NATIONAL LAW SCHOOL OF INDIA UNIVERSITY

BANGALORE

EXPANDING THE JURISDICTION OF ICC: THE CHALLENGES OF THE CONTEMPORARY WORLD

Dissertation Submitted in Partial Fulfilment of the Requirements for the Degree of LL.M (Human Right Law) Under the Guidance of

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LL.M (Human Right Law) 2012-2014

CERTIFICATE

This is to certify that the dissertation titled ***"Expanding the Jurisdiction of ICC: The Challenges of the Contemporary World"*** submitted by Nimrat Kaur, (Id No 528) in partial fulfilment of the requirements for the Masters in Law **(Human Rights)**, is a product of the candidate's own work carried out by her under my guidance and supervision. The matter embodied in this dissertation is original and has not been submitted for the award of any other degree in any other university.

Date: 21.05.2014

Place: Bangalore

Prof. (Dr.) T. Sathyamurthy

National Law School of India University

DECLARATION

I Nimrat Kaur, hereby declares that this dissertation titled **"Expanding the Jurisdiction of ICC: The Challenges of the Contemporary World"** is the outcome of doctrinal research conducted by me as a part to accomplish my academic requirement for LLM programme at National Law School of India University, Bangalore under the guidance of Prof T Sathyamurthy.

This work is my original work except for the help taken from such authorities as have been referred to at the respective places for which necessary acknowledgments have been tendered.

I further declare that this work has not been submitted either in part or in whole, for any degree or diploma at any other university or institution.

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ACKNOWLEDGEMENT

At the outset, I would like to thank the Almighty and my family to whom I am immensely grateful for inspiring, guiding and accompanying me in taking every step of my life. This dissertation would not have been possible without their blessings.

I express my sincere gratitude to my guide ***Prof T Sathyamurthy,*** for his guidance during the course of my dissertation, but more than that for the person he is. He has always taken keen interest in my topic and gone out of his way to help me with everything. It was a sheer pleasure and a great honour for being his student. I would also like to thank my dear friends who have been rock solid support to me throughout my two years at NLSIU.

This acknowledgement will remain incomplete if I don't mention the library and the ever helpful library staff. The library undoubtedly remains the "crown jewel" of NLSIU and the staff tirelessly works towards the upkeep of this treasure.

Thanking You

Yours obediently

Nimrat Kaur

Contents

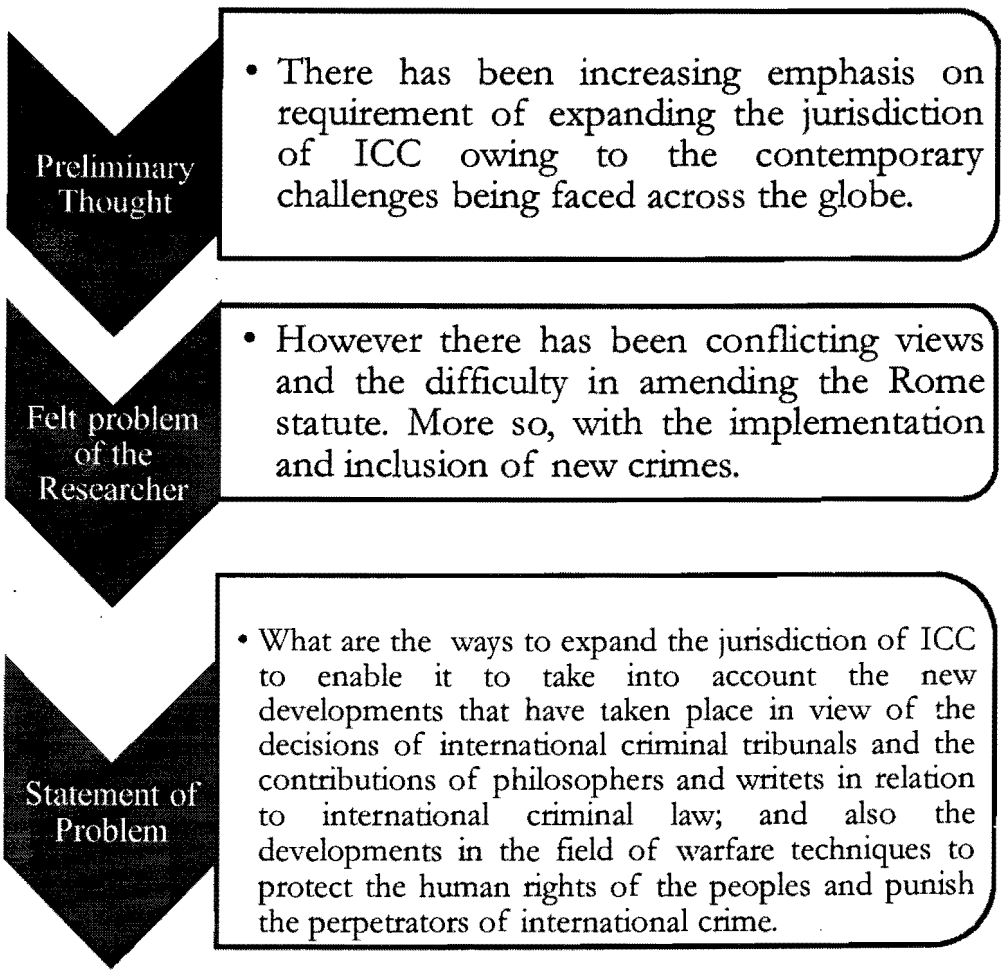
GLOSSARY OF ACRONYMS AND ABBREVIATIONS

- CICC- Coalition for the International Criminal Court
- ICC - International Criminal Court
- ICCPR- International Covenant on Civil and Political Rights
- ICESCR- International Covenant on Economic Social and Cultural Rights
- ICL- International Criminal Law
- ICTR- International Criminal Tribunal for Rwanda.
- ICTY - International Criminal Tribunal for Yugoslavia.
- IDP's - Internally Displaced Peoples
- ILA- International Law Association
- ILC- International Law Commission
- IMT - International Military Tribunal
- IMTFE - International Military Tribunal for the Far-East.
- JEM- Justice and Equality Movement
- NGO- Non Governmental Organisations
- PTC I- Pre-Trial Chamber I
- SLM/A- Sudan Liberation Movement/Army
- TCL- transnational criminal law
- UCC-Universal Criminal Jurisdiction
- UDHR- Universal Declaration of Human Rights
- UN – United Nations.
- UNODC- United Nations Office on Drugs And Crime
- UNSC-United Nations Security Council
- US- United Nations

LIST OF CASES

- *In Re Pinochet Case*
- *Llandovery Castle*
- *Prosecutor v. Al Bashir*
- *Prosecutor v. Charles Ghankay Taylor*
- *Prosecutor v. Jelisic*
- *Prosecutor v. Tadic*
- *Prosecutor v. The Jean Paul Akayesu*
- *Re Yamashita*
- *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*
- *The Prosecutor v. Thomas Dylo Lubanga*

STEPS TAKEN TO IDENTIFY THE STATEMENT OF PROBLEM:-



RESEARCH METHODOLOGY

Aim

The aim of the researcher is to investigate the possibility of expanding the jurisdiction of ICC under the present Rome Statute and suggesting ways to ensure comprehensive protection of human rights and effective prosecution of the perpetrators of International crime.

Research Objectives

1. Tracing the evolution and need for expanding the jurisdiction of ICC
2. Identifying the intricacies involved in dealing with crimes not defined under the Rome statute and explaining the scope of universal criminal jurisdiction
3. Analysing the interrelationship between Security Council and ICC.
4. In view of the difficulties associated with the amendment of the ICC Statute, can any other alternative models be thought of to supplement the purpose and objectives of ICC and ultimately the objectives of human rights regime.

Statement of Problem:

Though the establishment of ICC has been a milestone in the promotion of human rights and punishing the perpetrators; at present it is felt that the scope of the jurisdiction of ICC is limited and the enforcement is not reasonably effective. The statute of ICC in general is not comprehensive enough in light of the developments that are taken place in ICL due to the contributions of various international criminal tribunals and philosophers and writers in the field.

Scope and Limitations:

The researcher has limited her investigation only to the limitations restrictions and the weaknesses experienced by the court and also the various criticisms of the writers in this regard. Thus, the work will be restricted to the above postulants.

Research Hypothesis:

The Rome Statute was concluded in 1998 at the Rome Conference was a result of many compromises and political compulsions. In the following years many drastic developments have taken place both in terms of interpretation of the statutory provisions, the ICL principles and the political situations at large which necessitates a re-visit to the statute and make it more comprehensive and carry contemporary value.

Research Questions:

1. What were the historical, political, social and economic factors that led to the establishment of ICC in its current form?
2. Whether the present jurisdiction of the ICC is adequate to meet the present day challenges?
3. What are the present day challenges faced by ICC?
4. Are there any hurdles in the effective exercise of jurisdiction?
5. Can ICC act under universal criminal jurisdiction?
6. Whether the role of Security Council is promoting the objective of the Establishment of the ICC?
7. How can the independence of the ICC and its effective role in the administration of international criminal justice be further strengthened?

Research Methodology:

The researcher has adopted the historical, descriptive analytical and critical approach in connection with the investigation that has been undertaken.

Sources of Materials:

The researcher would be referring to primary resources like the Legislative enactments and Court decisions of the respective jurisdiction under study pertaining to jurisdiction of ICC. The researcher would also be relying upon secondary sources likeUN websites, commentaries and human rights

convention, Authoritative Books and Journals wherein Articles of high worth have been scripted in regard to the point of concern herein.

Mode of Citation

The researcher has adopted a uniform citation style as compiled by the Uniform Citation Style Guide Committee, NLSIU throughout this paper.

I. INTRODUCTION

"There is a need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many thought . . . that the horrors of the Second World War could never happen again. And yet they have. Our time has shown us that man's capacity for evil knows no limits -- Kofi Annan, United Nations Secretary-General"

The International Criminal Court [hereinafter referred to as ICC] ensures that the world reinstates its faith in rule of law and brings justice to the victims; to ensure that cold war and nazi holocaust is not repeated and to overcome the short comings of the Nuremberg trials and other adhoc tribunals like the ICTY, ICTR which were purpose oriented and time bound. Over the years, ICC has played a big role in ensuring justice in the field of international criminal law. Its judgments have brought the biggest perpetrators of crime to book and set precedents across the globe that crimes and violation of human rights shall not go unpunished. Over the last decade, the international community via the Rome Statute has taken action against various human right violations and methods of warfare like extermination, systematic rapes, ethnic cleansing etc. However, the jurisdiction of ICC is not free from contemporary challenges. With science and technology warfare and methods of warfare have increased manifold causing havoc on the populations and burdening the international community to come up with strong remedial measures. Hence, there is a need felt by the researcher to relook the current jurisdiction of the ICC.

It is the endeavour of the researcher to highlight the historical evolution of ICC and the various claims of nations present during the drafting of the Rome Statute. How the need for ICC was felt by the international community and finally whether the ICC has being effective in protecting the human rights based on the current jurisdiction; if nt then suggesting alternatives to expand its jurisdiction. The birth of ICC was not easy; instead it was a long treacherous journey consisting of a series of negotiations and dialogues before the birth of ICC. This was mainly due to ensuring that ICC having jurisdiction over grave

human right violations comes into place with wide support from the international community because the jurisdiction had to be exercised over nationals who were treated as individuals; a major shift from the traditional concept of sovereignity.

1.1 HISTORICAL EVOLUTION

The first modest effort to set up a permanent International Court was in the Year **1474** in Germany when the judges condemned Peter von Hagenbach for allowing his troops to rape, murder and loot.[1] World War I left the world shattered from the Turkey Armenian war and called for prosecution of Kaiser.[2] It resulted in trying the German War Criminals and setting up a court for the same but it failed being because it was not applied to Allied personnel.[3] It was during the trial of Turkey- Armenian War that "crimes against humanity" were recognised legally by the 1919 Commission on the Responsibilities of the Authors of the War and on the Enforcement of Penalties for Violations of the Laws and Customs of War.[4] The second attempt was made in **1937** when the League of Nations adopted a Convention on torture which fell apart due to lack of support and cooperation from the International community.[5] This shows that up till the Second World War, there were straying needs of an international criminal tribunal that were felt, but nothing concrete. Post Second World War, the allies established two adhoc tribunals in **1944** and **1946**- The Nuremberg and Tokyo Trials. While the researcher appreciates the fact that Tokyo and Nuremberg trials were the first ones to set the tone for an ICC, however they

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[1] M Cherrif Bassiouni, *The Time Has Come for an International Criminal Court*, (1) INDIANA INTERNATIONAL AND COMPARATIVE LAW REVIEW, 1-45, pg 1, (1991)

[2] Ibid, pg 2.

[3] Salman Kazmi, *Is Victor's Justice in Nuremberg Trial Justified or not?*, available at http://home.aubg.bg/students/MCA100/International%20Law/Salman%20Kazmi.pdf, (last visited on April 19, 2014), pg 1.

[4] M CherrifBassiouni, *The Time Has Come for an International Criminal Court*, (1) INDIANA INTERNATIONAL AND COMPARATIVE LAW REVIEW, 1-45, pg 2, (1991).

[5] Ibid, pg 5

were unsuccessful due to lack of prosecution from the Allied military personnel's side and are often condemned as being victors justice.[6]In **1948,** the United Nations General Assembly [hereinafter referred to as the UNGA] adopted the Convention on the Prevention and Punishment of the Crime of Genocide [hereinafter referred to as the Genocide Convention] which felt the need to establish an international court looking into different crimes but did not officially place a requirement for the same.[7]The International Law Commission [hereinafter referred to as the ILC] prepared a draft statute in**1951** which was discarded due to cold war.[8]In **1989,** collective efforts were made to combat the increasing problem of drug trafficking by the UNGA and ILC.[9]Ironically, the international community recognised drug trafficking but historically mass systematic killings of civilian population never got due importance. Thus, gradual legal force found its expression in ICTY and ICTR in a refined and detailed form before the formal adoption of ICC. Practically these adhoc courts were established because the five permanent members agreed to it.[10]

In **1994**, the ILC presented its final draft statute for an ICC to the UNGA and in July 1998, the Diplomatic Conference of Plenipotentiaries on the establishment of an ICC concluded by adopting a statute for such a court.[11] The Court received an overwhelming support from the world community with 121

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[6]Ibid, pg 6.

[7]Ibid, pg 7

[8]History of the ICC, *Ratification of the Rome Statute*, available at http://www.iccnow.org/?mod=icchistory, (Last visited on April 22, 2014).

[9]Ibid

[10]JelenaPejic, *"What Is an International Criminal Court? As Negotiations on the Establishment of an ICCStart, the Debate Heats Up"* American Bar Association, 16-17, volume 23(4), 1996. http://www.jstor.org/stable/2788000, (last visited on April 28, 2014)

[11]AtulBhardwaj, *International Criminal Court and the Question of Sovereignty* available athttp://idsa.in/system/files/strategicanalysis_atul_0303.pdf, (Last visited on April 22, 2014).

countries ratifying the Rome Statute.[12]It entered into force on 1st July 2002 after a series of debates and negotiations and shortly began its trial in the first case. The Court was created with the philosophy of ending impunity for war criminals and like any other international legal body; this too thrives and functions on state cooperation. In accordance with the provisions of the Statute, state parties are obliged to cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court. Up to the early **1990s**, efforts to codify or develop international criminal law or bring about the creation of an international criminal court remained unsuccessful.

Firstly, in classical international law, states, not individuals, were the exclusive subjects. Therefore, establishment of criminal norms in international law first required the recognition of the individual as a subject of international law. Secondly, it was necessary to overcome states' defensive attitude towards outside interference, popularly classified as the doctrine of sovereignty.[13]Untill very recently, the doctrine of sovereignity and territorial integrity was very powerful due to the protectionist attitude of the states. Thirdly, the problem of how independent and effective the ICC will be? But with the emergence of doctrine of human rights and international recognition for the same gave way for holding individuals accountable. Therefore, establishment of ICC represents the final stage of human rights movement precisely concerned with effective enforcement of human rights. To briefly trace the major highlights in human rights law before ICC, below is the chronological chart explaining the different stages which helped in establishing the ICC.

