note 149.

principle of separation of powers. Article 13(b) along with Article 16 thereof offer special rights that are “*prosecutorial*” in nature to an executive body that is independent from the ICC, namely the UNSC. This was one of the most burning areas of concerns that the drafters of the Rome Statute had been faced with at the time of working on the Rome Statute. The ability of an organ political in nature, belonging to the family of the UN entrusted with the responsibility, though in addition to various other responsibilities, of maintaining international harmony and safekeeping to impede with the functioning of an expect independently created international body was a bone of contention amongst various states.

While on the one hand, the UNSC referral becomes important to ensure that the perpetrators of the crimes are prosecuted and punished in order to serve justice, at the same time, such a provision could impair the ability of the ICC to function smoothly and the same may raise questions upon its impartiality and independence.¹⁵³ It has been often asserted that the power vested in an organ as politically powerful as the UNSC to refer a situation to the ICC along with the accompanying power to defer a prosecution or an investigation results in a situation of “*two courts in one*”¹⁵⁴ permitting the circumvention of crucial procedural steps on account of the nature of the involvement from the

¹⁵³ Jennifer Trahan, *The Relationship between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, Criminal Law Forum, (2013).

¹⁵⁴ Fletcher, George P. & Jens David OHLIN. “The ICC – Two Courts in One?”, *J. Int’l Crim. Just.*, (2006).

UNSC. Thus what may eventually occur is that the vested interests of the powerful political members of the UNSC may play an important role in deciding that cases that need to be referred to while those basking under the shield of the members of the UNSC may be quietly ignore, resulting in only selective administration of justice defeating the goal of universal justice.

In order to truly maintain its independence and impartiality, the ICC should handle the referrals of situations from the UNSC in a matter that is absolutely consistent with the provisions of the Rome Statute and the Rules of Procedure and Evidence, that ensures that selective justice is not the only thing that is provided by a body of international recognition and acceptance such as the ICC. After all, it is all human persons who ought to be protected and safeguarded against atrocities and heinous crimes and is not the aspirations of just a few nations of the world.

5.6 *India: Non-signature and consequential impact*

India, like USA, is amongst those countries that has refused to bring itself within the purview of the Rome Statute and hence, it becomes important to analyze the various grounds of objection that India has posed for not acceding to the Rome Statute. India has for some considerable time been a strong supporter of international peace and security and has also been in favour of codification of the provisions of International Criminal Law. Hence, it

would have been natural to expect India, as a country to become a part of the ICC family.

Also given the significance that has come to be attached to India as far as the geo-political situation is concerned, it becomes even more pertinent to understand the kind of objections and reservations India as a country has towards bringing herself within the ambit of the Rome Statute and consequentially, the ICC. However, India has stayed away from the same on several grounds, a brief analysis of these are as under:

5.6.1. Referral to the ICC by UNSC

India had objected to the extraordinary power that has been vested in the UNSC to refer situations to the ICC and as such, theoretically, the objection cannot be considered to be baseless. This is in close connection with the discussion above with regards to the selective approach used by the UNSC and its shielding of certain nations, thereby raising questions on the independence and impartiality of the ICC.¹⁵⁵ The UNSC referral has been a bone of contention right since the drafting stage of the ICC and concerns over the inclusion of the same in the final Rome Statute has been observed by a large number of countries, including India.

¹⁵⁵ *Supra* note 3.

5.6.2 No opt-in provision is available

Another strong ground of objection that has been used by India against the ICC is the absence of the provision with respect to opt-in to the Rome Statute. The absence of such a provision has been expressed by India, to have a direct effect and threat upon its sovereignty.¹⁵⁶

5.6.3 Terrorism and Use of Nuclear Weapons not Included in Rome Statute

The Rome Statute does not enlist terrorism *per se* as an international crime although the possibility of including the same while at the drafting stage of the Rome Statute had featured considerably.¹⁵⁷ However on account of the difficulties faced with respect to specifically listing down the definition of terrorism, it was decided against the inclusion of this crime in the Rome Statute.

