CRITICAL EVALUATION OF PART II OF THE ROME STATUTE 1998

A Thesis Submitted in Partial Fulfillment of the
Requirement for obtaining the degree of
MASTER OF LAWS
(LLM International Law)

By
MAVRA JALIL
Registration No. 414-FSL/LLMIL/S20
Degree Programme: LLM International Law

Supervisor:
Dr. Farkhanda Zia

Department of Law
Faculty of Shariah and Law
International Islamic University Islamabad

November 2023

INTERNATIONAL ISLAMIC UNIVERSITY ISLAMABAD

FACULTY OF SHARIAH AND LAW

****

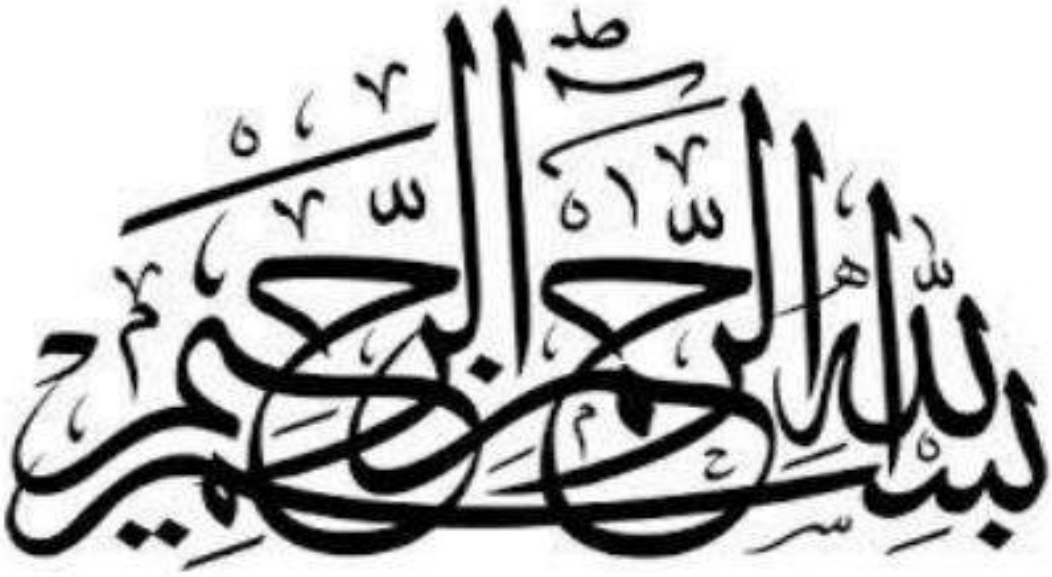
FINAL APPROVAL

It is certified that we have read and evaluated the Thesis entitled: **Critical Evaluation of Part II of the Rome Statute 1998**, submitted by Ms. Mavra Jalil (Reg No. 414- FSL/LLMIL/S20) as a partial fulfillment for the award of the degree of Masters of Law (LLM International Law). This Thesis fulfills the requirements in its scope and quality for the award of the degree.

Dr. Farkhanda Zia (Supervisor) _____

Dr. Ambreen Abbasi (Internal Examiner) _____

Dr. Hafsa Abbasi (External Examiner) _____


بسم الله الرحمن الرحيم

DECLARATION

I hereby declare that this thesis entitled, **"Critical Evaluation of Part II of the Rome Statute 1998"** is my own work, and further that, it contains no such text or material which has already been published by some other person previously, nor a substance already approved for the award of any degree of any university of institute for a Higher Learning, provided that a reference has been made in the paper.

Mavra Jalil.

DEDICATION

This thesis is dedicated to my mother, Shahida Jalil Bukhari, and my father, Syed Jalil Arshad. I could not have achieved this feat without their constant support, encouragement and love.

ABSTRACT

Rome Statute 1998 of the International Criminal Court (ICC) is an important multi-lateral treaty as it is a constituent treaty of first permanent international criminal court. Part II of this statute is perhaps the most significant portion of this treaty as it includes substantive law covering the subject matter jurisdiction of ICC. It also includes procedural law governing relationship of International Criminal Court with the United Nations Security Council (UNSC) and the member states. It is pertinent to see whether ICC is performing its role effectively or is it suffering from same defects which had afflicted previous tribunals. This can be ascertained by undertaking a critical evaluation of Part II. This critical evaluation includes discussion on different elements of offences forming part of subject matter jurisdiction of International Criminal Court as well as procedural law covering relationship of the court with the UNSC and the member states. A discussion on different cases of International Criminal Court along with their comparison with cases of ad hoc tribunals provides a keen insight into developments brought into international criminal law discipline by jurisprudence of the ICC. An analysis of important academic debates along with perusal of challenges faced by ICC leads to an understanding which is instrumental for proposing any potential reforms in Part II of the Rome Statute. After researching Part II of the Rome Statute, it is concluded that a number of reforms are worth considering such as inclusion of ad hoc judges from states under investigations and increasing the powers of Assembly of State Parties with regard to investigations of situations falling in the jurisdiction of the ICC in order to counter balance influence of UNSC.

ACKNOWLEDGMENT

Firstly, praises be to Allah S.W.T for His showers of blessings during my whole research.

I thank my supervisor Dr. Farkhnada Zia, for her guidance. Her enthusiasm for international criminal law discipline constantly inspired me. It was immensely beneficial for me to study and work under her supervision.

I am also thankful to all my university fellows at International Islamic University, Islamabad for their suggestions and feedbacks.

Finally, I am extremely thankful to my parents and family for their encouragement and support throughout this research process.