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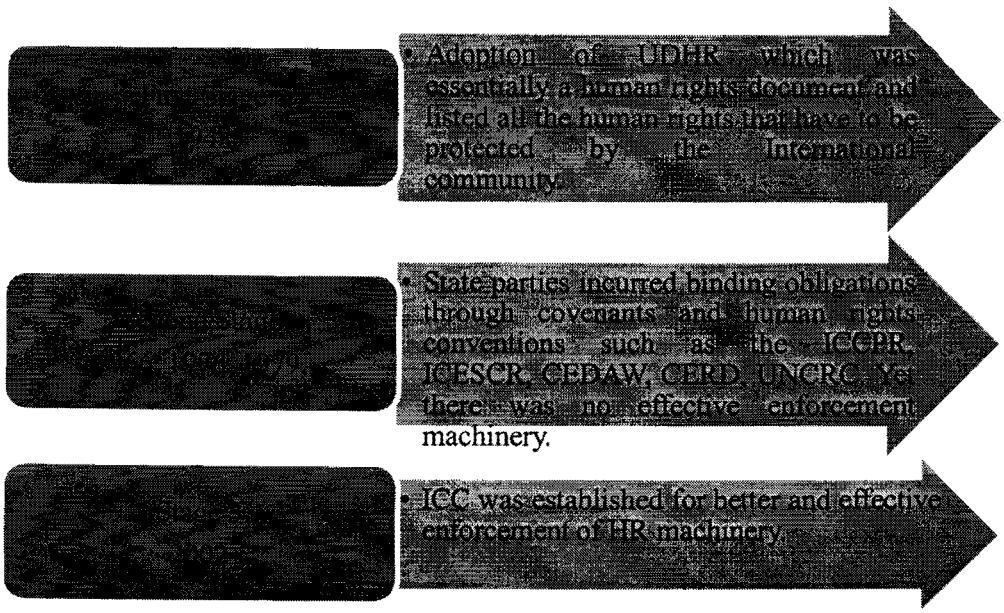
[12]A Universal Court with Global Support Ratification and Implementation > Ratification of the Rome Statute available at http://www.iccnow.org/?mod=romeratification, (last visited on April 21, 2014)

[13] Prof. Dr. G. Werle and Dr. J. Bung, *Evolution of International Criminal Law*, SUMMARY (HISTORICAL EVOLUTION) INTERNATIONAL CRIMINAL JUSTICE SOMMERSEMESTER, (2010). Available at http://werle.rewi.hu-berlin.de/01_History-Summary.pdf, (last visited on April 21, 2014)



In order to understand the complexity of jurisdiction of ICC, it is important to understand the motive of the drafters behind establishing ICC. The ICC is the first ever endeavour made to create a permanent, treaty based independent court under its own statute dealing with international crimes and holding such individuals responsible.

The researcher would like to draw attention to some challenges that were faced during the establishment of the tribunal like the-

- Concept of sovereignity
- Political motivation.

There is no denial that states are extremely protective about their sovereignity. The principle of state sovereignity evolved at the time of formation of United Nations [UN] in 1945. The main idea was to bring all states whether big or small at an equal footing and avoid domination by one over another. With the evolution of international law, the principle of sovereignity acquired a different nomenclature bringing in responsibility for human security as a duty for all its

citizens and international community as a whole.[14] Nations like China and US took the plea that human rights is an internal issue and trying nationals in international courts violates their sovereignity.[15]

1.2NOTED REASONS FOR ITS INCEPTION

1. TO HELP END CONFLICTS- ICC envisages a holistic approach of putting an end to bloody conflicts and acting as a deterrent for future human rights violations. It compels the State to take more humane actions during wars in order to make the war more humane as has been the purpose of International Humanitarian Law. It is helpful in legalizing the approach towards crime and the State instead of committing international crimes, actually prefer more peaceful means of dispute settlement like Arbitration and Advisory opinions of ICJ.

2. TO END IMPUNITY- impunity is always given to heads of state, diplomats, and consular agents under International law. This has led to an exponential increase in the crime rate without accountability.[16]The ICC aims to establish **individual criminal responsibility** against all individuals who are responsible for grave human right violations by piercing governmental hierarchy and military chain of command. The same was not the case during Nuremberg and Tokyo trials. As a result, many officials responsible for planning and instigating were never put to trial.

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[14]VahidaNainar&Saumya Uma, "COMBATING IMPUNITY: A COMPILATION OF ARTICLES ON THE INTERNATIONAL CRIMINAL COURT AND ITS RELEVANCE IN INDIA", (WOMENS' RESEARCH AND ACTION GROUP:2003), page 74.

[15] William Schulz, NATIONAL SOVEREIGNITY AND INTERNATIONAL JUSTICE , TAINTED LEGACY 9/11 AND THE RUIN OF HUMAN RIGHTS,(THUNDER'S MOUTH PRESS :2003) Available at http://www.thirdworldtraveler.com/Human_Rights/National_Sovereignty_TL.html, last visited on 30th April 2014.

[16] Antonio Cassese, THE INTERNATIONAL CRIMINAL LAW, 38, (OXFORD UNIVERSITY PRESS: 2008), page 35.

3. **To Remedy The Deficiencies Of Adhoc Tribunals**- Looking at ICTY, ICTR and other hybrid courts; we know that adhoc tribunals face time and place constraints. Moreover, the justice is "selective" instead of wholesome in nature since these courts try limited perpetrators for limited crimes. It is not always certain that a tribunal will be set up. For instance, there has been no adhoc tribunal set up for the 26 year long civil war in Sri Lanka, only recommendations by UNHRC to conduct investigations. Therefore, ICC works in a more consistent manner and delivers justice effectively being a permanent universal body.

4. **To Takeover When National Criminal Institutions Are Unwilling Or Unable To Act**- The Rome Statute recognizes the **principle of complementarity**[17], according to which the nation states are the first ones to investigate and punish the heinous crimes covered under the statute. Incase the nation states fail either due to the lack of political will to prosecute its citizens or failure of domestic machinery, then the ICC comes into picture so that the international crimes[18] do not go unaddressed.

5. **To Deter Individuals From Committing Crime**- ICC provides a mechanism for peaceful resolution of conflicts in order to provide justice for all having an impartial objective in mind.

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[17] This principle is derived from paragraph 10 of the Rome Statute preamble and Articles 17, 18, 19, 20, and 53. For this purpose, the Office of the Prosecutor, carries out their mandates with independence, impartiality, and objectivity. Lawyers Without Borders, "*The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that Demands More than a "Positive"Approach,* available at http://www.iccnow.org/documents/asf_rapport-anglais-complementarity_and_colombia.pdf, (last visited on April 20, 2013).

[18] Such as the four crimes given under the Rome statute- crimes against humanity, crimes against peace, aggression and genocide.

6. **TO ACHIEVE JUSTICE FOR ALL**-one of the main reasons for the establishment of ICC is to maintain international peace and order through cooperation and friendly relations among nation states in order to protect human rights of all. This was the lesson from the past instances of gross and large scale human rights violations across the world. It was established to bridge the gap created by ICJ because of its limited jurisdiction.[19] It incorporates the provision of holding individuals criminally liable for gross human rights violations extending over the territory of all sovereign states which could otherwise go unpunished as was the situation in the past where heads of the state were not punished. It also wanted to become a role model for the national legal systems by setting an example. [20]

The researcher has made an endeavour to first analyse the rationale of ICC followed by jurisdictional issues and how to further expand the jurisdiction. The penultimate attempt analyses the challenges faced by ICC with respect to its jurisdiction and potency of further expansion with the final appraisal of case laws and conclusions.

The paper consists of **seven** chapters with the convenient breaking of each chapter in different sections as per the needs of the work.
The ***first chapter*** is an introduction to the paper describing the historical background and establishment of ICC.
The ***second chapter*** deals with the ICC's powers to exercise jurisdiction over the existing international crimes as stated in the Rome Statute. In this chapter, the researcher will deal with the administrative part and certain case laws to elaborate the jurisdictional aspect.

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[19]The jurisdiction of ICJ does not extend to punishment of criminal activities and individuals. It is only limited to state parties and legality of the issue at hand between them.

[20]United Nations Treaty Collection, *Overview*, (1998-1999), *available at* http://untreaty.un.org/cod/icc/general/overview.htm, (last visited on April 18, 2013).

The ***third chapter*** deals with the concept of transnational crimes and its impact on the population which has violated a series of human rights leading to slow deaths. The researcher will highlight the need to expressly provide for terrorism and state sponsored torture under the Rome Statute. Whether and how can transnational crimes be incorporated within the jurisdiction of ICC and suggest alternate models. The researcher will deal in detail with the issue of transnational crimes and how to provide for an effective international mechanism in dealing with the same.

The ***fourth chapter*** deals with the role of ICC in light of universal criminal jurisdiction and how ICC is limited to the crimes under its statute but whether universal criminal jurisdiction can be a reality wherein the states can exercise jurisdiction over such crimes.

The ***fifth chapter*** deals with the relationship of UN with ICC and to what extent does the Security Council play a role in exercise of jurisdiction by ICC. The researcher aims to highlight the advantages of such an arrangement and suggesting ways to improve the same. The case laws and case specific situations discussed will show how the ICC has benefitted from the UNSC relationship in issuing arrest warrants and conducting trials. It is important to note the UNSC resolutions create a working environment wherein every member is obligated to abide by the UNSC resolutions, hence this working relationship is what the researcher will discuss.

The dissertation concludes with some strategic observations and the contemporary need for expanding the jurisdiction in the ***sixth chapter***. It is the quest of the researcher to find answers to the abovementioned research questions via this study.

II. ENSURING EFFECTIVE EXERCISE OF JURISDICTION OF ICC OVER INTERNATIONAL CRIMES: A PRACTICAL APPROACH

The Rome Statute which is the founding treaty of the International Criminal Court [ICC] identifies for the purposes of exercising jurisdiction the most serious violations of international human rights and humanitarian law. These violations are grouped within the categories of genocide, crimes against humanity, war crimes and the crime of aggression. With the entry into force of the Rome Statute of the ICC on 1 July 2002, the Court's jurisdiction over three of these four core crimes began to run- the crime of genocide, crimes against humanity and war crimes. The Court will exercise jurisdiction over the crime of aggression only once the terms of its definition have been agreed upon by the countries supporting the Court and formally amended into the Statute.

Under the draft statute, various issues arose; one of the fundamental issues being deciding the jurisdiction of the court. Enlisting the crimes over which it will have jurisdiction. This issue will resonate throughout the dissertation and the researcher will time and again refer to it. The Rome statute deals with crime of genocide, crimes against humanity, war crimes and crime of aggression which are exceptionally serious crimes in nature. The Genocide Convention 1948, the Additional Protocols of 1977 and Customary International law recognize the same. The reason for the unanimous approval of including these crimes was fear for a third world war and gross atrocities.

The way ICC exercises its jurisdiction over states is very interesting to note. First one is a simple procedure wherein a state consents to become a party to the Rome Statute.[21] The second one is when the perpetrator is a national of a state party or the crime was committed within the territory of the state who is a

[21]Article 14 of the Rome Statute. Available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf, last visited on May 2 2014.

party to the Rome Statute.[22] This method solved the issue of extradition. The last one being when a state on its own will decides to accept the jurisdiction of ICC.[23] The three types of exercise of jurisdiction was aimed to leave no scope for crime and encourage the states to be proactive in ensuring effective exercise of jurisdiction by ICC.

2.1 FOUR PRINCIPAL ORGANS:

- THE PRESIDENCY.
- THE DIVISIONS- the Appeals Division, Trial Division and Pre-trial Division.
- THE OFFICE OF THE PROSECUTOR.
- THE REGISTRY.

THE PRESIDENCY - the Presidency is one of the four organs of the Court. Its composition mainly consists of the President, the first and second Vice Presidents; all of whom are elected by an absolute majority of the 18 judges of the Court for a three year renewable term. The judges serve full time and the Presidency is responsible for the proper administration of the Court with the exception of office of the Prosecutor. The Presidency has to coordinate and seek concurrence of the Prosecutor at all matters of mutual concern. The Presidency is responsible for the administration of the court and variety of specialized functions set out in the Statute. The Presidency is entrusted with the responsibility of deciding the work load of other fifteen judges.[24] The presidency has the authority to decide the appropriate work load and "propose" for an increase in number of judges subject to authorization by State Parties. Any state may propose one candidate for the Court in any given election. The candidate need not necessarily be the national of the nominating state but he

[22]Article 13 of the Rome Statute. Available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf, last visited on May 2 2014.

[23]Article 12 of the Statute. Available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf, last visited on May 2 2014.

[24]Article 36(9) of the Rome Statute. Available at http://www.icc-cpi.int/nr/rdonlyres/add16852-aee9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf, last visited on May 1 2014.

must be a national of the State Party, provided there is only **one** judge from one state who is a person of "high moral character, impartiality and integrity"[25], a phraseology that is typical of international instruments.

JUDGES OF THE COURT- all the judges are elected as full time members[26] by the committee of state parties.[27] The judges must be fluent in the languages of the court i.e. English and French.The Rome Statute requires a degree of expertise in the subject matter of the Court. Here it creates two categories of candidates i.e. those with criminal law experience and those with international law experience. Although no specific percentages are set out, Article 36(8) commits the state parties to "take into account" the need to ensure representation of the principal legal system of the world, equitable geographic representation, fair representation of male and female judges' legal expertise on specific issues such as violence against women and children. They are often the soft targets for committing genocide, systematic rapes, forced sterilization therefore demand higher protection.

THE OFFICE OF THE PROSECUTOR- this happens to be the most important organ of the court. It is an independent arm of the court and is normally assisted by a deputy prosecutor, headed by a Chief Prosecutor. The Chief Prosecutor is elected by the Assembly of States and has full authority over the management and the administration of the office. The current chief Prosecutor is Fatou B Bensouda from Gambia, a lady judge who assumed office from June 2012.[28] The mandate of the office is to conduct the investigation and prosecution of crimes that fall within the jurisdiction of the Court and to end impunity for the perpetrators under ICC.

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[25]Article 36(3)(a) of the Rome Statute.

[26]Article 35 of the Rome Statute.Available at http://www.icc-cpi.int/nr/rdonlyres/add16852-aee9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf, last visited on May 1 2014.

[27]Article 36 gives an elaborate description of qualification, nomination and election of judges.

[28]ICC Structure and Officials, Office of the Prosecutor. Available at http://www.iccnow.org/?mod=prosecutor, last visited on May 2 2014.

The Chief Prosecutor may start an investigation upon a referral of situations in which there is a reasonable basis to believe that crimes have been/are being committed. Such referral must be made by a state party or the Security Council acting under international pressure to address a "threat to international peace and security". In accordance with the statute[29] and rules of procedure and evidence[30], the Chief Prosecutor must evaluate the material submitted to him before making the decision on whether to proceed. In addition to the State Party and Security Council referrals, the Chief Prosecutor may also receive information on crimes within the jurisdiction of the Court provided by other sources such as individuals or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court. The Chief Prosecutor conducts a preliminary examination of this information that is received and then decides whether it is reasonable to proceed with the case. For authorization, he will need the permission of Pre-Trial chamber.

DIVISION OF THE COURT- If the Pre-Trial Chamber considers that there is a reasonable basis to proceed with an investigation after conducting a preliminary examination and that the case appears to fall within the jurisdiction of the Court,it shall authorize the commencement of the investigation. Incase of a refusal by the Pre-Trial Chamber, it shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation. A case can be admitted based on new evidence.[31] Thus the role of the office of the Prosecutor becomes very

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[29]Article 16 of the Rome Statute.Available at http://www.icc-cpi.int/nr/rdonlyres/add16852-aee9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf, last visited on May 1 2014

[30] Rule 10- Retention of Information and Evidence in the course of investigations. Available at http://www.icccpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf, last visited on May 2, 2014

[31]Article 15(4)(5)(6) of the Rome Statute. Available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf, last visited on May 2 2014.

important and the power to start investigation on its own[32] is definitely a powerful provision. However, this fear was countered by the provision of making it mandatory to seek permission from the Pre-trial division. The process of double checking has ensured that there are no frivolous petitions/cases reported.