India has for long maintained that heinous international crime such as terrorism ought to be brought within the purview of the ICC by incorporating the same as a crime over which the ICC can exercise jurisdiction. India had asked for the inclusion of this crime as well as nuclear first action to be included within the jurisdiction of the ICC.¹⁵⁸ But despite the same, these

¹⁵⁶ Douglas Cassel, *Why We Need the International Criminal Court*, Human Escape, 63 (May 2000).

¹⁵⁷ Schabas & Bernaz, *Supra* 21, at 175-177.

¹⁵⁸ *Supra* note 3.

international concerns have not been incorporated within the ambit of the Rome Statute. India has been a victim of numerous terrorist attacks as a result of which a large number of innocent people, men, children and women have lost their lives. Thus, India's objection vis-à-vis terrorism is completely justified. So is the case of non use of nuclear weapon which may cause adverse impact as far as the health as well as well being of the people of the world is concerned. Thus, given India's geo-political location in the Asian region and the position it holds in international relations, India's stand on ICC because particularly important as it has the capacity of influencing decisions of other nations not just in the Asian region but also at the world at large.

India is amongst those few countries that has refused to bring itself within the purview of the Rome Statute and hence, it becomes important to analyze the various grounds of objection that India has posed for not acceding to the Rome Statute. India has for a long period of time been a strong supporter of international peace and security and has also been in favour of codification of the provisions of International Criminal Law. Hence, it would have been natural to expect India, as a country to become a party to the Rome Statute and to become part of the ICC family.

5.7 *Hurdles faced by the Office of the Prosecutor*

A saying that is very popular with regards to the working of the Prosecutor's

office of the ICC that is common parlance all through the Court is that:

“the Office of the Prosecutor is the engine; systematic efforts for professional investigations and effective cooperation are the fuel for the entire Court!”¹⁵⁹

A request that is very often made by the Chambers of the ICC to its OTP is to ensure that prior to undertaking any pre-trial or trial proceedings, the Office has reached complete certainty with regards to the situation in hand, that has been corroborated by sufficient evidence. In order to ensure an efficient and speedy prosecutorial regime, it would be worthwhile to ensure that the investigations that are undertaken with respect to a particular situation are completed during the pre-trial stage itself in order to ensure that the next obvious move would be the commencement of the prosecution.

Such an approach would ensure that not a lot of time gap flows between the confirmation of the investigation and the consequential prosecution, thereby providing a way of ensuring speedy trials as well as justice. Additionally, challenges may also surface with respect to clear and precise bifurcation of work and labour between the PTC as well as the Trial Chambers of the ICC in order to ensure that not a lot of time is spent on matters that would merely amount to duplication and repetition. As has been observed, the Office of the

¹⁵⁹ *Supra* note 151.

Prosecutor as it currently functions does not offer any scope for muddling but what is required is its transition into an effective prosecutorial set-up.¹⁶⁰

5.8 *Increased dependence on co-operation between States*

As has been apparent since its functioning, the ICC is largely, to the extent of almost one hundred per cent dependent upon the levels of co-operation that are displayed by the States who are part of the ICC. This becomes a challenge particular with respect to the trial of the persons who have been accused, in the sense, if arrest warrants are issued by the Court, then it all ultimately boils down to the tracing of the individual in question and the level of dedication, commitment and endeavor the State concerned displays for transferring the person to the Hague for his trial. As can be seen from the cases before the ICC, a large number of individuals against whom warrants have been released are still at large. In the absence of the availability of the accused person, the ICC is precluded from proceeding with the trial. This could therefor amount to be its Achilles' heel and may render the effective conduct of a trial, as it will only contribute to the backlogs of the trials.

Thus, these are some of the factors that may meddle with the effective, independent and efficient functioning of the ICC as far as delivering international criminal justice is concerned. This is particularly important in keeping with line the background against which the ICC has been conceived

¹⁶⁰ *Supra* note 149.

and established, calling upon the members of the world community to take such steps as would be required for ensuring the prevalence of international peace.

CHAPTER VI

CONCLUSION AND RECOMMENDATIONS

“All men are equal before the law. Nobody is above the law. More men and women in this world are united by the conviction that genocide, crimes against humanity, war crimes and the crime of aggression cannot go unpunished – regardless of the nationality and the rank of the perpetrators.”