Mavra Jalil.

TABLE OF CONTENTS

CHAPTER 2

CHAPTER 3

Procedural Law Governing Relationship of ICC with UNSC and State Parties 62

List of Abbreviations

AP	Additional Protocol
ASP	Assembly of State Parties
FTC	Forcible Transfer Clause
CAH	Crimes against Humanity
GC I-IV	Geneva Conventions I-IV
IAC	International Armed Conflict
ICC	International Criminal Court
ICL	International Criminal Law
ICTY	International Criminal Tribunal For Former Yugoslavia
ICTR	International Criminal Tribunal For Rwanda
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military tribunal for the Far East
NGOs	Non-governmental Organizations
NIAC	Non-International Armed Conflict
SWGCA	Special Working Group for Crime of Aggression
UNO	United Nations Organizations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

UNSG	United Nations Secretary General
UK	United Kingdom
USA	United States of America
WMDs	Weapons of Mass Destruction

Critical Evaluation of Part II of the Rome Statute

Introduction

Thesis Statement:

ICC has been assigned a commendable task of prosecuting alleged offenders of international crimes; however, without undertaking a critical evaluation of Part II of Rome Statute with the aim to propose necessary reforms to make its subject matter jurisdiction more comprehensive and to curtail undue influence of powerful states, it might not be able to fully realize its raison d'etre.

Adoption of the Rome Statute in 1998 was a watershed moment in history of international law. The Statute is actually a constituent treaty of the International Criminal Court (ICC). The main aim of the Court is to curb the impunity of individuals with which they were able to commit most heinous crimes imaginable.[1] Establishment of a truly international and independent ICC was also propelled by the motive to eliminate the limitations, namely undue political interference and limited mandate, faced by ad hoc tribunals of International Criminal Tribunal for Former Yugoslavia (ICTY 1993) and International Criminal Tribunal for Rwanda (ICTR 1994).[2]

Part II of the Statute is the most important portion of the treaty as it states subject matter jurisdiction of the court, relationship of ICC with UNSC and member states and applicable law. Article 5 of Part II of the Rome Statute[3] limits the jurisdiction of the ICC to most serious crimes of international concern. These are: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. Some academics are of the opinion that by restricting the Court's

[1] Phillipe Kirsch,"The Role of the International Criminal Court in Enforcing International Criminal Law", American University International Law Review 22 (2007): 539-547,539.

[2] Ibid, 540.

[3] The Rome Statute of the International Criminal Court https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf (accessed November 12, 2020).

jurisdiction to these 4 crimes, the domain of ICC has been curtailed considerably[4]. Such concerns are countered by the arguments that these 4 crimes are broad categories, subsuming a number of 'sub-crimes'[5] within them, thus widening the actual ambit of the Court's jurisdiction.

This thesis comprehensively discusses the four core crimes. Article 6 deals with crime of genocide and seems to be heavily influenced by the Genocide Convention of 1948 as the definition of Genocide is the same as has been stated by the Convention.[6] Some academics view it as a woeful loss of opportunity which should have been availed to extend the list of protected groups by including politically and linguistically affiliated factions as well.[7]

Article 7 deals with crimes against humanity. It is perhaps the first instance when this offence has been so comprehensively discussed by a multi-lateral convention. However, a number of writers find article 7 a bit lacking as it does not specifically include a number of serious crimes like , human trafficking and ecological crimes[8]. Writer Alejandro Teitelbaum thinks that these crimes constitutes lucrative businesses for rich and influential countries, hence the reluctance of these States to advocate for their inclusion as core crimes of international concern.[9]

Article 8 deals with war crimes comprehensively. Some writers think that it lacks a "generic formulation"[10] through which any future situation, which may not be covered neatly within the four corners of the definition as it currently is, can be accommodated. Absent such a

[4] Çakmak, Cenap. "THE INTERNATIONAL CRIMINAL COURT IN WORLD POLITICS." *International Journal on World Peace* 23, no. 1 (2006): 3-40, 10 (Accessed November 12, 2020) . http://www.jstor.org/stable/20753516.

[5] Ibid

[6] Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide 1948 https://www.oas.org/dil/1948_Convention_on_the_Prevention_and_Punishment_of_the_Crime_of_Genocide.pdf (accessed November 12, 2020).

[7] K. P. Prakash. "International Criminal Court: A Review." *Economic and Political Weekly* 37, no. 40 (2002): 4113-115, 4115. (Accessed November 12, 2020). http://www.jstor.org/stable/4412690.

[8] Teitelbaum, Alejandro. "Statute of the International Criminal Court: A Critique." *Social Justice* 26, no. 4 (78) (1999): 107-114.109, 110. (Accessed November 12, 2020.) http://www.jstor.org/stable/29767177.

[9] Ibid.

[10] K. P. Prakash. "International Criminal Court: A Review." *Economic and Political Weekly* 37, no. 40 (2002)

futuristic criterion, amendment of the Statute becomes the sole option in order to deal with any novel situation. Amendment of the Statute is not an easy process.[11] Furthermore amendments are applicable only on those State parties which actually accept them.[12]

Crime of aggression is the most contentious one. Its definition was only included in 2010 at Kampala Review Conference.[13] Moreover, even the UK and France have not ratified amendments incorporating crime of aggression in the Rome Statute.