The Trial Division is predominantly composed of judges having experience in criminal law. Once a case is admitted, the trial chamber is responsible for subsequent proceedings.[33]Its major role[34] is adopting all necessary procedures to ensure a fair, speedy trial taking into account the rights of the accused. It is the trial chamber that determines the innocence or guilt of the accused. Incase guilt is established; the trial chamber can impose financial penalties[35] or impose imprisonment upto 30 years. In addition to this, the trial chamber can order for payment of compensation, rehabilitation and restitution to victims.[36]

The Appeals Division is primarily composed of judges in the area of international law such as humanitarian law and human rights law. The Prosecutor is entitled to appeal against procedural errors, error of law or fact.[37] The appeals chamber may decide to reverse, amend the decision, judgment or sentence or order a new trial before a different trial chamber.[38]

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[32]Article 15 of the Rome Statute.*ProprioMotu*- acting on his/her own initiative.

[33]Article 64 of the Rome Statute. Available at http://www.icc-cpi.int/nr/rdonlyres/add16852-aee9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf, last visited on May 3, 2014)

[34]Article 64 (2) of the Rome Statute. Adopted at the 13th plenary meeting, on 11 June 2010

[35]Article 77 of the Rome Statute. Available at http://www.icc-cpi.int/nr/rdonlyres/add16852-aee9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf, (last visited on May 2 2014).

[36]Article 75 of the Rome Statute. Available at http://www.icc-cpi.int/nr/rdonlyres/add16852-aee9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf, (last visited on May 2 2014).

[37]Article 81 of the Rome Statute. Available at http://www.icc-cpi.int/nr/rdonlyres/add16852-aee9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf, (last visited on May 2 2014).

[38]Article 84 of the Rome Statute- revision or conviction of sentence wherever the Appeals Chamber feels appropriate. Available at http://www.icc-cpi.int/nr/rdonlyres/add16852-aee9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf, (last visited on May 2 2014).

JURISDICTION OF THE ICC- Initially in the 19th century only war crimes were punished. It was only post World War II when different crimes such as crimes against humanity and genocide were recognized during the Tokyo and Nuremberg Trials in 1945 and 1946under the statute of International Military Tribunal [IMT] and International Military Tribunal for the Far East [IMTFE].[39] However, genocide gained autonomous recognition under the Genocide Convention and followed its way in the Rome Statute. The Statute recognizes the following crimes within the jurisdiction of ICC-

1. *Crime of Genocide-* this crime was unanimously adopted owing to the grave serious nature. A detailed account is given under Article 6 of the Rome Statute. One of the early cases decided prior to the formation of ICC were by ICTY and ICTR. In the case of ***Prosecutor v. The Jean Paul Akayesu***[40]the court held that, "Genocide is a very distinct kind of crime for which *mens rea is* one of the requirements. This gives Genocide its uniqueness and distinguishes it from an ordinary crime against international criminal law.[41] The court in ***Prosecutor v. Jelisic***[42]stated that the intent to kill only a few members of a group destroyed must be a "substantial part" of genocide. Thus a greater number of victims, the more logical the conclusion that the intent was to destroy the group "in whole or in part".

2. *Crimes against Humanity-* though most often discussed yet a vague crime since it has not been defined anywhere (including a treaty or a convention). Though various attempts were made to define crimes against humanity prior to the Rome Statute.[43] ICC statute also suffers from

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[39]Article 6 (a) (b) (c) of the Nuremberg Charter.Referred in the formulation of Nuremberg Principles.DOCUMENT A/CN.4/W.6. Available at http://legal.un.org/ilc/documentation/english/a_cn4_w6.pdf, last visited on May 4, 2014).

[40]ICTR-96-4

[41]Malcolm N Shaw, INTERNATIONAL LAW, 6th ed. (Cambridge University Press:2008), at page 431

[42]IT-95-10-T. decided

[43]Article 6(c) of London Charter, ICTY (Article 5), ICTR (Article 3) ICC (Article 7)

ambiguity because some contents in genocide, war crimes and crimes against humanity are overlapping.

3. *War Crimes*- they are serious violations of the rules of customary international law and treaties concerning international humanitarian law given under Article 8 of the Statute with definite markers as to what all constitutes war crimes. In the ***Al Bashir case***,[44]ICC Prosecutor Luis Moreno-Ocampo presented evidence showing that Sudanese President, Omar Hassan Ahmad Al Bashir committed the crimes of genocide, crimes against humanity and war crimes in Darfur in relation to 10 counts of genocide, crimes against humanity and war crimes.The Prosecution evidence shows that Al Bashir masterminded and implemented a plan to destroy in substantial part the Fur, Masalit and Zaghawa groups, on account of their ethnicity, calculated destruction of villages and systematic gang rapes. Moreover, Al Bashir mobilised the entire state apparatus, including the armed forces, the intelligence services, the diplomatic and public information bureaucracies, and the justice system, to subject the 2.450.000 people living in internally displaced peoples [IDP's] camps, most of them members of the target group, to conditions of life calculated to bring about their physical destruction. He is the President. He is the Commander in Chief. He used the whole state apparatus and used the army.

The Prosecution submits that the evidence and the information summarised above give reasonable grounds to believe that AL BASHIR, committed the crimes alleged and under Article 58, the prosecution can issue arrest warrants. The Prosecution respectfully requests the issuance of an arrest warrant. The Prosecution submits that summons were submitted to the Sudanese government but Sudan not being a party to the Rome Statute, needs to cooperate with the ICC.Thus, the execution of the second arrest warrant is also pending.

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[44]ICC-02/05-01/09. Available at http://www.icc-cpi.int/iccdocs/PIDS/publications/AlBashirEng.pdf, last visited on May 21, 2014.

Under the definition of war crimes, the Court will also have jurisdiction over the most serious violations of the laws and customs applicable in international armed conflict within the established framework of international law. These violations are defined extensively in Article 8(b) of the Rome Statue .In the case of armed conflict not of an international character, the Court's jurisdiction will cover breaches of Article 3 common to the four Geneva Conventions of 12 August 1949.[45]

4. *Crime against Aggression-* this term is often inter-changeably used with crimes against peace[46]. The first case of aggression was before the Nuremberg International Military Tribunal following the Second World War to try Kaiser.[47] The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties[48]. Alternatively, the Court shall exercise jurisdiction over the crime of aggression subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute. Lastly, the Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The State can withdraw anytime after 3 years.[49]

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[45] " CORE CRIMES DEFINED IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT", available at http://www.iccnow.org/documents/FS-CICC-CoreCrimesinRS.pdf, last visited on May 27, 2014.

[46]Article 6 (a) of the London Charter defines crimes against peace as planning preparation initiation or waging war in violation of international treaties, agreements or assurance participation in a common plan or conspiracy for the accomplishment of any foregoing.

[47]Supra Note 2.

[48]Article 121(5) of the Rome Statute. Available at http://www.icc-cpi.int/nr/rdonlyres/add16852-aee9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf, (last visited on May 2 2014).

[49]Resolution RC/Res 6.Adopted at the 13th plenary meeting, on 11 June 2010.Available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.last visited on (May 5 2014).

2.2 General Principles Laid Down in The Rome Statute

Shift from State Responsibility to individual responsibility.

The matter of individual criminal responsibility first arose during World War I in case of ***Llandovery Castle***[50] in 1921 where the German Supreme Court held that the shooting of the survivors in lifeboats was a crime under international law. Hence the essence of the charter was first to declare that the planning or waging of a war of aggression is a crime and secondly its declaration that there shall be individual responsibility for such crimes. The ICTY reaffirmed the above principle in ***Prosecutor v. Tadic***[51] wherein DuskoTadic was prosecuted for crimes against humanity and 12 grave breaches under the Geneva Convention during the genocide in Yugoslavia. The ICTY upheld the principle of individual responsibility and convicted him.

During the Tokyo Trial, the individual rather than the State was held accountable. In ***Re Yamashita***[52], Tomoyuki Yamashita, a General in the Japanese Army was tried by the US Military Commission of Manila on 7th December 1945. The Commission found that a commander in his position may be held responsible, *even criminally liable* for the lawless acts of his troops and sentenced him to death. The Supreme Court ruled that the law of war imposes on a commander the duty to take any appropriate measures within his power to control the troops under his command in order to prevent acts which constitute violations of the law of war. Thus, Yamashita could legitimately be charged with personal responsibility arising from his failure to take such measures. The Principle of superior responsibility has been upheld in a number of tribunal judgments, the latest one by the Special Court for Sierra Leone in ***Prosecutor v. Charles Ghankay Taylor***[53]wherein Charles Taylor was the head of the

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[50]Annual Digest 1923-1924 , Case No. 235, Full Report, 1921 (CMD. 1450), p. 45

[51]IT-94-1 ICTY

[52]327 U.S. 1 (1946)

[53]SCSL-03-1-T, Special Court for Sierra Leone, 26 April 2012, available at: http://www.refworld.org/docid/4f9a4c762.html. (last visited on May 6 2014).

State of Liberia at the time of commission of crime. He was charged for crimes against humanity, serious violations of international humanitarian law and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II. Despite being the head, he was not allowed to take the defense of the head of the State.

A landmark judgment in this regard is the ***In Re Pinochet Case***[54] which is one of the most recent attempts to enforce international human rights law through criminal prosecution.Within days of the coup, the Chilean leader Pinochet created ad hoc firing squadsto eliminate leftists. During hissubsequent rule, he allegedly arrested 13,000 communists, killed and tortured them through his secret police. Pinochet also headed a plan involving exchanges of disappeared prisoners. He was responsible for killing approximately 3200 people during his regime.[55]Senator Pinochet claimed immunity from prosecution in Spainbecause he was the head of state of Chile when the criminal actsoccurred. The issue of immunity became the focal point of thelegal arguments in the case. Courts grant anacting head of state immunity *ratione personae* because he is the representativeof the state. This immunity renders the head of stateimmune from all "actions or prosecutions whether or not theyrelate to matters done for the benefit of the state. Once a personceases to be head of state he loses this immunity and he maintains only immunity *ratione materiae,* which covers only official actsperformed while acting as head of state. Although this protects the head of state from most crimes committed during his tenure,the Pinochet court found that it does not protect him.This shows a shift in the philosophy of king can do no wrong to whoever does wrong shall be punished for his act including the superior.

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[54] 28th October 1998, reproduced in 38 ILM (1999) 68. Available at http://www.globalissues.org/article/493/icc-the-pinochet-case, (last visited on May 6 2014).

[55]Inconsistency And Impunity In International Human Rights Law: Can The International Criminal Court Solve The Problems Raised By The Rwanda And Augusto Pinochet Cases GEORGE WASHINGTON INTERNATIONAL LAW REVIEW, 2000-2001, PAGE 19

Further, under Art 33 of the Rome Statute recognized that the Superior Order is no defense at all unless three conditions given in the Article cumulatively are fulfilled-

(a) The Person was under a legal obligation to obey orders of the Government or the superior in question.
(b) The person did not know that the order was unlawful
(c) The order was not manifestly unlawful. [56]

Hence, subject to the above conditions the Rome Statute does not recognize the defense of the Superior Order.

2.3 VICTIM ORIENTED JUSTICE

One of the great innovations of the Statute of the International Criminal Court and its Rules of Procedure and Evidence is the series of rights granted to victims. For the first time in the history of international criminal justice, victims have the possibility under the Statute to present their views and observations before the Court. This participation before the Court may occur at various stages of the proceedings and may take different forms. However, it will be up to the judges to give directions as to the timing and manner of participation which in most cases takes place through a legal representative and is conducted "in a manner which is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial."

The victim-based provisions within the Rome Statute provide victims with the opportunity to have their voices heard and to obtain, where appropriate, some form of reparation for their suffering. It is this balance between retributive and restorative justice that enables the ICC to not only bring criminals to justice but also to help the victims rebuild their lives. Another way of doing this is by setting up truth reconciliation commissions.

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[56] Paola Gaeta, THE DEFENCE OF SUPERIOR ORDERS: THE STATUTE OF INTERNATIONAL CRIMINAL COURT VERSUS CUSTOMARY INTERNATIONAL LAW, EUROPEAN JOURNAL OF INTERNATIONAL LAW (1999). Available at http://www.ejil.org/pdfs/10/1/571.pdf, last visited on May 6, 2014

The Rome Statute, the Rules of Procedure and Evidence and the Regulations of the Court and of the Registry contain important provisions for the protection and support of victims and witnesses. These provisions are the key for the successful functioning of the Court, aiming to ensure that victims can participate in proceedings and witnesses testify freely and truthfully without fear of retribution or suffering of further harm.

Article 68(1) of the Rome Statute provides that the "Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses." To this end, pursuant to Article 43(6), the Registrar has set up a Victims and Witnesses Unit within the Registry to provide protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony. The Registrar organised a roundtable on the protection of victims and witnesses at the seat of the Court in The Hague in the year 2009. It was organised in order to explain how the protection system operates, what challenges are faced and what support the Court requires to fulfill its mandate. The round table was also intended as a discussion forum to allow different points of view to be exchanged from the perspectives of Non-governmental organizations [NGOs], other international criminal tribunals and institutional partners of the Court. [57]

Thus the purpose of ICC was to ensure that victims get justice. There are different kinds of justice like retributive justice, deterrent justice, compensatory justice, rehabilitative justice, exonerative justice and restorative justice.[58]Which kind of justice will do full justice to the victim is a difficult question to answer as

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[57]Victims and Witness Protection Support. Available at http://www.icccpi.int/en_menus/icc/structure%20of%20the%20court/protection/Pages/victims%20and%20witsses%20protection.aspx, last visited on may 14 2014.

[58]YavKatshung Joseph, "THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND TRUTH COMMISSIONS: SOME THOUGHTS ON HOW TO BUILD A BRIDGE ACROSS RETRIBUTIVE AND RESTORATIVE JUSTICES", available at http://www.iccnow.org/documents/InterestofJustice_JosephYav_May05.pdf, last visited on May 14, 2014.

no one justice serves as a straight jacket formula. The researcher will briefly explain the two principles of justice which are essentially understood in the context of ICC. -

- *Retributive Justice* is essentially concerned with crime as a violation of the law. It administers justice primarily as a corrective measure through the state which acts as the custodian of the rights of its citizens. It is concerned with punishment for the wrong doer proportionate to the crime and largely focuses upon the treatment that should be given to the offender or perpetrator. It is a retroactive approach in which legal proceedings play a central role and is based upon the contention that mechanisms such as courts, national criminal laws and international criminal tribunals are essential for ensuring that speedy justice is delivered. It is a two-tierapproach wherein the society gets justice and the criminal is transformed. The ICC focuses on this form of justice because it was felt that criminal justice system shall be victim oriented.-[59]
- *Restorative Justice*- Restorative Justice views crime essentially as a violation of people andrelationships between people. Its primary objective is to correct such violations and to restore relationships. As such, it necessarily involves victims and survivors, perpetrators and the community in the quest for a level of justice that promotes repair, trust-building and reconciliation.[60] It restores harmony that was prevalent in the society prior to the crime and aims to achieve status quo. To sum up, it is concerned with resolving crime and conflicts. Its focuses upon the end result within the community as it involves participation from the entire society with a view to restoring rights that have been abused and redressing the harm caused to victims. This process is essentially conflict resolving oriented.It is highly participative, pro-active and is forward-looking focusing on development and justice delivery for the entire society. The only precautions the ICC should take with this form of justice is to

[59]Ibid, pg 4.