Judge Dr. jur. h.c Hans Peter Kaul,

Former Second Vice President of the ICC

Over the years, the notion of the establishment of a criminal court such as the ICC appeared to be a myriad, just a dream and the journey towards the successful transformation of this utopic dream into a reality has been a long and tedious one that has complemented the development of one of the youngest fields of International Law i.e. the one pertaining to crimes. The origin, growth and evolution of International Criminal Law, as a field that was essentially non-existent in nature to having found its way through divine scriptures during the warring tenth and eleventh centuries towards adopting a treaty based approach at the international level is nothing less than being unprecedented. However, the monumental progress that this field of law has

undergone can indeed be attributed to the codification of the principles of International Criminal Law in the form of the Rome Statute and also the establishment of the ICC.

The journey towards the ICC has indeed not been hassles free one. Despite the idea being around for a long period of time, it was not until 1998 that the Rome Statute eventually came to be adopted. Factors such as the upspring of the cold war along with the lack of clarity on the definition of the crime of aggression were responsible for the delay being caused in the adoption and the ratification of the Rome Statute and the eventual establishment of the ICC. Until the ICC was conceptualized, several tribunals in the form of ICTY and ICTR had been established in order to monitor and investigate into the abuse caused and reported in the situations of large-scale violence and consequential abuse of human rights that had tormented these regions. These tribunals have left behind rich jurisprudential heritage and legacy while dealing with different categories of international crimes as well as sexual crimes. Similar tribunals were also established in Sierra Leone and Lebanon, although these ones met with very moderate success. But it was with these tribunals that the UNGA first confronted the idea of establishing a court of a permanent nature that would address and counter those responsible for the crimes committed at the international level.

The establishment, evolution as well as the functioning of the ICC offers not only a intriguing study of a unique model of the twenty first century as far as the international criminal process is concerned but at the same time is also an example of an enduring phenomenon. It symbolizes all the efforts that have been undertaken by the modern day's international legal order for preventing extremely grim forms of atrocities ever to be committed upon mankind. Its establishment is a boon as far as the codification and enforcement of the provisions of ICL are concerned.

The ICC can be rightly said to be the most novel, state of the art inception since the U.N came to be established in the year 1945. Without a doubt, its establishment showcases how concerned the world community was with the protection and respect for some of the most basic human rights that individuals inherently possess, at the same time ensuring that justice is delivered and peace is maintained in world at large. From the time of the adoption of the Universal Declaration of Human Rights in the year 1948 until now, with the adoption of the Rome Statute and the functioning of the ICC, the world has witnessed a paradigm shift especially in light of the principle of individual criminal responsibility wherein individuals can be tried, prosecuted and punished for heinous crimes that are committed by them. This successfully fills in the lacunae that existed historically wherein only States could be held liable for the wrongs committed by them.

Needless to say, it is evident that the Rome Statute like other statutes and treaties is not completely devoid of flaws. In fact, the Rome Statute appears to be a cohesive treaty containing various interlinked articles. The provisions that have been analysed in this work are those related to the categories of crimes over which jurisdiction can be exercised, the provisions with respect to the structure and admissibility as these are the core areas on the basis of which a conclusion may be reached as to whether a particular matter will come before the ICC or not, and consequentially whether an individual will be tried or not before the Court and ultimately whether justice will be delivered or not.

The ICC continues to be confronted with several challenges that may impair its day-to-day functioning. Nevertheless, the solution lies not in abstaining from its ambit but in efficiently identifying those flaws and thereafter devising strong, robust mechanisms that would render the ICC more effective and capable in meeting out the demands of the day. It may also be argued that that it could probably be very premature to predict upon the success of the ICC given that it may not give us a good picture of the coming times. As has been analyzed in Chapter V of this study, there are a lot of areas that the ICC can improve upon with regards to its functioning and the delivering of its goals and promises but an institution of an international nature hoping to give justice to the world at large needs to be given additional time especially considering the ever changing political climate that we are witnessed to.

The researcher makes an earnest attempt to make certain recommendations at the end of this work that may help towards a more effective working of the ICC.