With regard to the relationship of International Criminal Court with the United Nations Security Council, the latter has the power of deferral, whereby it can request the Court in a resolution adopted under Chapter VII of the Charter of the United Nations Organization (UNO) to defer any investigation or prosecution for a period of 12 months. This request may also be renewed.[14] Practically, United Nations Security Council (UNSC) becomes empowered to prevent commencement of any proceedings for an indefinite period of time. Resultantly, working of International Criminal Court (ICC) can be steered to avail political gains. However, the divergent views of permanent members of United Nations Security Council, manifested through frequent use of veto power, which has so often paralyzed UNSC in imminent issues, may prove to be a blessing in disguise for International Criminal Court. This happened when the USA sought to renew the resolution 1487 (2003) in 2004 but was unable to because of other permanent members making use of veto power.[15] Thus, influence of UNSC does have potential to curb independence

[11] Article 121 (3) of the Rome Statute.

[12] Article 121 (5) of the Rome statute.

[13] Dapo Akande Antonios Tzanakopoulos, "Treaty Law and ICC Jurisdiction Over the Crime of Aggression",2 file:///C:/Users/DELL/Downloads/SSRN-id3226408.pdf (accessed October 30, 2023).

[14] Article 16 of the Rome Statute

[15] Antoine Kesia-Mbe Mindua,"Article 16 of the Rome Statute and its Impact on Independence and Autonomy of International Criminal Court" http://embajadamundialdeactivistasporlapaz.com/en/press/article-16-rome-statute-and-its-impact-independence-and-autonomy-international-criminal-cour (Accessed November 12, 2020).

of ICC. However, realization on part of UNSC to use this influence rarely, does indicate a motive to preserve legitimacy and independence of Court's actions.

Relationship of ICC with member states is governed through concept of complementarity which maintains sovereignty of the states. However, ICC also faces a number of hurdles while performing its functions. In order to remove these hurdles and increase legitimacy of ICC, a number of reforms can be considered such as inclusion of ad hoc judges from states under investigations and increasing the powers of ASP to counter balance those of UNSC are some of the reforms worth considering.

Significance of Research

The International Criminal Court performs an extremely pertinent function by prosecuting alleged offenders of most heinous offences falling under the purview of international criminal law. Therefore, it is a significant institution for bringing justice to victims of genocide, crimes against humanity, war crimes and crime of aggression. Currently, there is no international court for the redressal of violations of human rights. However, the subject matter jurisdiction of International Criminal Court includes many such violations. This is an acknowledgement of the fact that International Criminal Law (ICL) overlaps largely with International Human Rights Law (IHRL) and International Criminal Court can address human rights violations, committed both during peace time or during an armed conflict, whether of an international or non-international nature. The former UN Secretary General, Kofi Annan, had termed the Rome Statute as a "giant step towards universal human rights".[16] While reading the Rome Statute of ICC, it becomes evident that Part II of the Statute is the most important portion of the treaty as it states subject matter

[16] Roy Lee, "The International Criminal Court: Contemporary Perspectives and Prospects for Ratification", 16 N.Y.L. Sch. J. Hum. Rts. 505 (2000). 506.

jurisdiction of the court, conditions for admissibility, applicable law. Moreover, it also delineates the relationship of International Criminal Court with Security Council. Therefore, a research which sought to critically evaluate this part of the Statute, that is to ascertain merits and demerits of provisions of Part II by analyzing different academic opinions, through comparison of ICC cases and cases of previous tribunals with the aim to propose possible reforms therein, will prove to be consequential in international criminal law scholarship.

Objectives of Research

This research critically evaluates Part II of the Rome Statute. Through this evaluation, the merits and demerits of this significant portion of the statute are ascertained. The results of this evaluation are to be utilized to propose such reforms and recommendations both in substantive and procedural law which can make the subject matter jurisdiction of the International Criminal Court more comprehensive, remove the undue influence of powerful states which results in politically motivated steering of International Criminal Court, and thereby enable the court to fully realize its purpose.

Literature Review

A. **Axis Rule in Occupied Europe by Raphael Lemkin[17]:** This is a significant work by pioneer of the term genocide. He talks in detail about the different laws enacted by Axis powers to govern the occupied territories after world war II (WWII). Most important part of this work is the definition given in Chapter IX. This thesis utilizes the definition proposed by Lemkin to draw a comparison between this initial definition and subsequent

[17] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress* (Carnegie Endowment for International Peace 1944).

developments such as United Nations General Assembly Resolution 96 (I) of 1946, the Genocide Convention of 1948 and the Rome Statute of 1998. Lemkin has proposed a number of actus res through which genocide can be carried out. This Thesis utilizes this argument to propose reforms in genocide definition of the Rome Statute.

B. Crimes against Humanity in the 21st Century Law, Practice and Threats to International Peace and Security by Robert Dubler SC and Matthew Kalyk[18]: This book accurately analyses majority of the past legal precedents on crimes against humanity and incorporates them into a cogent explanation of the international criminal law that has developed since the Nuremberg ruling seventy years ago. According to authors of the book, Article 7 of the Rome Statute presents a 21st Century definition of the crimes against humanity. This book does a commendable job of removing any misunderstanding about origin of crimes against humanity being placed in the Nuremberg and Tokyo Trials. Authors have also included an analysis of legislation on crimes against humanity promulgated in different states. Sample of countries is representative of both the civil law and common law traditions, as well as all the major geographical regions. However, important countries such as Russia and China are not included. This Thesis will fill this gap by researching crimes against humanity in domestic legislations of permanent members of United Nations Security Council.

C. Elements of War Crimes under the Rome Statute of the International Criminal Court[19]: This book is an important read for war crimes as it has been written by eminent

[18] Robert Dubler and Matthew Kalyk, *Crimes Against Humanity in the 21st Century: Law Practice and Threats to International Peace and Security* (Boston: Brill, 2018).