[60] Charles Villa-Vicencio, "PIECES OF THE PUZZLE: KEYWORDS ON RECONCILIATION AND TRANSITIONAL JUSTICE", Cape Town Publications: 2004, p.33

ensure that no criminal goes unpunished and that maximum benefit is given to the victim was bore the harm.[61]

2.4 THE ICC AND ITS COMPLEMENTARY NATURE

After the adoption of a statute authorizing the setting up of ICC, it was entrusted with some important roles to play in the future in the battle against impunity and it has jurisdiction over war crimes, crimes against humanity and genocide with respect to crimes committed after the entry of force of the Treaty-Rome Statute in 2002. ICC recognizes a victim as a natural person suffered harm at the hands of the State or its officials. Under the Rome Statute, the victims could participate in the proceedings and seek compensation.[62]

It is well known that every international body needs state cooperation. To address the question of inter-relationship, the "principle of complementarity" was put forward. This principle defines the relationship between the ICC and national courts and decides the question of giving jurisdiction to whom in a particular case. Under this principle, international proceedings will co-exist with the already existing national mechanisms which is a boon as it acts as a double check.

There are four scenarios in accordance with Article 17(1) in which the ICC cannot admit a case: (a) the case is being investigated or prosecuted by a State which has jurisdiction over it; (b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned (in these two cases, the ICC has to preclude the

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[61] Supra Note 76, pg 6.

[62]This process of receiving compensation is called trust fund. The victims have the right to seek reparation under Article 75 of the Rome Statute. Trust fund provision is given under Rule 98 of the Rules for Procedure and Evidence wherein the resources of the Trust Fund may also be used for the benefit of Victims of crimes within the jurisdiction of the Court.The Trust Fund for Victims should be seen as an instrument that will truly complement the work of the Court in respect of victims, rather than simply functioning in the narrow role of administering awards granted by the Court. MariekeWierda, THE ICC TRUST FUND FOR VICTIMS: A COMPLEMENTARY ROLE", The ICC MONITOR, 2005, pg.10

possibility that the State is unwilling or unable genuinely to carry out the investigation or prosecution before it can admit the case); (c) the person concerned has already been tried for conduct which is the subject of the complaint (the principle of *ne bis in idem)*; and (d) the case is not of sufficient gravity to justify further action by the Court. Thus, the key consideration for the Court to admit a case is whether a State is unable or unwilling to investigate or prosecute a case.[63]

Unlike its predecessors, i.e. the ad hoc International Criminal tribunal for the former Yugoslavia and Rwanda which were meant for a time based specific purpose; the ICC will assert its permanent jurisdiction over crimes.

As a matter of legal policy, the emerging practice of 'self-referrals' and partial 'waivers of complementarity' constitute laudable and perhaps even necessary refinements of the complementarity scheme under the ICC Statute. The refinement effort reflects the fact that, in terms of international criminal legal policy, no rigid primacy rule in either direction can be formulated.[64] Much depends on the circumstances of the individual situation of mass atrocities, on the individual suspect (is it a person alleged to be among those most responsible for the alleged crimes or oneof the 'lower ranks'?) and much also depends on the ground of jurisdiction on which the exercise of national criminal jurisdiction is to be based. [65] However, under this practice certain risks are involved like relyingtoo heavily on a policy of self-referrals and actively encouraging such referrals. It is certainly true that where a territorial state 'of its

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[63]Lijun Yang, "ON THE PRINCIPLE OF COMPLEMENTARITY IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT", Chinese Journal of International Law, Vol 4 Issue 1, pg 122. Available at http://chineseijl.oxfordjournals.org/content/4/1/121.full, last visited on may 1 2014.

[64] C. Kress, drawing on A. Cassese, "REFLECTIONS ON INTERNATIONAL CRIMINAL JUSTICE", 61 (Modem Law Review: 1998), page 35.

[65] In the latter context, it is to be suggested that states should not, as a general policy rule, challenge the admissibility of international proceedings based on the title of universal jurisdiction. Further see C. Kress, drawing on A. Cassese, "REFLECTIONS ON INTERNATIONAL CRIMINAL JUSTICE", 61 (Modem Law Review: 1998), page 173-174.

own volition has requested the exercise of the Court's jurisdiction, the Prosecutor can direct the national authorities to the investigation, and will be anxious to provide the necessary level of protection to investigators and witnesses.[66]There is a danger, though, of creating the appearance that a quasi-consensual exercise of the ICC's criminal jurisdiction becomes the rule. Too much 'prosecutorial self-restraint' as regards the *proprio motu* powers under Article 15 could not only water down the significance of this very power or even cast doubts on its legitimacy, but could also detract from the legal obligation of States Parties to cooperate with the ICC. A policy of actively seeking self referrals is more problematic in that it may inadvertently give rise to expectations of a quid pro quo while the Prosecutor can promise no more than to do international justice - objectively, and in a fair and efficient manner. Again, it may be true, that the Prosecutor is in a different position from a national prosecutor, who may be seen to prejudice his or her independence if contacts are made with political authorities of the State and that the Prosecutor of the ICC must enter into dialogue with heads of States and Government and with other agencies of a State.[67] However, the appearance of independence and impartiality is crucially important at the international level no less than at the national one and this appearance may suffer from a lack of adequate distance from state authorities where such distance would have been possible.

Thus, the Prosecutor has also taken useful administrative precautions within his office by separating the Jurisdiction, Complementarity and Cooperation Division from the Investigation Division. Thus the principle of complementarity aims to strike an indubitably delicate balance between constructive

[66] There maybe cases where inaction by States is the appropriate course of action. For example, the Court and a territorial State incapacitated by mass crimes may agree that a consensual division of labour is the most logical and effective approach.

[67] The need to keep that distance seems to underlie Rule 44(1) Rules and Procedure of Evidence, which specifically empowers the Registrar to inquire, at the request of the Prosecutor, whether a state intends to make the declaration provided for in Art. 12(3) of the Rome Statute.

communication and necessary distance in the relationship between the Prosecutor and the state in the context of self-referrals.

With the changing times, the crimes enlisted in the ICC need serious review. While the ICC has been successful to a large extent in dealing with crimes enlisted in the Rome Statute across the globe. The functioning of the different wings of the court ensure that war crimes, crimes against humanity and genocide don't remain unpunished. In this chapter, the researcher gave a birds' eye view to the work done by ICC and the way its decisions are being implemented in the present day context. In the next chapter, it is the endeavour of the researcher to highlight the concept of transnational crimes and research over the possibilities of including it within the jurisdiction of ICC and the need felt for doing the same.

III. EXPANDING THE ROLE OF ICC vis-à-vis THE NEW FACET OF TRANSNATIONAL CRIMES

3.1 CONCEPT AND MEANING OF TRANSNATIONAL CRIMES

Transnational organized crime manifests in many forms, including as trafficking in drugs, firearms and even persons. At the same time, organized crime groups exploit human mobility to smuggle migrants and undermine financial systems through money laundering. The vast sums of money involved can compromise legitimate economies and directly impact public processes by buying elections through corruption. It yields high profits for its culprits and results in high risks for individuals who fall victim to it. Every year, countless individuals lose their lives at the hand of criminals involved in organized crime, succumbing to drug-related health problems or injuries inflicted by firearms, or losing their lives as a result of the unscrupulous methods and motives of human traffickers and smugglers of migrants.There are many activities that can be characterized as transnational organized crime, including drug trafficking, smuggling of migrants, human trafficking, money-laundering, trafficking in firearms, counterfeit goods, wildlife and cultural property, and even some aspects of cybercrime..The United Nations Office on Drugs and Crime [UNODC] is the watchdog responsible for implementing and overall working of the United Nations Convention against Transnational Organized Crime [Organized Crime Convention] and the three Protocols on Trafficking in Persons, Smuggling of Migrants and Trafficking of Firearms.[68] Some of the crimes are explained below-

[68]Organised Crime, "THE UN CONVENTION AGAINST TRANSNATIONAL CRIMES AND THE PROTOCOLS THERETO", available at https://www.unodc.org/unodc/en/organized-crime/index.html, last visited on May 7 2014.

- *Drug trafficking* continues to be the most lucrative form of business for criminals, In 2009, UNODC placed the approximate annual worth of the global cocaine and opiate markets alone at $85 billion and $68 billion, respectively.[69]
- *Human trafficking* is a global crime in which men, women and children are used as products for sexual or labour exploitation. It has increased at an alarming rate and the figures are extremely disturbing. For instance, in Europe, the trafficking of mostly women and children for sexual exploitation alone brings in $3 billion annually and involves 140,000 victims at any one time, with an annual flow of 70,000 victims.[70]
- *Smuggling of migrants* is a well-organized business moving people around the globe through criminal networks, groups and routes. Migrants can be offered a "smuggling package" by organized crime groups, and the treatment they get along the route corresponds to the price they pay to their smugglers. In the process of being smuggled, their rights are often breached and they can be robbed, raped, beaten, held for ransom or even left to die in some cases.
- *Illicit trading in firearms* brings in a lot of black money and arms in the hands of criminals. It is difficult to count the victims of these illicit weapons, but for example in America, there is a strong correlation between homicide rates and the percentage of homicides by firearms.
- *Trafficking in natural resources* includes the smuggling of raw materials such as diamonds and rare metals. In addition to funding criminal groups, this strand of criminal activity ultimately contributes to deforestation, climate change and rural poverty. The illegal trade in wildlife is another lucrative business for organized criminal groups, with poachers targeting skins and body parts for export to foreign markets. Trafficking in elephant ivory, rhino horn and tiger parts from Africa and South-East Asia to Asia produces millions of criminal profits each year and threatens the existence of some species. Organized

[69]World Drug Report 2011.

[70] Available from www.unodc.org/documents/publications/TiP_Europe_EN_LORES.pdf., last visited on May 3, 2014.

crime groups also deal in live and rare plants and animals threatening their very existence to meet unlawful demands.

- *Sale of fraudulent medicines* is a worrying business, as it represents a potentially deadly trade for consumers. Piggybacking on the rising legitimate trade in pharmaceuticals from Asia to other developing regions.[71] Instead of curing people, however, they can result in death or cause resistance to drugs used to treat deadly infectious diseases. In addition to traditional trafficking methods, criminals continue to build a lucrative online trade in fraudulent medicines targeting developed and developing countries alike, which leads to lethal health implications for consumers.
- *Cybercrime* encompasses several areas, but one of the most profitable for criminals is identity theft, which generates around $1 billion each year.[72] Criminals are increasingly exploiting the Internet to steal private data, access bank accounts and fraudulently attain payment card details.

There is no standard definition of transnational crimes[73]; however the Convention does contain a definition of 'organized criminal group'. Article 2(a) states that:-

- a group of three or more persons that was not randomly formed;
- existing for a period of time;
- acting in concert with the aim of committing at least one crime punishable by at least four years' incarceration;
- in order to obtain, directly or indirectly, a financial or other material benefit.

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[71] Supra note 99.

[72] Supra note 96.

[73] The true defining characteristics of organized crime groups under the Convention are their profit-driven nature and the seriousness of the offences they commit. The term transnational covers not only offences committed in more than one State, but also those that take place in one State but are planned or controlled in another. Also included are crimes in one State committed by groups that operate in more than one State, and crimes committed in one State that has substantial effects in another State.

The Organized Crime Convention offers States parties a framework for preventing and combating organized crime and extends cooperation including extradition. States parties have committed to establishing the criminal offences of organized crime group, money laundering, corruption, drug trafficking, counterfeiting currency etc in their national legislation. States parties have also committed to promoting training and technical assistance to strengthen the capacity of national authorities to address organized crime. In short, transnational organized crime transcends cultural, social, linguistic and geographical borders.

Prior to the conclusion of the Rome Statute, the distinction between an international criminal law [ICL] with an international element and ICL with a transnational element was not significant.[74] However, during the drafting of the Statute, Latin American countries were extensively lobbying for inclusion of transnational crimes especially drug trafficking because it was a greater cause of human rights violations in that region as compared to the crimes under the Rome Statute..The development of the ICC solidified the distinction between this ICL *strict sensu* and transnational criminal law [TCL]. While the International Law Commission [ILC] had included the crimes created by the suppression convention[75], the so-called 'treaty crimes', in all the drafts ofthe Code of Crimes against the Peace and Security of Mankind from 1991 up to and including the 1995 Draft Code,[76] opposition within the ILC meant that they were excluded from the 1996 Draft Code, which was restricted to a catalogue of 'core' crimes. That distinction was carried forward into the Rome Statute. The core international crimes, those over which Articles 5 to 9 of the Rome

[74]Bassiouni, 'POLICY CONSIDERATIONS ON INTER-STATE CO-OPERATION IN CRIMINAL MATTERS' , page 807,

[75]The International Convention for the Suppression of Financing of Terrorism, 1999 directs the states to freeze assets for the purpose of funding terrorist activities and regulate any suspicious funding activities by providing criminal penalties within their domestic jurisdictions.

[76]Report of the ILC, 47th Session, UNGAOR 50th Sess., Supp. No.10 (A/50/10), paras.112–118.

Statute give the ICC jurisdiction, are offences that are firmly established in customary international law.[77]

These core offences provide for individual criminal liability fortheir violation, even in the absence of a domestic prohibition and are subject to direct enforcement where the individual is prosecuted before international criminal court. TCL is concerned with the treaty crimes excluded from the jurisdiction of the ICC. Unlike ICL, TCL does not create individual penal responsibility under international law. TCL is an indirect system of interstate obligations generating national penal laws.[78] The suppression conventions impose obligations on state parties to enact and enforce certain municipal offences. A failure to comply with the prescribed international model results in an international tort or delict; the remedies for thefailure of state parties to take action in their domestic law are the ordinary remedies of treaty law and the law of state responsibility. If a state fails to meet its obligations, it cannot plead the insufficiency of its own criminal law or administration of justice.

However, in contrast to the core crimes, the authority to penalize comes from national law and individual criminal liability is entirely in terms of national law.[79]States recognize this distinction explicitly. For example, while Article 1 of the Genocide Convention records that genocide is a 'crime under international law', the treaty crime of drug trafficking is considered in the preamble of the 1988 Drug Trafficking Convention only to be an international criminal activity.Unlike ICL, which is usually customary, a characteristic reinforced by the selection of crimes in the Rome Statute, TCL is usually treaty based,

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[77] Genocide, aggression, serious violations of the laws and customs of armed conflict and crimes against humanity

[78] Self-executing treaties still require state application and thus do not detract from the thesis that the suppression conventions are applied indirectly.

[79] Article 36(4) of the 1961 Single Convention on Narcotic Drugs, which provides that nothing contained in Article 36 on the subject of penal provisions 'shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.

enabling groups of states to respond rapidly to new forms of criminality.[80]The problem with TCL is that incase one state is not a party to a treaty which recognizes transnational crime, then the tracing and conducting trials for such crimes is difficult. Moreover, transnational crimes base their jurisdiction largely on extradition procedures which is political in nature.

In this chapter, the researcher will look into the possibility of including transnational crimes within the jurisdiction of ICC and suggesting alternate models to deal with them. The chapter will specifically deal with terrorism and state sponsored torture.[81]

3.2 Possibility of Inclusion of Terrorism in The ICC Statute

The word "terror" stems from Latin, entering French and English in the 14th century during the Reign of terror extending till the Second World War where it was used as an instrument of State control.[82] The historical record of terrorism is mixed and can be backdated to 2000 years when it was used to kill religious enemies until the French Revolution in 1799. It was first perpetrated by a radical off shoot of the Jews against the Roman Empire in 1st century AD. The era of 1990s witnessed a whole range of emerging trends in terrorism. Terrorism was used to describe the violence perpetrated by anti-colonialist organizations for liberation, nationalism and self determination during 1940s and 1950s especially in Asia and Africa. Beginning with "state-sponsored"

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[80]With respect to ICL, in the Tadic Appeal Chamber decision the ICTY affirmed that an international criminal tribunal could apply international agreements binding on the parties to a conflict as a basis for individual penal responsibility even though these agreements were not part of customary international law. The ***Prosecutor v. DuskoTadic***, 2 October 1995, Case No. IT-94-1-AR72, paras 143–144. In ***US v. Arizona*** 120 US 479 (1887) the US Supreme Court upheld the constitutionality of a Federal power to suppress the counterfeiting of foreign currency at home on the basis of an obligation generated by the law of nations prior to the Counterfeiting Convention.