6.1 *International Criminal Justice and not Selective Criminal Justice*

As it currently works, nations have stayed away from becoming parties to the Rome Statute and hence, the ICC is rendered incapable of exercising universal jurisdiction through all the countries of the world. Influential countries such as India, the UK and the USA and the Peoples' Republic of China have not yet signed it, and only a handful number of nations from the Middle East have done so. Thus, it becomes pertinent to ensure that more number of States sign the same so that the ICC is able to exercise its jurisdiction in a more universal way and is not limited to, what at best may be described as, delivering selective justice. Having a wider audience will ensure that the reach of the Court is indeed global and universal in nature and is not just limited to a handful nations. As the Preamble to the Rome Statute observes, the State parties are "**Resolved** to guarantee lasting respect for and the enforcement of **international justice**", to attain international justice would be possible only with having all members of the world community become a party to the Rome Statute. Though this may sound utopic, it is perhaps the only way to achieve the same.

6.2 *Enhanced political will and co-operation amongst States*

Since the success of the ICC to a large extent depends upon the level of co-operation that exists between the States, especially in the absence of a police force of its own, it becomes extremely useful to ensure that the States enhance their levels of political willingness and commitment to truly frame an environment that is conducive enough for the strong, efficient and appropriate working of the ICC. Non-cooperation on part of the States is a major issue that the ICC faces that can be corroborated from the fact that out of all the arrest warrants that have been issued by the ICC, only a handful have actually been executed in reality.

This indicates the laidback approach adopted by the States and in consequence, causes questions to be raised upon the efficiency and working of the ICC. To overcome such a situation, it is increased political will that will cause countries to co-operate with one another to truly work towards peace. Not just individually, but even with respect to the commitments at regional levels, organisations such as the African Union and the European Union can exhibit greater co-operation in order to ensure that the procedural requirements that are an integral part of the ICC are met with and speedy justice can be delivered. Given that the ICC functions on complementarily, in the event the national jurisdictions display determination and will at their own domestic levels, the burden would probably be greatly reduced upon the ICC.

6.3 *Inclusion of Terrorism as a crime under the Rome Statute*

As discussed in Chapter V of this work, the Rome Statute recognizes four important categories of international crimes over which the Court is capable of exercising its jurisdiction. However, the world has, off late, witnessed tremendous devastation in the form of terrorist activities, be it in the form of hijacking of aircrafts, trans-boundary movement of terrorists across countries, bomb blasts that have led to the death of millions of innocent people, including vulnerable groups of women and children and has also led to large scale destruction of property. Given the absence of consensus over the precise meaning and definition of the term 'terrorism' globally, a lot of ambiguity prevails over the identification of acts that would amount to terrorism.

With the occurrence of the September 11, 2001 attacks on the soil of the USA followed by the campaign of the "War on Terror" led under the George W. Bush administration, it is now the time more than ever to work towards the inclusion of terrorism as an international crime giving the much needed authority to the ICC to be able to charge, try and prosecute those individuals who are responsible for this crime. Thus, settling this issue to rest may be achieved after an internally accepted definition of the term has been identified and the same has been codified for in the Rome Statute by way of

an amendment. This will change the game and help ensure that individuals who are responsible for the terrorist activities, and not through state sponsored aspect of terrorism, are brought to trial and are prosecuted and punished for the crime that is being committed by them in their individual capacity.

6.4 **Increased prosecution of cases of sexual crimes**

Drawing inspiration from the various categories of sexual crimes that the ICTY and ICTR had conducted trials in respect of, the Rome Statute for the very first time makes provisions with respect to the definitions of sexual offences which includes *inter alia* acts such as enforced prostitution, rape, sexual slavery and sterilization as part of the various crimes therein. Yet this monumental achievement on part of those responsible for the creation of the Rome Statute has not yet been effectively enforced. Over all, one third of the categories of sexual offences that are charged for are not confirmed on account of which, these cases do not reach the trial stage.