[19] Knut Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press, 2004).

legal advisers at International Committee of the Red Cross (ICRC). It deals in a systematic manner with all the articles dealing with the war crimes included in Part II of the Rome Statute. This arrangement of the book is quite handy and convenient for the reader. This book includes discussion on war crimes at drafting stage of the Rome Statute. It also includes the interpretation of criminal law by the ad hoc tribunals. This discussion on ad hoc tribunals' case law were utilized in the research process to draw comparison between war crimes jurisprudence of these tribunals and that of the International Criminal Court in order to determine developments brought in by the International Criminal court in the international criminal law and international humanitarian law.

D. The Crime of Aggression under the Rome Statute of the International Criminal Court by Carrie McDougall[20]: This book is a significant read on crime of aggression as present in the Rome Statute. It deals with a number of issues attached to the crime of aggression. The author has explained in detail the political context in which the amendments were adopted and the Court's jurisdiction activated. The author has also investigated the shortcomings of the United Nations General Assembly Resolution 3314 Definition on aggression and concluded that it was never meant to be a legal definition for the purposes of criminal law, but rather a tool for collective security. The author also tackles in detail different debates on role of United Nations Security Council in determining existence of an act of aggression. The author makes a pertinent point that United Nations Security Council is a political organ and its workings are also guided by geopolitics. These views

[20] Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press: New York, 2021).

of the author prompted research in this thesis on influence of United Nations on the International Criminal Court.

E. From Versailles to Rwanda in 75 years: need for an International Criminal Court by M. Cheriff Bassiouni[21]: This article is an important read as it discusses all the criminal investigative commissions and tribunals established since 1919 to 1995. The author makes the argument that these investigative commissions and tribunals suffered from undue political interference. He mentions a number of instances where many individuals have escaped international criminal prosecutions due to political considerations. German Emperor Kaiser Wilhelm and Turkish officials in the wake of WWI are some such examples. The author also cites political considerations at play at International Military Tribunal (IMT) and International Military Tribunal for the Far East (IMTFE) trials after WWII. This political expediency was manifested in the early release of all convicted Japanese war criminals. This thesis will utilize arguments made by M. Cheriff to ascertain whether the International Criminal Court is also becoming a victim of political considerations. The author has made the argument that a permanent international criminal court should be established to overcome the issues faced by international criminal tribunals. However, United Nations Security Council has a considerable influence over International Criminal Court in the form of power of referral (art. 13 (b) of the Rome Statute) and deferral (art. 16 of the Rome Statute). These powers need to be researched to determine whether International Criminal Court is also facing similar political pressures which had affected working of previous ad hoc tribunals.

[21]M. Cherif Bassiouni, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 Harv. Hum. Rts. J. 11, 62 (1997) file:///C:/Users/DELL/Downloads/MCherifBassiouniFromVersa_stamped.pdf (accessed 9 March 2021).

F. An Introduction to International Criminal Law and Procedure[22]: This book broadly deals with substantive and procedural aspects of international criminal law. It explains important concepts of international criminal law which are instrumental while undertaking an analysis of Part II of the Rome Statute 1998. An argument is made in one chapter entitled, "The Future of International Criminal Law", that criticism that international criminal law is selective will be removed once more states ratify the Rome Statute. Authors also forecast that opposition to the International Criminal Court will diminish in the next decade as the court proves itself to be capable of dealing with atrocity crimes and also fear of politically motivated prosecution are removed due to working of the Court. However, it does not explain how the International Criminal Court will prove its capability. This thesis will explore how those reforms can be considered in the Part II of the Rome Statute which can improve capability of the International Criminal Court to respond to international crimes in contemporary era. This Thesis will also research the political influence of the United Nations Security Council on legal workings of the International Criminal Court.

G. The Principle of Complementarity in International Criminal Law: Origin, Development and Practice by Mohamed El Zeidy[23]: This book show case quite a comprehensive research on the concept of complementarity. It offers the most comprehensive and in-depth examination of the complementarity doctrine's historical evolution to date. The author emphasizes that the main goal was to restrict the Court's jurisdiction to the most serious crimes of global concern that national courts were unable

[22] Robert Cryer et al., *An Introduction to International Criminal Law and Procedure,* 2nd edition (New York: Cambridge University Press, 2010).

[23] Mohamed M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Leiden: Martinus Nijhoff Publishers, 2008).

to handle. The author comes to the conclusion that the Rome Statute's proposed system combines two regimes: an optional complementarity regime, which takes effect when a State agrees to give up its jurisdiction, as a consequence of self-referral, in favour of the Court's, and a mandatory complementarity regime, which allows the Court to proceed without the consent of a State in the event that it is unable or unwilling to handle a situation or case in its domestic courts. These arguments of the author were pertinent in researching role of concept of complementarity in enabling the International Criminal Court to eradicate impunity for atrocity crimes. Moreover, reforms are also proposed in the thesis to improve complementarity regime.

H. The Rome Statute of the ICC at Its Twentieth Anniversary: Achievements and Perspectives[24]: This book consists of thirteen chapters written by a number of academics providing a critical evaluation of the achievements, problems, and perspectives of the International Criminal Court. It demonstrates the inspirations for the International Criminal Court as well as how other international criminal law initiatives are influenced by the Rome Statute. It discusses contribution of the ICC on the definition and interpretation of international crimes, particularly war crimes, crimes against humanity, and crimes of aggression. A commendable aspect of the book is its futuristic outlook on role of the International Criminal Court in international criminal law. This approach of the book proved instrumental in proposing reforms in this thesis in order to make the International Criminal Court still relevant with regard to contemporary situation.