[81] Neil Boister, "TRANSNATIONAL CRIMINAL LAW", European Journal of International Law. Available at http://ejil.oxfordjournals.org/content/14/5/953.full.pdf+html, last visited on May 3 2014

[82] Ben Saul, "DEFINING TERRORISM IN INTERNATIONAL LAW", page 1, (Oxford :2006).

terrorism that caused loss of life, bloodshed and displaced millions of people in Yugoslavia and Rwanda. The terror groups were sponsored by the government and allied forces, the international community took notice of such activities for the first time and popularly named it "genocide" and conducted trials. It was only in the wake of 9/11 attacks on the World Trade Centre in New York that the international law and UN realized the menace of terrorism.[83] There is no doubt that terrorism poses one of the biggest challenges for the international community. But what is even more challenging is the way the State and its officials deal with terrorists during interrogation from the counter-terrorism perspective.[84]

Therefore, the researcher would like to submit that although terrorism is not a part of the Rome Statute, it shall be included as terrorism is a globally recognised issue that needs a strict enforcement mechanism under international law. The States have their own domestic laws and punishments dealing with the menace of terrorism however in the views of the researcher, this is not sufficient. Terrorism has not only caused loss of life and destruction of property and serious violations of human rights but also put tremendous pressure on nations' resources which overall effects the global resources. Therefore, it is the submission of the researcher that there is a need for ICC to deal with the crime of terrorism. One way of dealing with it is to interpret the crime of aggression extending to the crime of terrorism. Another way is to amend the Rome statute[85] by which the states can amend the list of crimes given under Article 5, 6, 7 and 8 of the Rome Statute. Another reason why terrorism can be incorporated under the ICC is the unanimous consensus which the world has over this issue.

Though initial efforts were made to fight against terrorism but they were mostly

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[83]Ibid, page 27-35.

[84]Salma Yusuf, "PROTECTING HUMAN RIGHTS WHILE COUNTERING TERRORISM", (February 14, 2012), *available at* http://www.e-ir.info/2012/02/14/protecting-human-rights-while-countering-terrorism/, (Last Visited on April 24, 2014).

[85]By way of Article 121 and 122 of the Rome statute.

domestic and state centric approaches having no uniform approach towards this crime. It was only after 9/11 that the international community realised the importance of mobilising the global community to collectively "fight" against terrorism" popularly called as "global war on terrorism". This was done because with the changing times, the intensity and method of executing terrorism and proxy wars has threatened the very existence of mankind.

Hence, it is the contention of the researcher to make a provision under the statute wherein the jurisdiction of ICC covers the crime of terrorism.

3.3 Including State Sponsored Torture Under the ICC Statute

Terrorism is one aspect but what about violence meted out by the state under the garb of "national interests and security emergencies"? Isn't that a coloured version of terrorism which the ICC should be empowered to exercise jurisdiction over? Due to sophisticated technology and increase in funds, there is a serious threat of terrorist access to and use of nuclear, chemical, biological and other potentially deadly materials[86]. The measures employed by states have to be strengthened. The purpose of setting up state machinery in a free democratic society is to "protect the rights of the people" but what is the solution if the State itself becomes the "biggest violator of human rights?" Torture can be included as war crimes and crimes against humanity. Post the 9/11 attack the world witnessed a **boomerang effect**. States were resorting to all possible methods to punish terrorists and in turn the terrorist activities increased manifold. There has been overwhelming unanimity and agreement among scholars that while terrorism is by no means a new phenomenon, the events of September 11 signaled the birth of a 'new brand of terrorism' which has consequently given rise to state sponsored terrorism. It geared the international community to take urgent steps thereby United Nations Security Council resolution no 1368 was adopted unanimously on 12 September 2001.

Terrorists are classified as enemy combatants and IHL principles are not

[86]UNSC, *Resolution 1456,* S/RES/1456 (2003).

applicable.[87]Such people are in conflict with the society and each state has its laws to deal with them. However, a few methods mentioned below are used most commonly by the State:-

(a) **International assistance and cooperation**- Assistance is given in terms of militaryequipment, increasing manpower and transferring sophisticated machinery and technical know-how. For instance, an African country Sahel sought defence cooperation from other states to fight against the Al Qaeda groups.[88]

(b) **Torture and third degree methods**- The Bush administration began using "torture-lite "techniques against suspected terrorist detainees. These techniques included waterboarding, sleep deprivation, long-term use of loud noises, forced nudity, and forced standing, sexual humility and sometimes death. Psychological torture techniques of employing psychiatrists to observe the vulnerabilities of detainees and threaten harm to family members was often resorted to. [89] The ICRC called this "a flagrant violation of medical ethics".[90] States justify torture on three counts (a) time pressure and a measure of last resort to retrieve the information; (b) on a utilitarian calculus, the benefits outweigh the cost to

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[87] Gabor Rona, *Legal Framework to Combat terrorism: An Abundant Inventory of Existing Tools of War,* CHICAGOJOURNAL OF INTERNATIONAL LAW, (2005), *available at* http://heinonline.org/HOL/Page?handle=hein.journals/cjil5&div=37&g_sent=1&collection=journals, (Last visited on April 26, 2014).

[88] Religious sect named Boko Haram stepped up its bombing activities in Nigeria and another sect named al-Shabab became active in Kenya and Somalia causing destruction of life and property. Refer to Amnesty International, *Report 2012: The State of World's Human Rights*, (2012), *available at* http://www.amnestyusa.org/sites/default/files/air12-report-english.pdf, (Last visited on April 24, 2014)

[89] Tom Head, *American Torture Techniques*, ABOUT.COM, *available at* http://civilliberty.about.com/od/waronterror/p/torturelite.htm, (last visited on April 25, 2014).

[90] Torture techniques used in Guantanamo Bay, *available at* http://thejusticecampaign.org/?page_id=273, (Last visited on April 26, 2014).

one man (c) strong presumption of the detainee being guilty.[91]

(c) **Pride and Ego Down Technique**- is used by the US army to get valuable information bydirectly attacking the person's sense of personal worth. In order to defend his ego, he reveals valuable information.[92]

(d) **Rapid Fire and Fear Up Harsh Technique**- rapid fire is when two or more interrogators continuously and simultaneously throw questions. Fear up involves yelling, accusing the subject of lying and banging one's fist on the table. [93]

(e) **Reformative justice**- though uncommon but highly efficient. When terrorists surrender, they may be employed or given allowances to take care of the family or be given education so that they can enter into mainstream society. In such cases, a terrorist is viewed as a victim who needs to be cured of the disease.

(f) **Stricter domestic laws**- incase the domestic laws have loopholes and prescribe heavy punishments for terrorism, they can have a deterrent effect in producing terrorists in the first place.

3.4 Due Justifications Given By The State

Do ends really justify means or do means justify the end? This answer is no in

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[91] Torture is a just means of preventing terrorism, *available at* http://securingliberty.idebate.org/arguments/torture, (Last visited on April 26, 2014).

[92] Interrogation Techniques revealed by United States, *available at* http://lawofwar.org/interrogation_techniques.htm, (Last visited on April 27, 2014).

[93] PratapChatterjee, An interrogator speaks out, (March 7, 2005), *available at* http://www.corpwatch.org/article.php?id=11941, (Last visited on April 27, 2014).

the views of the researcher. However, all states have argued that there is urgency to maintain high standards of security and defence and defend the state from ever increasing terrorist attacks. Some of the arguments put forth are discussed here. Firstly, self-defence and use of force has become a *grundnorm* for dealing with terrorism post 9/11 as UNSC itself justifies it fails to lay down the grounds for exerting reasonable force. It however, has the authority to make findings regarding threats/ breaches of international peace and security and states can impose restrictions or/and use armed force if it violates Article 2(4) of the UN Charter.[94]Therefore a state is justified to use force incase of a threat or an armed attack. Secondly, international law recognizes the sovereignity of the state at all times in order to keep all states at an equal footing. When there is an attack by foreign terrorists, the state is justified to defend its sovereignity. Thirdly, often states face the problem of identification of terrorists and the factors causing this range from foreign origin of a person, lack of authentic travel documents and passports, eye witnesses against such persons to language problem etc to name a few.[95]Lastly, the UNSC in its resolution no S/RES/1456 (2003) directed the states to prevent terrorists from making use of other criminal activities such as transnational organized crime, illicit drugs and drug trafficking, money-laundering and illicit arms trafficking by using a comprehensive approach of active state participation and collaboration with regional and international organizations.[96]It urged states to take steps to combat terrorism through legislative enactments or administrative measures against their nationals and other individuals or entities and to report the results of all related investigations.

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[94] Jackson Maogoto, War on the enemy Self Defence and State Spinsored Terrorism, Page 21, *available at* http://www.academia.edu/225358/War _on_the_Enemy_Self-Defence_and_State-Sponsored_Terrorism, (Last visited on April 26, 2014).

[95] UNORG, 1999 International Convention for the Suppression of the Financing of Terrorism, *available at* http://www.un.org/terrorism/instruments.shtml, (Last Visited on April 26. 2014).
[96]UNSC, *Resolution 1456,* S/RES/1456 (2003).

Therefore, by adopting the Rome Statute with jurisdiction over core crimes, international society has focused public attention on these crimes, and has accepted the challenge of dealing with international criminal law in a more coherent manner. But identifying all forms of international penal cooperation with the core international crimes gives a distorted view of the extent and nature of this cooperation because it ignores the role of the suppression conventions. Moreover, it leaves unanswered the challenge of developing the coherence of the system of law that deals with these crimes comprehensively. There is growing political pressure to deal with transnational crimes comprehensively which brings us to the point where the international community has to collectively deal with transnational criminal law because it creates a havoc on the entire population, crosses borders and involves a number of people responsible for slowly wiping off the entire population and eroding the human rights. The researcher feels that alternative models to deal with transnational crimes shall be set up apart from the option of expanding the jurisdiction of the Rome Statute.

3.5 Impact of Transnational Crimes

Transnational crime is a huge business. In 2009, it was estimated to generate $870 million; an amount equal to 1.5% of the Global GDP which has only increased by 2014.[97]It undermines the democratic set up of a nation, disrupts free market economy, drain national assets, and inhibit the development of stable societies. The national and international criminal groups threaten the security of all nations. These transnational crime networks often victimize on governments that are unstable or not powerful enough to prevent them, conducting illegal activities that provide them with immeasurable profits.

[97]UNODC Research Report, "Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes". Available at http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf, last visited on May 25, 2014.

Transnational organized crimes result in interrupting peace and stability of nations worldwide, often using bribery, violence or terror to meet their needs.

Transnational organized crime encompasses virtually all serious profit-motivated criminal actions of an international nature where more than one country is involved. The vast sums of money involved can compromise legitimate economies and have a direct impact on governance, such as through corruption and the "buying" of elections.
Every year, countless lives are lost as a result of organized crime. Drug-related health problems and violence, firearm deaths and the unscrupulous methods and motives of human traffickers and migrant smugglers are all part of this. Each year millions of victims are affected as a result of the activities of organized crime groups.

3.6 ALTERNATE MODELS DEALING WITH TRANSNATIONAL CRIMES

1. Establishment by way of a **treaty-statute (much like the Nuremberg Charter and Tokyo Statute), of a universal nature**, as opposed to a regional, international criminal court having jurisdiction over all international crimes, to that of the International Law Association [ILA], which has advocated an International Commission of Inquiry. Thus, national criminal courts and national structures of administration of criminal justice would remain competent but they would be able to act even when the crime was not committed within their territory.[98]

2. The establishment of an international criminal court, whether universal or regional, should be on **exclusive jurisdiction for certain crimes or on concurrent or alternative jurisdiction with that of the state having criminal**

[98] Bartram S. Brown "U.S. OBJECTIONS TO THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A BRIEF RESPONSE", INTERNATIONAL LAW AND POLITICS, VOL 31, page 855. Available at http://www.pict-pcti.org/publications/PICT_articles/JILP/Brown.pdf, last visited on may 3 2014.

jurisdiction[99]. The jurisdictional mechanisms are, of course, to be established by the treaty-statute.

3. Expanding the jurisdiction of the International Court of Justice to **include questions of interpretation and application of conventional and customary international criminal law**, and providing for compulsory jurisdiction under Article 36 of the Statute of the International Court of Justice for disputes between states arising out of these questions.[100]

4. Establishing an **international commission of inquiry**, either as an independent organism, as part of the international criminal court or as an organ of the United Nations. Such a commission would investigate and report on violations of international criminal law, taking into account the proposal of the

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[99]DapoAkande, "JURISDICTION OF INTERNATIONAL CRIMINAL TRIBUNAL OVER NATIONALS OF NON PARTIES: LEGAL BASIS AND LIMITS", JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE, 2003, page 618-650.Available at http://www.oxfordjournals.org/our_journals/jicjus/2003award.pdf?origin=publication, last visited on May 1, 2014.

[100] 1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;

b. any question of international law;

c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

International Law Association and existing United Nations experiences with fact-finding and inquiry bodies which have developed over the years.

5. Establishing **an international (universal) criminal jurisdiction** along the lines of the 1953 United Nations Draft Statute for Establishment of an International Criminal Court[101] or the1980 Draft Statute for the Establishment of an International Criminal Jurisdiction to Implement the International Convention on the Suppression and Punishment of Apartheid Convention. The possibility of this is dealt with in the subsequent chapter.

The inadequacies of the current system of ICC to investigate, prosecute, and convict transnational organised crime are obvious and long-standing. Every year, too many people are becoming a prey to these crimes which has caused tremendous human rights violations. The creation of the International Criminal Court has created an opportunity to overcome many of the deficiencies of the past. It offers a neutral forum to try offenders that are not extradited because too many countries are seeking jurisdiction, or because a country remains too fearful its nationals or other alleged offenders may face biased trials in a foreign jurisdiction.

However, there are still reservations towards broadening the ICC's mandate as countries continue to place sovereignty ahead of criminal justice. It is still emerging as a strong conflict resolution body which is largely based on state cooperation. Thus, ICC will be of enormous practical assistance to the states setting a standard that "no one is above the law'It would serve as stabilising reference points for floundering national criminal justice systems. The next chapter deals with the principle of universal criminal jurisdiction and how the ICC can encourage states to make use of this principle.

[101]Report of the 1953 Committee on International Criminal Jurisdiction to the Sixth Committee, 9 U.N. GAOR Supp. (No. 12), at 23, U.N. Doc. A/2645 (1953); last visited on may 5 2014.

IV. EVALUATING THE ROLE OF ICC IN THE LIGHT OF UNIVERSAL CRIMINAL JURISDICTION [UCC]

Universal criminal jurisdiction [UCC] is an important tool in the worldwide struggle to end impunity for serious international crimes.The term "universal jurisdiction" refers to the idea that a national court may prosecute individuals for any serious crime against international law such as crimes against humanity, war crimes, genocide and torture based on the principle that such crimes harm the international community or international order itself.The development of universal jurisdiction was kicked off with the establishment of the ad-hoc tribunals for the former Yugoslavia and Rwanda in 1993 and 1994, respectively, and extended to the establishment of the internationalized courts such as the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts for Cambodia. The efforts to ensure individual criminal accountability culminated in the establishment of the International Criminal Court on July 1, 2002.[102]Generally, universal jurisdiction is invoked when other traditional bases of criminal jurisdiction do not exist. For instance- if the defendant is not a national of the State, the defendant did not commit a crime in that State's territory or against its nationals or the State's own national interests are not adversely affected.[103]

At present, there are four main criterions to establish jurisdiction:-

(a) Territorial jurisdiction- the State has legal jurisdiction to judge crimes committed on its territory;
(b) Active personality jurisdiction- the State has legal jurisdiction to judge crimes committed by its nationals;

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[102]Factsheet: Universal Jurisdiction. Available at http://ccrjustice.org/learn-more/faqs/factsheet%3A-universal-jurisdiction.Last visited on May 1, 2014.

[103]Universal Jurisdiction. Available at http://www.ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/, last visited on May 25, 2014.

(c) Passive personality jurisdiction- the State has legal jurisdiction to judge crimes committed against its nationals;
(d) Protective principle- the State has legal jurisdiction to judge crimes deemed to constitute a threat to some fundamental national interests.

The definition and exercise of universal jurisdiction varies around the world. A national or international court's authority to prosecute individuals for international crimes committed in other territories will depend on the relevant sources of law and jurisdiction such as national legislation or an international agreement, which may require that only individuals within the country's national territory may be subject to prosecution for such crimes.