Sexual offences or those that are committed on the basis of gender need not be silently ignored. This calls for a strong requirement on part of the various organs of the ICC to adopt measures and mechanisms that will help ensure that sexual crimes are adequately dealt with. Women are considered to be a vulnerable group and very often, sexual crimes go unreported due to various

social factors. Whether sexual crimes should be altogether be considered as a separate class of crime is a question that needs to be tested in coming times, but a stronger outlook needs to be taken by communities as well as ICC as far as sexual crimes are concerned. Thus, there should be increased need on part of the ICC to prosecute, in a more systematic and cohesive way these categories of violent sexual crimes and gender based crimes, by engaging special experts having knowledge in an area as delicate as this one.

6.5 **Increased support for victims**

The Rome Statute makes a particularly significant innovation as far as the provisions with respect to victims and their participation in the proceedings are concerned. The objective of such a shift from the approach adopted earlier under the *ad hoc* tribunals wherein such persons were merely looked upon as witnesses and not treated as victims, attributes to these persons a more humane way of perceiving these persons not merely as witnesses but also as victims of large scale atrocities that have been inflicted upon them.

Stronger push should be made for by allowing the unit on Victims' Participation and Reparations of the Registry to undertake pertinent field related activities wherein the victims are made aware of their rights with respect to participation and all other kinds of assistance that they can seek

from the Court. The States concerned can allocate more funds as far as making available the participation related process to the victims and witnesses are concerned. Additionally, it becomes pertinent to ensure that the entire process of participation on part of the victims is not rendered meaningless and hence, representation offered to these persons should be independent and individual. The ICC is the first amongst the lots of international organizations that offers a mandate for providing reparation to the victims who have suffered unimaginable atrocities and despair on account of the crimes that have been inflicted upon them. As would be the case with any other issue of an international concern, it becomes necessary for the ICC to ensure that stringent safeguards and measures are adopted with respect to provide rehabilitative as well as reparatory measures to the victims of the crimes and to ensure that they are not subjected to such atrocities again. Immediate psychological and medical assistance should be available in order to provide the same to the victims of these atrocities so that they are rendered rehabilitated and in a position to be able to be reinstated with the members of the community of persons.

6.6 **Greater administrative support and increased funding**

The ICC depends upon the funding and financial resources it receives from the State parties. Also being seated in The Hague and being distant from the areas of conflicts, a lot of administrative hurdles are to be faced by it while

dealing with the situations in conflict. Thus, in order to have a more organized and wider ambit, the administrative offices of the ICC can be set up at different places, especially temporary offices where the conflicts are underway. This will prevent administrative hassles by ensuring the trials are smoothly conducted, the information and evidence is also easily conducted by the ICC. Although this may require additional funding from the States concerned, a decision that can be unanimously taken by the parties keeping in spirit the benevolent purpose of the Rome Statute.

Despite the challenges that have crossed its way, the ICC today is a functioning reality and has grown on to be a strong, respected and a determined watchtower of some of a class of grave, brutal, heinous, barbaric and ruthless crimes to be committed upon our fellow people, especially when justice cannot be provided as far as the domestic regime of the nations is concerned. Hopefully, in the decades to come, the ICC will grow on to become more respected and accepted but at the same time it will become imperative to ensure that its ideals, integrity and goals are not compromised on account of ruthless, dominant, power political at the international level.

BIBLIOGRAPHY

PRIMARY SOURCES

INTERNATIONAL CONVENTIONS

- The Rome Statute of the International Criminal Court
- The Charter of the United Nations Organization
- The Charter of the International Military Tribunal at Nuremberg
- The Charter of the International Military Tribunal for the Far East
- The Convention on the Protection and Prevention of the Crime of Genocide 1948

SECONDARY SOURCES

BOOKS

- Antonio Cassese, INTERNATIONAL CRIMINAL LAW, Oxford University Press, (2008).
- Bantekas I., INTERNATIONAL CRIMINAL LAW, Hart Publishing, (2010).
- Bantekas I and Susan Nash, INTERNATIONAL CRIMINAL LAW, Cavendish Publishing, (2003).
- Bartram S. Brown, RESEARCH HANDBOOK ON INTERNATIONAL CRIMINAL LAW, EDWARD ELGAR PUBLISHING LIMITED (2011).