Research Questions

[24] *The Rome Statute of the ICC at Its Twentieth Anniversary: Achievements and Perspectives*, ed. Pavel Sturma (Boston:Brill, 2017).

i) Comparison of significant cases of ICC with that of previous international criminal tribunals. Is ICC opting for a similar approach while interpreting norms of international criminal law? This question will help to ascertain any developments introduced by the International Criminal Court in international criminal law.

ii) How independent is the International Criminal Court from influence of the United Nations Security Council? This question will be answered by researching implementation of the United Nations Security Council's power of referral and deferral of situations to the International Criminal Court.

iii) How proactive has been the role of prosecutor under article 15 of Part II of the Rome Statute?

iv) What legislative measures have been passed by states for repression of international crimes? How do these measures compare with that of Part II of the Rome Statute?

Research Methodology

A library centric research approach was undertaken. Principal portion of the reading material was accessed through library, both digital and manual. Furthermore, Rome Statute, cases decided by ICC, ad hoc tribunals and internationalized tribunals, books pertinent for relevant scholarship, reports of imminent think tanks and international regional organizations were studied. Legislative measures, implemented in other countries, in order to efficiently prosecute alleged offenders of international core crimes were examined. So, a doctrinal research methodology was adopted. This reading material was critically analyzed in order to suggest possible reforms and give suggestions while adopting an analytical research methodology. Hence, both doctrinal and analytical legal research methodologies were adopted for purposes of research.

Scope and Limitation of Research

This thesis encompasses both substantive and procedural law present in Part II of the Rome Statute. However, it was not possible to include influence of the Rome Statute on domestic legislation of all the states. So a limited number of states which are permanent members of the United Nations Security Council have been selected.

Outline of Chapters

First chapter delineates all the historical developments that occurred before the International Criminal Court. A discussion on International Military Tribunal (IMT), International Military Tribunal for Far East (IMTFE), International Criminal Tribunal for Former Yugoslavia (ICTFY) and International Criminal Tribunal for Rwanda (ICTR) places ICC in its correct context. It delineates how all the previous developments in international criminal law culminated in formation of the International Criminal Court. Second chapter covers substantive law governing subject matter jurisdiction of the International Criminal Court. Historical developments of the four core crimes, jurisprudence of International Criminal Court and that of the previous tribunals, academic debates and domestic legislations are covered. This helped in developing an understanding on contribution of International Criminal Court in international criminal law discipline. Third chapter covers procedural law governing relationship of International Criminal Court with United Nations Security Council and the member states because a cooperative relationship is essential for success of ICC. This chapter also discusses hurdles faced by International Criminal Court while performing its function in order to propose some reforms. The last chapter entitled, conclusion and recommendations includes conclusion of thesis discussion, answers to research questions and some recommendations based on the research**.** Part II of the Rome Statute is also annexed for convenience of the reader.

CHAPTER 1

Historical Background of ICC

1.1 Introduction

An understanding of various definitions of international crimes and the rationale for its punishment is imperative along with a brief over-view of historical developments that lead to the formation of ICC. Important work was performed under the auspices of the UNO to realize the aspiration of formation of a permanent and independent international criminal court. Some major powers are still not signatories to the Rome Statute either due to genuine concerns or domestic political considerations. However, the fact that a majority of states are signatories of this convention testifies the confidence of world community at large in this institution.

1.2 Meaning of International Crimes

There is no single universal definition of international crimes. Various academics have devised different formulations to define this concept. According to M. Cherif Bassiouni, international crime is that offensive conduct which harms some international interest or cause outrage to some internationally shared value. Alternatively, this can be a crime which includes an international element by virtue of involving people of different nationalities. Moreover, crimes of a lesser seriousness can be included if curbing them requires assistance from a number of countries.[25] Further, according to authors of the book *An Introduction to International Criminal Law and Procedure*, international 'core' crimes are those on which some international court or tribunal has jurisdiction.[26]

[25] Robert Cryer, *An Introduction to International Criminal Law and Procedure*, 2nd edition (New York: Cambridge University Press, 2010), 17.

[26] Ibid, 3.

1.3 Rationale for Punishing International Crimes

There are a number of different theories of punishment which provide justifications for punishing international crimes. One of them espouses the theory of retribution that a perpetrator being an autonomous being should take full responsibility for the offences committed.[27] ICTY Appeals Chamber explained retribution as the outrage of an international community.[28]

Another justification is presented by theory of deterrence which sought to prevent both the offender and others from committing the offence. ICTY in the *Tadic* case has referred to principle of deterrence as a legitimate consideration in assessment of sentences.[29] Moreover, the Rome statute also accepts role of deterrence in paragraph 5 of its preamble. According to Friedrich Harhoff, deterrence is ultimately dependent on support of international community [30]. Along with the above mentioned justifications, some other objectives sought through punishment are: providing justice and a sense of closure to victims[31], and recording history and preventing revisionism at later stages[32] which can then result in reconciling post conflict societies[33]

1.4 Establishment of International Criminal Tribunals

1.4.1 International Military Tribunal (IMT) and International Military Tribunal for Far East (IMTFE)

[27] Ibid, 24.

[28]PROSECUTOR v. ZLATKO ALEKSOVSKI, ICTY Appeals Chamber. 24.3.2000 para. 185. https://www.refworld.org/cases,ICTY,4146e5204.html (accessed 28th August, 2023)

[29]Prosecutor v. Dusko Tadic´ ICTY A.Ch. 26.1.2000 para. 48. https://www.icty.org/x/cases/tadic/acjug/en/tad-asj000126e.pdf (accessed 28th August, 2023).