In view of the various human rights instruments such as the UDHR, ICCPR, ICESCR which guarantee protection of rights to everyone, the ICC can exercise its jurisdiction beyond it statutory provisions but it has to be in conformity with its basic objective of protecting human rights through administration of international criminal justice. This power can be exercised under the universal jurisdiction principle recognized under the said international documents which have assumed the customary nature of international law. Technically, expanding the jurisdiction of the court by amending the statute is an onerous task. However, in the exercise of the inherent power as a judicial institution; it needs to assert its power to extend its jurisdiction to other serious violations of human rights in exercise of universal jurisdiction. It can also go to the extent of giving directions to states to take cognizance of crimes which currently are beyond the scope of ICC statute. To answer this question in affirmative, the researcher would like to state two major reasons for the same-

1) Universal jurisdiction provides victims of international crimes with access to justice- Courts in the "territorial state" are often inaccessible for victims for a variety of reasons, including the availability of domestic immunities or self-imposed amnesties and de facto impunity and security risks, especially when the crimes were state-sponsored.

2) *Universal jurisdiction bridges the impunity gap*- While in some cases victims may obtain justice through international tribunals and courts or the ICC, these courts are constrained by a mandate that is limited to a specific territory and a specific conflict. Example are the two ad-hoc tribunals for Yugoslavia and Rwanda. Indeed, the Office of the Prosecutor of the ICC indicated there's a "risk of an impunity gap," meaning some human rights violators may fall through the legal cracks, unless "national authorities, the international community, and the ICC work together to ensure that all appropriate means for bringing other perpetrators to justice are used." Similarly, the preamble of the Rome Statute of the ICC expressly provides that it "is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and emphasizes that *"the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions."*[104]

In practice however, several conditions have to be fulfilled for the principle of universal jurisdiction to apply. There is a need for specific ground for universal jurisdiction; a clear and precise definition of the crime and of its constitutive elements and national means of enforcement allowing the judiciary to exercise their jurisdiction over these crimes. Thus, the principle of universal jurisdiction is not immediately operative.[105]With growing frequency, national courts operating under the doctrine of universal jurisdiction are prosecuting despots in their custody for atrocities committed abroad. Impunity may still be the norm in many domestic courts, but international justice is an increasingly viable option, promising a measure of solace to victims and their families and raising the possibility that would-be tyrants will begin to think twice before embarking on a barbarous path.

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[104] Supra Note 137.

[105]Available at http://www.trial-ch.org/en/resources/international-law/universal-jurisdiction.html, last visited on May 19 2014.

4.1 DOMESTIC LAWS INCORPORATING UNIVERSAL JURISDICTION

A range of States' national laws provide for some form of universal jurisdiction. Such domestic legislation empowers national courts to investigate and prosecute persons suspected of crimes potentially amounting to violations of international law regardless of where the crime was committed, the nationality of the suspect, or the nationality of the victim.[106]States have provided for universal jurisdiction over ordinary crimes under national law, which may or may not also constitute violations of international law.

For example,[107]**New Zealand's** International Crimes and International Criminal Court Act of 2000 defines war crimes, crimes against humanity and genocide in accordance with the Geneva Conventions and the Rome Statute, and its Section 8(1)(c) provides that individuals may be prosecuted in New Zealand for these crimes regardless of -

(i) the nationality or citizenship of the person accused;
(ii) whether or not any act forming part of the offence occurred in New Zealand;
(iii) whether or not the person accused was in New Zealand at the time that the act constituting the offence occurred or at the time a decision was made to charge the person with an offense.

Another example is **Canada** is another example of a State that provides domestic exercise of universal jurisdiction, in its Crimes Against Humanity and War Crimes Act of 2000. For genocide, crimes against humanity, or war crimes as defined in the Act, section 9(1) provides that proceedings may commence in any territorial division in Canada for those offences "alleged to have been

[106]Amnesty International, UNIVERSAL JURISDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD – 2012 UPDATE (2012), page 2.

[107]Supra note

committed outside Canada for which a person may be prosecuted under this Act "whether or not the person is in Canada."[108]

There are other aspects of the principle of universal jurisdiction such as the compatibility of the ICC statute with constitutional provisions to the immunity of Heads of State and amnesty laws that have been considered recently. Through the *aut dedere aut judicare* principle present in the Rome Statute, the states have increasinglyimplemented the principles of universal jurisdiction and complementarity in a more systematic and concrete manner through their national legislation.The preamble to the ICC Statute contains the universal jurisdiction principle in *aut dedere aut judicare principle* which provides:-

"Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation" (para.4) (universal jurisdiction); Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes' (para.6); (principle of complementarity); Emphasizing that the International Criminal Court established under this Statuteshall be complementary to national criminal jurisdictions (para. 10)."

There are basically three necessary steps to get the principle of universal jurisdiction working: the existence of a specific ground for universal jurisdiction, a sufficiently clear definition of the offence and its constitutive elements, and national means of enforcement allowing the national judiciary to exercise theirjurisdiction over these crimes[109].

As of today, several States acknowledge that they can and should exercise their universal jurisdiction in order not to let go unpunished cases of torture, war

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[108] Supra note 139.

[109] Xavier Phillipe, "THE PRINCIPLES OF UNIVERSAL JURISDICTION AND COMPLEMENTARITY: HOW DO THE TWO PRINCIPLES INTERMESH?", International Review of the Red Cross, Volume 68 Number 862 June 2006, p 379.

crimes, crimes against humanity or even genocide. However, it appears difficult to do in reality, particularly because of the lack of political will of the States and of the difficulty to prosecute and try cases which took place on foreign territory and have been committed by nationals of another State. Yet, one can observe that more and more State give themselves universal jurisdiction, such as Belgium, Spain, Switzerland, the Netherlands, Great Britain, Canada, etc.[110]

We are all bound as members of the international community to punish under the due process of law, persons alleged to have committed serious crimes. Impunity cannot be allowed to thrive at the expense of fellow human beings. Those who commit wanton acts of atrocity should be brought to face the legal consequences of their actions. State officials must realize that immunities granted to them are not for their personal benefit, but for the pursuit of State interests. These State interests must also be tempered with reasonability.[111]

4.2 Prominent Cases Involving Universal Jurisdiction

The ***Pinochet***[112]case and the related cases in Spanish and other European courts provide a facinating case study for universal jurisdiction. Complaints against Pinochet for deaths and mass disappearances of Chileans were accepted for coordinated effort for South American military with Latin America, Europe and the United States.[113] Judge Garzon issued an arrest warrant and a request for extradition of General Pinochet when he arrived in London for medical treatment. The court held that firstly, there was no former head-of-state

[110]Available at http://www.trial-ch.org/en/resources/international-law/universal-jurisdiction.html, last visited on May 23 2014.

[111] THE SCOPE AND APPLICATION OFTHE PRINCIPLE OF UNIVERSAL JURISDICTION: THE REPORT OFTHE SIXTH COMMITTEE A/64/452-RES 64/117. Available at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Kenya.pdf, last visited on May 23 2014.

[112]Regina v. Bow Street Metropolitan Stipendiary Magistrate.Ex parte Pinochet Ugarte. [1998] 3 W.L.R. 1456 (H.L.)

[113]Naomi Roht-Arriaza, "THE PINOCHET PRECEDENT AND UNIVERSAL JURISDICTION ". Available at http://www.nesl.edu/userfiles/file/lawreview/vol35/2/roht.pdf, last visited on May 21 2014)

immunity for certain international crimes, including torture and secondly, extradition was allowed but the extradition able charges were reduced to those alleging torture committed after 1988, the date the United Kingdom passed implementing legislation for the Convention Against Torture. Given that both the national courts and the ICC will remain limited in their ability to obtain custody over potential criminals, the option of transnational prosecutions will be important to international justice efforts for some time to come.

In another landmark judgment, the Supreme Court of the United States in ***Ex Parte Quirin Case***[114]that individuals might be held punishable for crimes against international law. The court stated that there is no need of prior, specific, domestic legislation attaching a punishment for breach of international law in question. One may draw an inference that as long as the international community recognizes a crime, the ICC has jurisdiction over it. Though this is applicable only for piracy, for others yet only the crimes that are enlisted in the Rome Statute are tried in the ICC.

Political difficulties created when resorting to such a jurisdiction have been illustrated by the case of Belgium. Belgium had a 1993 legislation which made an extensive implementation of the principle, i.e. it authorized prosecution in the absence of the alleged authors of the crimes on Belgian territory. Following direct pressure, particularly from the United-States and NATO within the framework of the ***Sharon case***[115], yet it decided to limit the scope of its universal jurisdiction in its legislation, making prosecutions impossible without any direct link with Belgium

In particular, Spanish courts have made use of universal jurisdiction to try individuals from around the globe. Recently, however, the Spanish government

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[114]317 U.S 1 (1942)

[115] In re Sharon, CA June 26, 2002, In reaching the decision, the Court of Appeals relied primarily on domestic law. It did, however, make some pronouncements on the right to exercise universal jurisdiction in absentia under international law.

restricted its courts' ability to hear such cases by narrowing the legal basis for exercising universal jurisdiction to those cases not already before another competent jurisdiction and that involve Spanish victims, perpetrators located in Spain, or that affect Spanish interests.[116]

Responsibility to Protect

A distinct, but related, evolving concept is that of "Responsibility to Protect," which promotes the idea that the international community has a responsibility to assist a State in fulfilling its primary responsibility of protecting the lives and wellbeing of those within its territory. The norm suggests that States are obligated to intervene diplomatically and/or militarily to prevent the commission of crimes such as genocide, war crimes, crimes against humanity, and ethnic cleansing.

4.3 Principle of Complementarity and Universal Jurisdiction

The principle of complementarity is mainly read in connection to ICC's jurisdiction, which is supposed to be complementary to the national jurisdictions. The basic idea of complementarity prior to ICC existed in the context of the treaty of Versailles in 1919, in which the Allies authorized the Germans to try someof the war criminals themselves in Leipzig, Germany.[117] In the following, complementarity will be discussed under two different aspects, first as an issue of admissibility before the ICC and second as a State's right and obligation.

The rationale of the principle of complementarity is an obligation and right as well as a part of admissibility which needs to be established. It might be manifold: - on the one hand it avoids proceedings on the international level, where the access to evidence, witnesses and local investigation organs is complicated and favours jurisdiction of the National State and on the other hand

[116] Supra note 139.

[117] M. Bergsmo& P. Webb, 'International Criminal Courts and Tribunals, Complementarity and Jurisdiction', in R. Wolfrum (ed.), The Max Planck Encyclopaedia of Public International Law, Vol. 1 (2012), 688, 691, para. 12

it ensures that State parties to the Rome Statute have to keep their sovereign right to try crimes committed under their jurisdiction. Another reason is to close the gap between the prosecution on the international level and the prosecution of the National States in their own legal systems, in order to actively fight against impunity by prosecuting a higher number of perpetrators.[118]

Accordingly, the Statute connects issues of admissibility with the national jurisdiction of States,[119] and grants primacy to the national jurisdiction as long as the State does not remain "wholly inactive" there isno deficiency in the domesticinvestigation or prosecution or there is an attempt to shield a person from such "criminal responsibility from crimes within the jurisdiction of the Court.

The principle of complementarity is implemented in paragraph 10 of the Preamble to the Rome Statute and in Art.1 of the Rome Statute. It needs to be clarified if the principle of complementarity provides for an obligation/duty on States, to investigate and prosecute crimes under their jurisdiction in addition to the right of a State to claim for priority in prosecuting a crime. Further, there are two points that need to be discussed- first there is the possibility that the ICC could be more effective in prosecuting and trying a case because there might be situations in which the ICC as an international court has more authority to obtain the necessary information and cooperation needed for prosecution; secondly based on human rights considerations the ICC proceedings will be more favorable and a desirable solution for the accused, since the system grants the accused a certain minimum standard regarding fair trial guarantees which could be disregarded in some States' legal systems as there are no international checks and balances over these legal systems.Another argument in favor of implementing the Universal Jurisdictioninto national jurisdiction referred to in Art.

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[118] Britta Lisa Krings, "THE PRINCIPLES OF 'COMPLEMENTARITY' AND UNIVERSAL JURISDICTION IN INTERNATIONAL CRIMINAL LAW: ANTAGONISTS OR PERFECT MATCH?", 4 (2012) 3, 737-763, page 739. Available at http://www.goijl.eu/issues/43/43_article_krings.pdf, last visited on May 26 2014.

[119]Stigen holds the view that it is the international jurisdiction that is referred to in Art. 17 Rome Statute, rather than the national jurisdiction, which nevertheless "typically will be required"

17 Rome Statute is the ***Lotus case***[120]principle which states that as long as international law does not prohibit something, it may be applied, which means in the present discussion that as long as there is no internationally recognized prohibition of Universal Jurisdiction, the States may use it and the ICC would be obliged to respect this as national jurisdiction.

As a concluding answer to the question which forms of jurisdictional linkages are envisaged in Art. 17 Rome Statute for the States' jurisdictions it needs to be underlined that there is no clearly set standard of the ICC itself. The issue is still open and may come up in the future because the ICC is a relatively young institution. Moreover, the geographical scope of its jurisdiction is vast thereby making it a little difficult to implement universal jurisdiction which might cause pendency of cases in the near future. It is the researcher's view that incase of a conflict between national and universal jurisdiction, the latter shall prevail with full support and cooperation from states.

4.4 CURRENT SITUATION

The Court's jurisdiction is further limited to events taking place since 1 July 2002. In addition, if a State joins the Court after 1 July 2002, the Court only has jurisdiction after the Statute entered into force for that State. Such a State may nonetheless accept the jurisdiction of the Court for the period before the Statute's entry into force. However, in no case can the Court exercise jurisdiction over events before 1 July 2002.

Even where the Court has jurisdiction, it will not necessarily act. The principle of "complementarity" provides that certain cases will be inadmissible even though the Court has jurisdiction. In general, a case will be inadmissible if it has been or is being investigated or prosecuted by a State with jurisdiction. However, a case may be admissible if the investigating or prosecuting State is unwilling or unable to genuinely to carry out the investigation or prosecution. For example, a

[120]S.S. Lotus (France. v. Turkey.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

case would be admissible if national proceedings were undertaken for the purpose of shielding the person from criminal responsibility. In addition, a case will be inadmissible if it is not of sufficient gravity to justify further action by the Court.[121]

4.5 United States and Universal Jurisdiction

The US does not exercise universal criminal jurisdiction, however the Alien Tort Claim Act provides US courts with jurisdiction to seek civil damages for specific crimes, such as human rights violations, committed anywhere in the world. The US is concerned that the exercise of universal jurisdiction by other states may result in politically motivated prosecutions of US citizens by foreign courts[122].

The US campaign against the ICC has taken a number of forms. Initially, an attempt was made to secure US interests from within the circle of potential parties to the Statute. The US participated vigorously in the sessions of the Preparatory Commission, seeking to secure opt-outs for itself or exemptions for its service personnel. In addition, further safeguards were negotiated in relation to challenges to the activities of the Prosecutors.[123] On 31 December 2000, the last possible date for signature established at Rome, the waning Clinton administration signed the Convention to ensure a continued voice in the important negotiations on the procedure of the Court. Oddly, this was accompanied by a declaration that the US would not ratify in the foreseeable future. The second avenue of attack was pursued through the US Congress. In 2000 it debated the extraordinary American Servicemembers' Protection Act.[124] That document sought to prohibit any US cooperation with, or support of, the ICC. It also precludes US participation in UN peacekeeping or enforcement

[121]Ibid.

[122]Amitis Khojasteh, The American Non-Governmental Organisations Coalition for International Criminal Court. Available at http://www.amicc.org/docs/Universal%20Jurisdiction%20Q&A.pdf, last visited on May 5 2014.

[123]106th Congress, 2nd Session, H.R. 4654; S. 2726, 14June 2000.