- John P. Grant & J. Craig Barker, INTERNATIONAL CRIMINAL LAW DESKBOOK, Cavendish Publishing, (2006).
- M. Cherif Bassiouni, INTERNATIONAL CRIMINAL LAW: ENFORCEMENT, (2012).
- Manoj Kumar Sinha, INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS, Manak Publications Pvt. Ltd., (2010).
- Machteld Boot, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES, SCHOOL OF HUMAN RIGHTS RESEARCH, Hart Publishing, (2001).
- Malcolm N. Shaw, INTERNATIONAL LAW, 6TH ED., Cambridge University Press, (2008).
- Robert Cryer, PROSECUTING INTERNATIONAL CRIMES, Cambridge University Press, (2005).
- Roger O'Keefe, INTERNATIONAL CRIMINAL LAW, The Oxford International Law Library (2015).
- Ronald C. Slye AND Beth Van Schaack, INTERNATIONAL CRIMINAL LAW, ASPEN PUBLISHERS, (2009)
- ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 67-68, Ed by William A. Schabas and Nàdia Bernaz, Routledge Publications, (2011).
- William A. Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, Cambridge University Press, (2011).

- William A. Schabas, *GENOCIDE IN INTERNATIONAL LAW*, Cambridge University Press, (2000).

ARTICLES/ REPORTS

- Amnesty International, U.S.A, Fact Sheet 2007-2008, https://www.amnestyusa.org/pdfs/IJA_Factsheet_1_International_Criminal_Court.pdf, (2007-2008).
- C Jayaraj, The International Criminal Court and the United States: Recent Legal and Policy Issues, Vol. 42, *Indian Journal of the International Law*, 496-497, October December (2002).
- Daniel D. Ntanda Nsereko, The Role of the International Criminal Tribunals in the Promotion of Peace and Justice: The Case of the International Criminal Court, *Criminal Law Forum*, Springer (2008).
- Fletcher, George P. & Jens David OHLIN. "The ICC – Two Courts in One?" *J. Int'l Crim. Just.*, (2006).
- Frank Jarasch, *Establishment, Organization and Financing of the International Criminal Court*, 6 *European Journal of Crime, Criminal Law and Criminal Justice*, (1998).
- Human Rights Watch, *Statement for the General Debate of the International Criminal Court's Sixteenth Assembly of States Parties*, <https://www.hrw.org/news/2017/12/08/human-rights-watch-statement-general-debate-international-criminal-courts-sixteenth>.

- Human Rights Watch, *ICC: Defend Core Principles*, <https://www.hrw.org/news/2016/11/16/icc-defend-core-principles>.
- Human Rights Watch, *The United States and the International Criminal Court: The Bush Administration's Approach and a Way Forward Under the Obama Admn*, August 02, 2009, <https://www.hrw.org/news/2009/08/02/united-states-and-international-criminal-court-bush-administrations-approach-and-way>).
- International Criminal Court, Dr. jur. h. c. Hans-Peter Kaul, Judge and Second Vice-President of the ICC, *Human Rights and the International Criminal Court*, at the international conference held on January 21, 2011.
- International Criminal Court, *The State Parties to the Rome Statute*, as on 2018.
- International Criminal Court, *Assembly activates Court's jurisdiction over crime of aggression*, Press Release December, 15 2017, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1350>.
- ICC, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda*, regarding the worsening situation in Gaza, April 8, 2018.
- Jennifer Trahan, *The Relationship between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, Criminal Law Forum, (2013).

- J. L. Brierly, *Do We Need An International Criminal Court?* 87, Year Book of the International Law.
- Kenneth S. Grallant, *Individual Human Rights in a New International Organization: The Rome Statute of the International Criminal Court.*
- Lauren Marie Balaso, *The International Criminal Court as a Human Security Agent, Praxis, The Fletcher Journal of Human Security*, Vol. XXVIII, 2013.
- Michael Schitt and Richards, *Uncharted Waters, The International Criminal Court*, Naval War College Review, Vol. L111, No. 1, (2000).
- M. Cherif Bassiouni, *Establishing an International Criminal Court: Historical Survey*, Vol. 149 Military Law Review, 55, (1995).
- Peter De Jong, *Towards Stability and Lasting Peace*, (2012).
- The United Nations Organisation, *Darfur: ICC charges Sudanese President with genocide*, July 12, 2010.
- Usha Ramanathan, *India and the ICC*, Journal of International Criminal Justice, (2005).