[30] Friedrich Harhoff, "Sense and Sensibility in Sentencing-Taking Stock of International Criminal Punishment" in *Law at War: The Law as it Was and the Law as it Should Be*, eds. Ola Engdal and Pal Wrange (Leiden: Martinus Nijhoff Publishers, 2008). 126

[31] Rome statute provides a victim centric approach by containing a number of provisions providing for victims' participation in proceedings and reparation.

[32] Robert Cryer, *An Introduction to International Criminal Law and Procedure*, 2nd edition (New York: Cambridge University Press, 2010), 32.

[33] Preamble of Rome Statute also links prosecution with peace.

Formation of International Military Tribunal (IMT) at Nuremberg and International Military Tribunal for the Far East (IMTFE) can be termed an inception point for modern international criminal law.[34] These tribunals were constituted in the wake of World War II (WWII) and contributed immensely to substantive international criminal law. Although legitimacy of these tribunals suffered from a number of challenges such as: allegations of meting out victors' justice, breaking from pre-established norms of international law[35] and trying offences ex post facto, hence violating the foundational principle of *nullum crimen sine lege* (no crime without law). However, importance of these tribunals in the journey for formation of a permanent international criminal court cannot be denied. These were the first instances, in recent history, of prosecuting individuals for a conduct deemed criminal according to international norms.

1.4.2 The Ad Hoc International Criminal Tribunals

Formation of ICTY and ICTR constitutes an important milestone for development of international criminal law. Both tribunals were created by United Nations Security Council, while acting under Chapter VII of the United Nations Charter.[36] ICTY was created to prosecute crimes committed during Yugoslav wars of dissolution.[37] Jurisprudence of ICTY has contributed immensely in legal development of war crimes, crimes against humanity and genocide. Similarly, ICTR was formed by UNSC acting under Chapter VII of the UN Charter.[38] Its judgment in the case of Prosecutor v. Jean Paul Akayesu is significant for evolution of offence of genocide as it

[34] Robert Cryer, *An Introduction to International Criminal Law and Procedure,* 2nd edition (New York: Cambridge University Press, 2010), 109.

[35] Otto Kranzbuhler, "Nuremberg Eighteen Years Afterwards," *DePaul Law Review* 14 (1965): 333-347.

[36] UNSC Resolution 827 (1993) and Security Council Resolution 955 (1994).

[37] Robert Cryer, *An Introduction to International Criminal Law and Procedure,* 2nd edition (New York: Cambridge University Press, 2010), 122.

[38] Security Council Resolution 955 (1994).

held that a sexual assault can also constitute an *actus reus* of genocide.[39] Moreover, it developed the law on offence of incitement to genocide through use of mass media.[40] Jurisprudence of both tribunals is significant for work of ICC[41] as it provides guidance about a number of procedural and substantive points of law. Indeed, in the case pertaining to situation in Uganda, Pre-Trial Chamber II[42] treated the jurisprudence of the ad hoc tribunals as one of the sources of applicable law as mentioned in article 21 of the Rome statute.

1.5 Establishment of ICC

The journey to establish an international criminal court can be traced to League of Nation's Terrorism Convention of 1937 which called for formation of such a court..[43] After it, the Genocide Convention 1948[44] and the Apartheid Convention 1973[45] had also called for formation of an international jurisdiction. Trinidad and Tobago again raised this issue in 1989 in context of prosecuting drug traffickers.[46] United Nations General Assembly tasked International Law Commission (ILC) to prepare a report on establishment of an International Criminal Court for prosecution of persons for drug trafficking.[47] International Law Commission, on its part, prepared a wider report which focused on other international crimes too. International Law Commission,

[39] The Prosecutor V. Jean-Paul Akayesu Case No. ICTR-96-4-T, para. 731.

[40] The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, ICTR Trial Chamber 3.12.2003.

[41] Both tribunals had jurisdiction only on offences of war crimes, crimes against humanity and genocide. Aggression was not included.

[42] Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, para 19.

[43] M. Cheriff Bassiouni and William A. Schabas, *The Legislative History of the International Criminal Court*, 2nd ed. (Leiden: Brill Nijhoff, 2016), 67.

[44] Article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide 1948.

[45] Article 5 of the Convention on the Suppression and Punishment of the Crime of Apartheid 1973.

[46] M. Cheriff Bassiouni and William A. Schabas, *The Legislative History of the International Criminal Court*, 2nd ed. (Leiden: Brill Nijhoff, 2016), *69.*

[47]United Nations General Assembly Resolution 44/39 (1989).

encouraged by a favourable response from UNGA to its report, started work on a comprehensive statute for an ICC.[48]

International Law Commission submitted the draft statute in 1994. An Ad hoc Committee (1995)[49] and subsequently a Preparatory Committee (PrepCom)[50] in 1996 were formed to review the draft. PrepCom submitted its final report to the 51st session of the UNGA. UNGA then called a diplomatic conference in Rome from June 15–July 17, 1998, to adopt a Convention on the Establishment of an International Criminal Court[51].

The Diplomatic Conference of Plenipotentiaries commenced in Rome. A 'like-minded' group of states had emerged from the time of ad hoc and Prepcom.[52] This group along with a number of NGO's, specially ICRC and the Coalition for the International Criminal Court, worked tirelessly to make the Diplomatic conference a success. The like-minded group tried its utmost to accommodate various concerns of the USA. However, the USA on its part had adopted a rigid attitude on question of jurisdiction and independence of the prosecutor.[53] This inflexibility, fueled by domestic political concerns, convinced other states that further concessions should not be given to the USA as there was little chance of it signing the convention. The final vote on the draft was conducted on 17th July, 1998 with 120 delegations voting for the adoption of the Statute. Only

[48] M. Cheriff Bassiouni and William A. Schabas, *The Legislative History of the International Criminal Court*, 2nd ed. (Leiden: Brill Nijhoff, 2016), 70.