[124]Ibid.

missions after entry into force of the Rome Statute, unless a permanent or ad hoc exemption of US forces from the purview of the Tribunal has been obtained, or unless the host state of the operation is itself not a party to the Statute. It also precludes US military assistance to any state party, unless that state has concluded an agreement with the US preventing the surrender of US personnel to the Court.[125] In its most celebrated provision, the draft 'authorized' the US President 'to use all means necessary and appropriate to bring about the release from captivity' of US service members and other personnel detained by or on behalf of the Court. [126]While this draft was not initially adopted, budgetary legislation was passed and signed into law by newly installed US President, George W. Bush which precluded US activities in support of the Tribunal. By August 2002, however, the full package of anti-ICC legislation was adopted as part of authorizing instruments for funding the 'war on terror', including the 'invading The Hague' provision and the prohibition of military assistance to states party to the Statute that had not concluded agreements with the US exempting its personnel from it. When Belgium was in the forefront of assertion of universal jurisdiction, U.S. Defense Secretary Donald H. Rumsfeld threatened the Belgium Parliament that it risked its status as host to NATO's headquarters if it did not rescind its universal jurisdiction laws. As a result of the political pressures exercised by the United States, Belgium Parliament repealed its law.[127]

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[125]However, this provision would not apply to NATO members, to other major allies (such as Australia, Egypt, Israel, Japan, the Republic of Korea and New Zealand, or to Taiwan).

[126]The term 'all means necessary' was considered sufficiently similar to UN terminology of'all necessary measures'-which grants authority to use military force-to impel the Royal Netherlands government to send a high level mission to Washington, seeking assurances that this would not imply a claim to authority to invade The Hague, the seat of the tribunal and the likely location of suspects that might offer themselves for rescue.

[127]Dalila V. Hoover, "UNIVERSAL JURISDICTION NOT SO UNIVERSAL: A TIME TO DELEGATE TO THE INTERNATIONAL CRIMINAL COURT", University of St. Louis School of Law, 2011. Available at http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1081&context=lps_clacp, last visited on May 5, 2014.

The essence of US objections can be summarized as follows[128]:-

(a) The ICC exposes US citizens to criminal sanction in relation to crimes not established by US legislators;
(b) The ICC exposes US citizens to an international judicial mechanism not approved by the US government that threatens sovereign decision-making, its right of self-defence and US participation in international humanitarian or anti-terrorism operations;
(c) The ICC is open to abuse. It is not subject to a system of checks and balances and undermines the pre-eminent role of the UN Security Council.

Thus, US has been in a dominant position to politically control the applicability of Universal jurisdiction. The successful argument often put forth by US is that the exercise of the jurisdiction by the ICC over U.S. nationals without its consent violates international law on the ground that a treaty cannot impose obligations on non-state parties without their consent.

Despite several breakthroughs for universal jurisdiction in the past years, some obstacles remain and prevent its full implementation. The biggest hindrance according to the researcher is that ICC has a limited jurisdiction. However, this can be remedies by exploring the principle of complementarity wherein the states extend their cooperation and support for trying different crimes. The ICC can direct states to look into such crimes from a case to case basis. Finally, one must not forget that the use of universal jurisdiction implies that another State has jurisdiction according to the classic criterions of jurisdiction and as such, could have primacy over the case which is basically the concept given under the Rome Statute that first jurisdiction shall lie with the national courts and incase they fail, ICC shall become operative for that case.

[128]Marc Grossman, Under Secretary for Political Affairs, American Foreign Policy and the International Criminal Court, at http://www.state.gov/p/9949.htm, last visited on April 12, 2014.

It is thus believed that the main burden of enforcing international criminal law in the future shall not rest with the International Criminal Court and the states who are parties to the Rome statute but with third States willing to prosecute by exercising universal jurisdiction over international crimes after seeking directions from the ICC which being a judicial body is solely entrusted with ensuring justice delivery and protecting the human rights. The next chapter will look into the relationship between the ICC and UNSC and evaluate as to how ICC can benefit from SC resolutions especially for crimes which are currently beyond the scope of the court.

V. THE INTERRELATIONSHIP BETWEEN THE JURISDICTION OF ICC WITH UNSC

Under the United Nations Charter, the UN Security Council bears the responsibility for the maintenance of international peace and security. The Security Council can take decisions in this regard that are binding on all UN Member States. The Charter empowers the Security Council to decide on a broad range of measures, including sanctions and the use of force that may be necessary to maintain or restore international peace and security.[129] The Council may take such decisions where it determines "the existence of any threat to the peace, breach of the peace, or act of aggression". The Security Council thus has a key role to play in responding to acts of aggression. The Rome Statute, as amended in 2010, takes account this key role and preserves the primary role of the Security Council.

How does UNSC function with regard to the jurisdiction of ICC? To answer this question in detail, the researcher will discuss the various means through which ICC considers the UNSC decisions:-

- The Security Council may refer a situation to the ICC, which empowers the ICC to investigate all four crimes under the Rome Statute, including crimes of aggression, without any further conditions [130] The Security Council's powers under the UN Charter are the legal basis upon which the ICC can investigate such crimes without any consent requirement by the States involved.
- Where an investigation is initiated by the Prosecutor ***proprio motu***[131], or where a situation is referred by a State Party, the Prosecutor must inform

[129]Chapter VII of the UN Charter.

[130] Article 15 *ter* and Article 13(b) of the Rome Statute

[131]Article 15 *bis* Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

the Security Council about the investigation and give the Security Council six months time to determine that an act of aggression has occurred. Where the Security Council makes such a determination, the Prosecutor may then proceed with the investigation regarding a crime of aggression in the same manner as regarding the other three core crimes. If the Security Council makes no such determination within six months, the Prosecutor may only proceed if so authorized by the judges of the Court's Pre-Trial Division. This solution was possible because Article 15 *bis* created a consent-based regime and thereby reduced the scope of the Court's jurisdiction.

- The Security Council may also suspend an investigation into a crime of aggression under Article 16 of the Rome Statute for a period of one year. This provision applies equally to all four core crimes under the Rome Statute. The Security Council's determination of an act of aggression in accordance with Article 39 is not binding for the ICC.

Thus, the relationship between the ICC and the Security Council is important and unique because of mainly two reasons. The first one being that the ICC is an independent judicial institution but Rome Statute recognizes a specific role for the Security Council and secondly, the Security Council regularly discusses issues and themes relevant to the mandate and activities of the Court. This follows from the due process principles of the Rome Statute and was explicitly confirmed in Articles 15 *bis* and 15 *ter*. The Court thus fully retains its judicial independence vis-à-vis the Security Council, as the Court has to make its own assessment as to whether aggression has occurred.

5.1 DARFUR CRISIS

Facts- The War in Darfur is a major armed onslaught in the Darfur region of Sudan. It began in February 2003 when the Sudan Liberation Movement/Army [SLM/A] and Justice and Equality Movement [JEM] rebel groups took up arms against the government of Sudan, which they accused of oppressing Darfur's

non-Arab population. The government responded to attacks by carrying out a campaign of ethnic cleansing against Darfur's non-Arabs. This caused deaths of tens to hundreds of thousands of civilians and the indictment of Sudan's president Omar Al-Bashir for genocide and crimes against humanity by the International Criminal Court.

One side of the conflict was composed mainly of Sudanese military and police and the Janjaweed, a Sudanese militia group recruited mostly among Arabized indigenous Africans and a small number of Bedouin of the northern Rizeigat; the majority of other Arab groups in Darfur remained uninvolved. The other side was made up of rebel groups, notably the SLM/A and the JEM which were the ethnic groups. Although the Sudanese government publicly denies that it supported the Janjaweed, evidence supports claims that it provided financial assistance and weapons and coordinated joint attacks, many against civilians. Estimates of the number of human casualties range up to several hundred thousand dead, from either combat or starvation and disease. Mass displacements and coercive migrations forced millions into refugee camps or across the border, creating a humanitarian crisis. US Secretary of State Colin Powell, described the situation "as a genocide or acts of genocide".[132]

The US Position-The United States has been wary of the ICC ever since it was created in 1998 by a United Nations statute negotiated in Rome [The Rome Statute].The primary U.S. concern has been that the court might hurdle American personnel in its jurisdictional web even though the United States hasn't ratified the Rome Statute. The United States also is concerned that the ICC prosecutor might initiate politically motivated cases as has been discussed in the previous chapter.[133]

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[132] "Crisis Guide: Darfur- The Grim Reality". Available at http://www.cfr.org/sudan/crisis-guide-darfur/p13129, last visited on May 8 2014.

[133] James Podgers, "U.S. POSITION ON DARFUR SUGGESTS IT MAY HAVE FOUND A WAY TO LIVE WITHTHE ICC", ABA Journal, Vol. 91, No. 9, page 18-19.

The break in this cold war against the ICC came March 31, when the United States abstained from using its veto power to block a resolution by the U.N. Security Council referring a major case to the court's chief prosecutor. The Security Council resolution covers alleged violations of international human rights laws in the Darfur region of Sudan in northeast Africa, where civil war has been going on since 2003. The ICC Prosecutor opened an investigation in Darfur. The case study of Darfur is important because firstly- the U.N. Security Council's referral "is the first time the international community has given a vote of confidence to the court on a very important issue," and the US Govt did not veto the UNSC resolution. The US government stated that, absent consent of the state involved, in any investigations or prosecutions of nationals of nonparty states *should come only pursuant to a decision by the Security Council."* This proves that US finally recognized the importance of the UNSC in ICC related matters especially where the limited jurisdiction of ICC can be expanded by US to include crimes of grave concern.[134]

This position "gives life to the idea that the U.S. and the court might find a way to live together, and U.S. might find a way to at least reduce its opposition towards the court that it has been nurturing since the inception". The real challenge is how ICC seeks cooperation from the Sudanese govt to cooperate in the ICC proceedings. The only possible way is by putting international pressure by the P5 and the UN body.

5.2 Situation in Libya

On 27 June 2011, ICC Pre-Trial Chamber I [PTC I] issued warrants of arrest for Libyan leader Muammar Mohammed Abu Minyar Gaddafi, his son Saif Al-Islam Gaddafi, Libyan government spokesman, and Abdullah Al-Senussi, Director of Military Intelligence, for alleged crimes against humanity of murder and persecution committed in Libya in February 2011.The responsibility for the implementation of arrest warrants lies with the Libyan national authorities. Libya

[134]Ibid.

is obliged to cooperate fully with the ICC and the prosecutor, under the terms of United Nations Security Council (UNSC) Resolution 1970 (2011). According to this resolution, the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor. The resolution also called for other international sanctions such as the arms embargo, travel bans and asset freeze for Libyan officials involved in genocide.[135]This was the second time that a situation was referred to the Court by the UNSC under its Chapter VII authority and the first time such a resolution was passed unanimously.

5.3 CÔTE D'IVOIRE

The ICC opened its investigation in the situation of the Republic of Côte d'Ivoire in 2011. Two arrest warrants have been issued for crimes against humanity for Laurent Gbagbo and Simone Gbagbo.Côte d'Ivoire signed the Rome Statute on 30 November 1998, but only ratified it in February 2013. However, in April 2003, Côte d'Ivoire accepted the jurisdiction of the ICC under the provisions of article 12 (3) of the Rome Statute. It is the first time that the prosecutor has opened an investigation on this basis.

After conducting a preliminary examination of the situation in Côte d'Ivoire from 2003 onward, the prosecutor concluded that there was a reasonable basis to believe that war crimes and crimes against humanity within the jurisdiction of the Court had been committed in Côte d'Ivoire since 28 November 2010. It was the second time that the prosecutor used his proprio motu powers to initiate an investigation without first having received a referral from a state or by the United

[135]United Nations Security Council S/RES/1970 (2011). Available at http://www.icc cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5D0B0F2F5EFA/0/1970Eng.pdf, last visited on May11, 2014.

Nations Security Council. It is the seventh situation under investigation by the Office of the Prosecutor. On 23 November 2011, judges of Pre-Trial Chamber III issued an arrest warrant, following a request made by the prosecutor for Laurent Koudou Gbagbo, former president of Côte d'Ivoire. Following the arrest warrant, on 30 November 2011 Mr. Gbagbo was transferred to the ICC detention centre in The Hague.The suspect appeared before Pre-Trial Chamber III on 5 December 2011 at which time the Chamber verified the identity of the suspect, and ensured that he was clearly informed of the charges brought against him, as well as informed of his rights under the Rome Statute. The Cote D'Ivoire court is handling the trial after the Pre-trial Chamber unsealed the arrest warrant on four accounts of crimes against humanity (murder, rape and other forms of sexual violence, other inhumane acts and persecution).

5.4 Democratic Republic of Congo[DRC]

The government of the DRC formally referred the situation on 19 April 2004, requesting that the Prosecutor investigate potential crimes under the Court's jurisdiction which were committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002.

The Prosecutor v. Thomas Dylo Lubanga[136]- On 17 March 2006, a first arrest warrant was publicly announced and unsealed concerning the situation in DRC for the leader of a political and military movement, the Union of Congolese Patriots (UPC), Thomas Lubanga Dyilo. Lubanga was arrested and transferred to The Hague. On 20 March 2006, Thomas Lubanga Dyilo first appeared in Court before ICC Pre-Trial Chamber I and the charges were confirmed. The Chamber found sufficient evidence to establish substantial grounds to believe that Lubanga is criminally responsible as a co-perpetrator for all three charges made against him. The Prosecutor of the ICC has charged Lubanga with three war crimes: 1) enlisting children under the age of fifteen; 2) conscripting children

[136] ICC-01/04-01/06

under the age of fifteen; and 3) using children under the age of fifteen to participate actively in hostilities.

Verdict- In a public hearing on 14 March 2012, Trial Chamber I delivered a guilty verdict against Lubanga. He was found guilty of having committed the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities in the DRC between September 2002 and August 2003.

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui[137]- On 18 October 2007, a warrant of arrest listing nine counts of war crimes and four counts of crimes against humanity in the Ituri district of eastern DRC was unsealed for Germain Katanga, alleged commander. Alleged acts include murder or willful killing, inhumane acts, sexual slavery, rape, cruel or inhuman treatment, using children to participate actively in hostilities, outrages upon personal dignity, intentional attack against the civilian population, pillaging and destruction of property. Katanga was surrendered by the DRC authorities and transferred to the ICC on 17 October 2007.

Verdict- On 7 March 2014, a majority of Trial Chamber II found Katanga guilty of the crime against humanity of murder and the war crimes of willful killing, intentional attack against the civilian population, pillaging and destruction of property, during an attack on Bogoro on 24 February 2003. He was acquitted however of charges of sexual slavery and rape as well as using child soldiers.

Former ICC suspect Mathieu Ngudjolo Chui is being held in an asylum detention center while his application for asylum in the Netherlands is being processed. On 21 December 2012, he was released from ICC custody and handed to Dutch authorities to be repatriated to the DRC. However, Ngudjolo indicated that it would be unsafe for him to return to the DRC and made an asylum application.

[137] ICC-01/04-01/07 OA 8

His defense has requested the Appeals Chamber to order the Netherlands to hand him back to the ICC pending the outcome of the prosecution's appeal.[138]

Henceforth, together this relationship seems to illustrate a paradox: On the one hand, a closer relationship between the power-politics of the UNSC and the ICC diminishes the quality and legitimacy of justice; On the other hand, without cooperation between the UNSC and the ICC, some of the worst international crimes would never be tried.

5.5 Recommendations For The Security Council, ICC And Its Member States

- Devise a coherent accountability strategy; apply consistent standards and articulate Security Council policy with regard to ICC referrals.
- Make use of the wide range of diplomatic tools at the council's disposal to buttress the court and enforce ICC arrest warrants.
- Use the council's powers to impose sanctions and asset freezes to inducecooperation by states.
- Stop imposing limitations on the ICC's jurisdiction, on the obligations ofstates to cooperate with the ICC and on UN sources of funding for the court in referral resolutions.
- Refrain from endorsing amnesties in situations where crimes punishable under the Rome Statute appear to have been committed.
- Security Council's informal working group on tribunals and regularly hold open debates on peace, justice, and the ICC.
- Permanent members of the Security Council should avoid using the veto in situations where crimes punishable under the Rome Statute appear to havebeen committed.