WEBSITES

- ICC, Official Website, <https://www.icc-cpi.int>.
- Assadullah Amin, UNHCR, *Those responsible for war crimes in Syria 'will be held accountable for what they have done,' says UN rights chief*, UN News, <https://news.un.org/en/story/2018/03/1003981>).

- BBC History, World Wars: A View of the Holocaust, February 17, 2011, http://www.bbc.co.uk/history/worldwars/genocide/holocaust_overview_01.shtml.
- The Japan Times, *Congo's child soldiers awarded \$10 million in damages*, <https://www.japantimes.co.jp/news/2017/12/15/world/crime-legal-world/congos-child-soldiers-awarded-10-million-damages-icc/#.WJT1fhSZygQ>.
- Danya Chaikel, Recent Advancements and Remaining Gaps in Addressing the Witness Protection Challenge at the ICC, April, 17, 2014, <https://www.international-criminal-justice-today.org/arguendo/recent-advancements-and-remaining-gaps-in-addressing-the-witness-protection-challenge-at-the-icc/>.
- Jane Onyanga Omara, What is the International Criminal Court and Why are Countries Bailing?, USA Post, <https://www.usatoday.com/story/news/world/2016/11/17/whats-international-criminal-court-and-why-countries-bailing/94017990/>.
- Jack Healey, We are all Africa: The ICC and Selective Justice, the Huffington post, Jun. 23, 2013, , https://www.huffingtonpost.com/jack-healey/we-are-all-africa-the-icc_b_3128864.html.
- Mark Kersten, The International Criminal Court is set to investigate alleged U.S. war crimes in Afghanistan, The Washington Post,

https://www.washingtonpost.com/news/monkey-cage/wp/2017/12/08/the-icc-will-investigate-alleged-u-s-war-crimes-in-afghanistan/?utm_term=.b7cdb644c769.

- Serajul Quadir, *U.N. Official says will raise sexual violence against Rohingya with ICC*, Reuters, <https://www.reuters.com/article/us-bangladesh-myanmar/u-n-official-says-will-raise-sexual-violence-against-rohingya-with-icc-idUSKBN1DC0N7>.
- The Guardian, *US Army and CIA may be guilty of war crimes in Afghanistan, says ICC, November 15, 2016*, <http://www.theguardian.com/law/2016/nov/15/us-army-and-cia-may-be-guilty-of-war-crimes-afghanistan-says-icc>).
- The Guardian, *The Observer view on the effectiveness of international law*, <https://www.theguardian.com/commentisfree/2017/dec/17/observer-view-international-law-criminal-court>.

- William A. Schabas, *GENOCIDE IN INTERNATIONAL LAW*, Cambridge University Press, (2000).

ARTICLES/ REPORTS

- Amnesty International, U.S.A, Fact Sheet 2007-2008, https://www.amnestyusa.org/pdfs/IJA_Factsheet_1_International_Criminal_Court.pdf, (2007-2008).
- C Jayaraj, The International Criminal Court and the United States: Recent Legal and Policy Issues, Vol. 42, *Indian Journal of the International Law*, 496-497, October December (2002).
- Daniel D. Ntanda Nsereko, The Role of the International Criminal Tribunals in the Promotion of Peace and Justice: The Case of the International Criminal Court, *Criminal Law Forum*, Springer (2008).
- Fletcher, George P. & Jens David OHLIN. "The ICC – Two Courts in One?" *J. Int'l Crim. Just.*, (2006).
- Frank Jarasch, *Establishment, Organization and Financing of the International Criminal Court*, 6 *European Journal of Crime, Criminal Law and Criminal Justice*, (1998).
- Human Rights Watch, *Statement for the General Debate of the International Criminal Court's Sixteenth Assembly of States Parties*, <https://www.hrw.org/news/2017/12/08/human-rights-watch-statement-general-debate-international-criminal-courts-sixteenth>.