[49] U.N. Doc. A/RES/49/53

[50] U.N. Doc. A/RES/50/46 at para. 2.

[51] G.A. Res. 160, U.N. GAOR, 52d Sess., U.N. Doc. A/RES/52/160 (1997).

[52] M. Cheriff Bassiouni and William A. Schabas, *The Legislative History of the International Criminal Court*, 2nd ed. (Leiden: Brill Nijhoff, 2016), 82.

[53] Ibid, 98.

seven voted against[54] and twenty-one abstained and with it Rome Statute emerged as a multilateral convention establishing first permanent international criminal court.[55]

1.6 Objection of Some States to Formation of the International Criminal Court

A number of objections were raised by different states during drafting stage of the Rome Statute. India[56] and China held that complementarity regime was allowing an international institution to scrutinize the judicial system of sovereign states, thus undermining sovereignty. India also felt that UNSC was being given an undue influence over working of ICC through power of referral and deferral.[57] China[58] and India[59] have also objected to inclusion of war crimes in a NIAC under jurisdiction of ICC as both felt it can amount to undue intrusion in sovereignty of a state. For Russian Federation, its constitutional provisions, particularly about amnesty and pardon, clashed with the Rome Statute. Moreover, its constitutional arrangement does not envisage any international court complementing or in some circumstances supplanting national court. As far as the USA is concerned, its biggest objection was the jurisdiction of ICC over nationals of a non-State party or without sovereign consent.[60] The USA felt that it violated article 34 of the Vienna Convention on the Law of Treaties which does not place any obligation or create any right on third party to a treaty. Many academics think that this is a misplaced objection since in international

[54] The USA, Israel, China, Iraq, Yemen, Libya, and Qatar

[55] M. Cheriff Bassiouni and William A. Schabas, *The Legislative History of the International Criminal Court*, 2nd ed. (Leiden: Brill Nijhoff, 2016), 100.

[56] Usha Ramanathan, "India and the ICC," Journal of International Criminal Justice 3 (2005): 627-634, at 633.

[57] Statement of Dilip Lahiri, "Explanation of India's Vote on the Adoption of the Statute of the International Criminal Court," in *The International Criminal Court: Global Politics and the Quest for Justice*, ed. William Driscoll et al (London: International Debate Education Association, 2004), 43.

[58] Bing Bing Jia, "China and the International Criminal Court: The Current Situation", 10 SINGAPORE Y.B. INT'L L. 87, 88-89 (2006).

[59] Usha Ramanathan, "India and the ICC," Journal of International Criminal Justice 3 (2005): 627-634, at 631.

[60] Jason Ralph, *Defending The Society of States: Why America Opposes The International Criminal Court and Its Vision of World Society*, (Oxford: Oxford University Press,2007), 130.

law, territorial jurisdiction can be exercised as of right even if perpetrator is a non-national.[61] Moreover, nothing in international law prohibits states from collectively delegating their territorial jurisdiction to an international institution.

The USA, although signed Rome statute on 31st December, 2001, yet withdrew on 6th May, 2002 owing to a number of objections of the USA. It held that article 12, which allows ICC the jurisdiction over nationals whose country has not ratified the statute, is against international law norms.[62] Over the years, different US administrations have carried out different measures to prevent ICC from having jurisdiction over its nationals. It passed American Service members' Protection Act, entered into bilateral agreements to prevent surrender of its national to court[63] and persuaded UNSC to pass two resolutions of deferral pursuant to art. 16 with regard to the UNO military operations.[64]

Conclusion

Signing of the Rome Statute on 17th July, 1998 was a culmination of all the efforts spanning many decades. Unfortunately, this venture has started without the support of some major powers which are host to large percentage of world population and also have considerable influence on world politics. Genuine concerns of these states should have been more adequately addressed at the drafting stage. However, hope should not be shelved about these states becoming signatories in the future. In order to do so, Assembly of State Parties (ASP) should periodically engage with these states. Discussions on concerns of states should continue. By solving genuine concerns of

[61] M. Cherif Bassiouni, "Explanatory Note on the ICC Statute", 71 REVUE INTERNATIONALE DE DROIT PÉNAL, 8 (2000).

[62] Michael P. Scharf, "The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position" (2001). Faculty Publications. 68-116, 69.

[63] Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, 2nd edition (New York: Cambridge University Press, 2010),176.

[64] United Nations Security Council resolution 1422(2002) and 1487(2003).

these states, membership of the ICC can increase. This will in turn increase legitimacy of the court's work.

CHAPTER 2

Substantive Law Governing Subject Matter Jurisdiction Included in Part II of the Rome Statute

2.1 Introduction

This chapter focuses on four core crimes of international concern. Historical evolution of the crime is discussed. Moreover, the wording of Part II on each crime along with some cases of ICC are analyzed. Furthermore, academic debates on each crime are also delineated. In the end, domestic legislation vis-à-vis these crimes are reviewed.