[138] ICC-01/04-01/07 OA 8 Date: 25 September 2009 Available at http://www.refworld.org/docid/4ac9dd592.html, last visited on May 26 2014.

- States parties should assemble a dedicated caucus to push the Security Council to progressively improve its practice in the area of justice and accountability.
- The court itself should proactively engage with the Security Council—for example, through the court's visits to New York and invite the Security Council to visit The Hague to witness court proceedings periodically for a better understanding and appreciation of the existing relationship.[139]

5.6 KEY CHALLENGES

The challenges in the relationship between the ICC and the Security Council are significant. Many of the key problems are rooted in the Security Council's referral practice, which has placed a number of limitations on the jurisdiction of the court and on the sources of financing to pay for the ICC investigations. This practice subsequently has limited obligations of states to cooperate with the court in enforcing its decisions and lack of a follow up procedure. As in any court system, the ICC is limited to investigating situations within its jurisdiction. The ICC can investigate a case when a crime is committed in a state that is party to the ICC or if the person accused of committing the crime is a national of a state party. Article 13(b) of the Rome Statute, however, also vests the UN Security Council, acting under Chapter VII of the UN Charter, with the authority to refer situations to the ICC, including those where crimes were committed on the territory of non-states parties or by nationals thereof.

The degree of Security Council control over the court is the fourth issue that will greatly affect its independence and credibility. Under the draft statute, the court could not take up an individual case arising from a situation that the Security Council is dealing with as a threat to or a breach of the peace or an act of aggression (under its Chapter VII powers), unless the Security Council

[139] International Peace Institute, "THE RELATIONSHIP BETWEEN THE ICC AND THE SECURITY COUNCIL: CHALLENGES AND OPPORTUNITIES", March 2013. Available at http://www.regierung.li/fileadmin/dateien/botschaften/ny_dokumente/IPI_E-Pub-Relationship_Bet__ICC_and_SC__2__01.pdf,on May 21 2014. last visited

otherwise determines. Thus, the Security Council would effectively be able to preclude proceedings before the court by characterizing a situation on its agenda as an item being considered under Chapter VII of the U.N. Charter. [140]

To date, this is the only way to make ICC jurisdiction universal—i.e., extended to any state, whether it is an ICC state party or not. The Security Council is a political body so its decisions are affected by its political nature, especially given the veto power of its permanent members. The decisions of the Security Council are often affected less by considerations of judicial purity and coherence than by factors relating to the conflict at hand. This built-in bias has serious implications for the perceptions of legitimacy and the integrity of the ICC. Some of the limitations are-

(a) **Limitations on jurisdiction-**Beyond the decision of whether or not to refer a situation to the ICC, it is important to consider how a referral is made. In its current practice, the Security Council has imposed certain conditions aimed at limiting and circumscribing exactly who is to be covered by the jurisdiction of the court. For example, in UN Security Council Resolution 1970 (2011) concerning the referral of the situation in Libya to the ICC the council

"Decide that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts unless such jurisdiction is exclusively waived".

The limitations on the jurisdiction of the court in Libya were a result of negotiations in the Security Council and seen as necessary to secure the political buy-in to be able to pass the referral resolution. In order to

[140] JelenaPejic, *"What Is an International Criminal Court? As Negotiations on the Establishment of an ICCStart, the Debate Heats Up"* American Bar Association, 16-17, volume 23(4), 1996. http://www.jstor.org/stable/2788000, (last visited on April 28, 2014)

overcome this limitation, it could be argued that the Security Council can only activate the Rome Statute as a whole, not selected parts of it. Article 13(b) gives the Security Council the authority to refer a situation to ICC but does not imply any restrictions on ICC's jurisdiction. The Office of the Prosecutor thus might not feel bound by UNSC referrals.

(b) **Cost of Investigations-** A growing workload without concurrent budget increases is putting a strain on the ICC's finances. While the overall economic situation in countries around the world limits the availability of funds in general, the ICC faces an additional financial challenge. Security Council resolutions referring situations to the ICC stipulate that all costs resulting from the respective investigations be borne by the parties to the Rome Statute and voluntary contributions.[141] So far, however, no such separate agreement has been concluded and no decision has been taken by the UN General Assembly to allocate funds from the United Nations budget to the ICC which will ease the burden and lead to better coordination between the two bodies.

(c) **Lack of Cooperation and Non Enforcement of Arrest Warrants-**this is one of the worst factors effecting the effective functioning of ICC's jurisdiction because it is quintessentially based on cooperation among states which give meaning to court's decisions. The challenges of cooperation are multifaceted, involving the Security Council referrals, follow-up support by the Security Council, and practical support by both states parties and non–statesparties in enforcing the court's decisions. After the referral, a follow up by the UNSC is equally important. When such follow-up support is not forthcoming, when the Security Council is not using the powers at its disposal to advance the cause of justice, the amount of progress the ICC can achieve when left to its own devices is very limited.

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[141] UN General Assembly, Relationship Agreement between the United Nations and the International Criminal Court(August 20, 2004), UN Doc. A/58/874.

It is felt by the researcher that there is an overall need for coherence in the Security Council's policies on questions of international accountability and the ICC. As the mandating authority in the situations that it has referred to the ICC via Chapter VII resolution, it is the duty of the UNSC to ensure that ICC functions effectively. The UNSC also guarantees greater support from the international community over grave crimes. For instance, the Security Council can also use or threaten the use of sanctions and asset freezes to induce cooperation by states with the court in general and increase the pressure on persons accused of having committed atrocity crimes, including political leaders. Furthermore, it is important to continue strengthening and endorsing the role of civil society in particular that of factors working together in the Coalition for theInternational Criminal Court [CICC] in supporting and building up the court is well known and of unprecedented importance. There is a growing consensus that impunity in the face of atrocity crimes is no longer acceptable. Therefore the relationship of ICC and UNSC shall be celebrated. It is because of the efforts of UNSC that ICC could exercise its jurisdiction over certain crimes. In the eyes of the researcher, this inter-dependence shall only increase to ensure that there is promotion and protection of human rights at all levels.

The next chapter will be the concluding remarks of the researcher on the topic of expanding the jurisdiction of ICC with respect to the contemporary challenges of today's world.

VI. CONCLUSION- The Way Forward.

The establishment of ICC is a major leap in the administration of international criminal justice which ensures justice to the victims within the confines of international criminal law and the Rome Statute. This institution is of great importance from the point of view of protecting and promoting human rights. Thus, it is acting as the guardian of human rights at the international level. its functioning has a great deterrent value on the perpetrators of large scale human rights violations be it the states or de facto authorities or other organized groups. There has been effective international cooperation in this regard which can be seen in its member states to the statute. Hence, this has been playing a remarkable role to end impunity. Already the court has undertaken a number of investigations for the same purpose.

The four main divisions of the court- the Prosecutor, the trial and appeals division and the registry have been effectively taking into cognizance various crimes in different parts of the world. The Presidency is one of the four organs of the Court which is responsible for the administration of the court and variety of specialized functions set out in the Statute. It has the authority to decide the appropriate work load and "propose" for an increase in number of judges subject to authorization by State Parties. All the judges are elected as full time members by the committee of state parties. The statute creates two categories of candidates i.e. those with criminal law experience and those with international law experience. Although no specific percentages are set out, Article 36(8) commits the state parties to "take into account" the need to ensure representation of the principal legal system of the world, equitable geographic representation, fair representation of male and female judges' legal expertise on specific issues such as violence against women and children. The Office of the Prosecutor is the most important organ of the court. It is an independent arm of the court and is normally assisted by a deputy prosecutor, headed by a Chief Prosecutor. The mandate of the office is to conduct the investigation and prosecution of crimes that fall within the jurisdiction of the Court , act on referrals

and to end impunity for the perpetrators under ICC. If the Pre-Trial Chamber considers that there is a reasonable basis to proceed with an investigation after conducting a preliminary examination and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation. Incase of a refusal by the Pre-Trial Chamber, it shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation. Thus the role of the office of the Prosecutor becomes very important and the power to start investigation on its own is definitely a powerful provision. The Trial Division is predominantly composed of judges having experience in criminal law. Once a case is admitted, the trial chamber is responsible for subsequent proceedings. Its major role is adopting all necessary procedures to ensure a fair, speedy trial taking into account the rights of the accused. It is the trial chamber that determines the innocence or guilt of the accused. The appeals chamber may decide to reverse, amend the decision, judgment or sentence or order a new trial before a different trial chamber.

Thus the researcher in this chapter highlighted the applicability and functioning of the ICC in the present context through various decisions given by the court like in case of Prosecutor v. The Jean Paul Akayesu, the Jelisic case, Al Bashir and the Llandovery Castle case to name a few. The case laws decided by the ICC prove that human rights violators shall not go unpunished. There is a major shift from upholding the concept of sovereignity and territorial integrity to upholding the head of the state and other superiors liable.

It is widely felt that the jurisdiction of ICC is restricted to only cases where there has been large scale and serious human rights violations thus restricting its jurisdiction to war crimes, genocide and crimes against humanity and over the crime of aggression in principle but this arrangement has made the institution of ICC only a symbolic instrument of international criminal justice. Further there are also other crimes which involve serious violations of human rights generally throughout the globe such as torture and rape. Apart from this, another

important crime that has appeared on the international scene is terrorism wherein innocent people have been used as instruments/weapons against the belligerent states. Even the offences of drug trafficking, counterfeiting of currency and money laundering are playing havoc in the socio-economic aspects of human beings. In lieu of this, there is a necessity to enlarge the jurisdiction of the court in terms of the international crimes. Such expansion of jurisdiction will also stimuli the states to take effective measures in relation to the set crimes. These measures will go along way in further strengthening the institution of international criminal justice in protecting human rights.

In view of the various human rights instruments such as the UDHR, ICCPR, ICESCR which guarantee protection of rights to everyone, the ICC can exercise its jurisdiction beyond it statutory provisions but it has to be in conformity with its basic objective of protecting human rights through administration of international criminal justice. This power can be exercised under the universal jurisdiction principle recognized under the said international documents which have assumed the customary nature of international law. Technically, expanding the jurisdiction of the court by amending the statute is an onerous task. However, in the exercise of the inherent power as a judicial institution; it needs to assert its power to extend its jurisdiction to other serious violations of human rights in exercise of universal jurisdiction. It can also go to the extent of giving directions to states to take cognizance of crimes which currently are beyond the scope of ICC statute. This if implemented in its true spirit will give rise to a new jurisprudence of human rights wherein both the ICC and the state parties will mutually coordinate to ensure that every state or affected state has jurisdiction over crimes calling for urgent international attention. This is the essence of principle of universal criminal jurisdiction when states cover up for limitations faced by ICC for certain crimes.

It is felt by the researcher that there is an overall need for coherence in the Security Council's policies on questions of international accountability and the ICC. As the mandating authority in the situations that it has referred to the ICC

via Chapter VII resolution, it is the duty of the UNSC to ensure that ICC functions effectively. The UNSC also guarantees greater support from the international community over grave crimes. For instance, the Security Council can also use or threaten the use of sanctions and asset freezes to induce cooperation by states with the court in general and increase the pressure on persons accused of having committed atrocity crimes, including political leaders. Furthermore, it is important to continue strengthening and endorsing the role of civil society in particular that of factors working together in the Coalition for the International Criminal Court [CICC] in supporting and building up the court is well known and of unprecedented importance. There is a growing consensus that impunity in the face of atrocity crimes is no longer acceptable. Therefore the relationship of ICC and UNSC shall be celebrated. It is because of the efforts of UNSC that ICC could exercise its jurisdiction over certain crimes. In the eyes of the researcher, this inter-dependence shall only increase to ensure that there is promotion and protection of human rights at all levels.

There is a necessity of adopting guidelines resolution for the purpose of referring the cases to ICC to free the decisions from the political considerations and make it a more transparent one. The cost of investigations and the failure of implementing arrest warrants are some of the shortcomings of the ICC which need to be remedied for better functioning of both UNSC and the ICC. The limitations can be overcome by making the UNSC resolutions accessible to the ICC judges and vice versa. The UNSC should engage proactively in peace, justice and conflict settlement resolutions. The lawmakers and drafters shall devise a coherent accountability strategy; apply consistent standards and articulate Security Council policy with regard to ICC referrals. There should be effective usage of the wide range of diplomatic tools at the council's disposal to buttress the court and enforce ICC arrest warrants. The powers of UNSC shall be used to impose sanctions and asset freezes to induce cooperation by states as and when required. Last but not the least, the international community shall not impose limitations on the ICC's jurisdiction and all states shall cooperate

with the ICC by refraining from endorsing amnesties in situations where crimes punishable under the Rome Statute appear to have been committed.

The ICC is aptly the court of last resort. Establishment of the ICC has, however, had an unexpected impact on the domestic laws of ratifying States. The ICC may prosecute international crimes only once it is clear that a State is unwilling or unable to conduct a trial, this highlights the principle of complementarity and the inter-dependence on state cooperation. To further enhance the credibility of ICC, its independence shall never be undermined. Divergent practices and jurisprudence may emerge as States adopt differing means of giving effect to their obligations under the Rome Statute. These and other legal questions will doubtless provide much grist for the international lawyers' mill. We are already headed in that direction, further expansion of the jurisdiction of ICC will make this a practical reality.

Presently, the court only has jurisdiction over events that occur after its entry into force on July 1, 2002. If a State becomes party to the Rome Statute after July 1, 2002, the court may only exercise jurisdiction with respect to crimes committed after the entry into force of the Rome Statute for that particular State, unless the State makes a declaration otherwise. Furthermore, the ICC only has jurisdiction if an applicable crime is committed by a national of a State party, if a crime has been committed in the territory of a State party or if the U.N. Security Council refers a specific case in the interest of maintaining or restoring international peace and security.. The main motto of ICC shall be, "no grave crime shall go unpunished". It is true that the statute looks into only the grave crimes as recognized by the international community but the issue lies with having no standard markers for what constitutes a grave crime. An amendment to the statute with the aim of expanding the jurisdiction of the court so as to make its proceedings more approachable, flexible and apolitical.

One way of expanding the jurisdiction of ICC is by holding public meets and conferences wherein legal experts from different fields and countries can freely

express their views on the statute and make it count too. Alternatively, spreading awareness about the increasing crimes and the varying nature on the same and will assist the states to effectively try such cases. If by 2/3rd majority voting by member states, the Rome statute can include the challenges of the contemporary world either under the broad heading of war crimes or as a new provision. Yet, the biggest challenge lies in getting consent and acceptance from the states because only with that can there be cooperation between the ICC and the states for successful execution of crimes defined under the Rome statute (both present and by way of amendments).

The main idea behind this is to take an informed consent on the crimes to be included in the statute and make the court as independent as possible without the control and influence of international politics on it. For this, the INGOs and other international and humanitarian bodies can come to rescue by regular reporting of the nature of crimes committed in different parts of the world, conducting thematic studies, review domestic court decisions and producing parallel shadow reports on state activities.

One of the biggest challenges which the court currently faces which undermines its independence and transparency is the dependence on state cooperation. Because of state cooperation, a lot of crimes and criminals go unpunished, the arrest warrants are never executed and the war criminals extradite and take shelter in nations based on the extradition treaties. This can be remedied by better cooperation and communication between such treaty provisions, the transnational crimes popularly called as treaty crimes and the statute crimes. Transnational crimes if fall within the ICC's jurisdiction will lead to a better justice delivery mechanism wherein it will have universal jurisdiction over crimes irrespective of whether or not a state is a party to the Rome statute. The universal jurisdiction will bring a lot of nations under its scanner and the justice will become victim oriented instead of state-centric.

Therefore, the researcher would like to conclude by stating that various possibilities of expanding the jurisdiction of the court shall be evaluated and considered. It could mean setting up truth reconciliation commissions, amending the statute or setting up courts for transnational crimes, making court proceedings and UN meetings open and accessible for both the judges at ICC and the UNSC members. At this juncture it is important for the international community to understand the importance of the universal jurisdiction of the ICC and how will the mankind benefit as a whole.

The ball for expanding the jurisdiction of ICC is already rolling, the time is not far when all the contemporary crimes will fall under the purview of the ICC

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