2.2 Genocide

2.2.1 Historical Background of Crime of Genocide

Convention on the Prevention and the Punishment of the Crime of Genocide (henceforth Genocide Convention) was adopted on 9th December, 1948 by UNGA, just a day before adoption of UDHR 1948.It was a significant moment for protection of rights of individuals. Convention on Genocide was a direct result of the efforts of Raphael Lemkin, a Polish legal expert who had coined the term Genocide in 1944 to define the mass atrocities committed by Nazi forces on its own population as well as of the territories occupied by them. Lemkin explained the concept of Genocide in his book *Axis Rule in Occupied Europe*[65]. He combined *genos* meaning race or tribe in Greek with *cide* meaning killing in Latin. According to him genocide meant:

> "A coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves."[66]

[65] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress* (Carnegie Endowment for International Peace 1944).

[66] Ibid, 79.

Although, all the acts forming *actus reus* of the offence fall in the category of human rights violations, the distinguishing trait of genocide is the identity of the individual as a member of a particular group. Thus, attack is not caused by a motive to settle any personal score.[67]

Before adoption of Genocide Convention, UNGA Resolution of 96 (I) of 1946 had also condemned genocide in strictest possible terms by holding it as a denial of existence of entire human groups. It termed it as a crime which shocks human conscience and is contrary to moral law. It also highlighted the need to punish perpetrators whether private or public individuals or heads of states.[68]

2.2.2 Crime of Genocide in Rome Statute

Article 6 in Part II of the Rome statute deals with the crime of genocide. Definition of the crime is actually a reiteration of Article II of the Genocide Convention 1948. *Mens rea* of the crime is the intention to destroy in whole or in part four enumerated groups. Required *actus reus* can be carried out by committing either of the five listed actions. Article 6 does not provide for any context requirement. However, Elements of Crime for genocide provide for a context of manifest pattern of similar conduct.[69]

2.2.3 Crime of Genocide as Tried by ICC

ICC has dealt with the crime of genocide in case against *Al Bashir.*[70] Decision of the court sheds light on many a pertinent elements of the crime.

---

[67] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress* (Carnegie Endowment for International Peace 1944), 79.

[68] UNGA Resolution 96 (I).

[69] Article 6 of Elements of Crime.

[70] Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir.

First of all, it provided guidance on when an act of genocide would be deemed complete. According to the decision when threat becomes "concrete and real" and is not merely "latent and hypothetical".[71] The decision, however, did not adequately explained the term concrete. It also seems oblivious to the danger of committal of exorbitant damage before the requirement stands to be fulfilled. Same apprehension was expressed by dissenting opinion of Judge Ušacka.[72]

Secondly, ICC's decision in *Al Bashir Arrest Warrants* case also held the list of protected groups to be exhaustive.[73] This assertion implicitly rejected the suggestion forwarded by ICTR chamber in *Akayesu* case of extending the protection to other groups provided they fulfilled certain conditions.[74]

Thirdly, ICC in its case of *Prosecutor v. Bashir* held that apart from a general intent which is required for the prohibited act an additional specific intent is also required. According to which any genocidal acts must be carried out with the "intent to destroy in whole or in part" the targeted group.[75] A higher intent requirement depicts the seriousness of the crime and is also in line with the approach of ad hoc tribunals.[76]

2.2.4 Academic Debates with regard to the Crime of Genocide as present in the Rome Statute

2.2.4.1 On Inclusion of Children as a Protected Group

[71] Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 124.

[72] Separate and Partly Dissenting Opinion of Judge Anita Ušacka, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 19, fn. 26.

[73] Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) paras 135–7.

[74] The Prosecutor v Jean Paul Akayesu, para.516.

[75] Prosecutor v. Bashir, Case No. 02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 139. https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01517.PDF (accessed 23rd October, 2022).

[76] Prosecutor v. Krstic´, note 6, para. 134. https://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pd (accessed 23rd October, 2022).

Some scholars of international criminal law support inclusion of children as a separate group in article 6 of Rome Statute. Currently it is just a sub-group of other protected groups through "Forcible Transfer Clause" (FTC). The academics supporting inclusion of children as a separate group extend the argument that protection of children has become a vital part of international criminal law. According to some writers it has emerged into a peremptory norm of international law as depicted through its inclusion in a number of international law instruments.[77] Further recognition was granted to this norm through various national laws and policies.[78] This special protective status is granted to all children without discriminating on any ground. This inclusion of children as another protected group will be in conformity with the special protection accorded to them throughout the international law discipline.[79]

2.2.4.2 On Inclusion of Political Groups

Author David L. Nersessian in book *Genocide and Political Group* advocates for inclusion of political group as one of the protected groups.[80] His argument is that this inclusion will further the objectives of prosecuting international crimes such as restoring rights, minimizing violence in societies and documenting the historical occurrence. David L. Neserssian thinks that proscribing political genocide will achieve them.[81]

---

[77] Ruth Amir, "Probing the Boundaries of Genocide Convention: Children as a protected group", in *The Concept of Genocide in International Criminal Law: Developments after Lemkin*, ed. Marco Odello and Piotr Łubiński (London: Routledge, 2020), 147.

[78] Ibid.

[79] See, for example, Protocols I and II Additional to the Geneva Convention, the UNGC, UNCRC, and its optional protocol I on child soldiers and the United Nations Convention on the Rights of Children (OPAC 2000), and Optional Protocol II, on the Sale of Children. Child Prostitution, and Child Pornography.

[80] David L. Neserssian, *Genocide and Political Group* (New York: Oxford University Press, 2010), 196-197.

[81] Ibid.

2.2.4.3 Inclusion of Political Groups in Article 7 instead of in Article 6 of the Rome Statute

There is a widely held belief in international criminal law scholarship that mass violence against individuals due to their political affinity can be prosecuted under category of crimes against humanity.[82] Hence there is no need for creation of another protected group within article 6. Author David L. Neserssian refutes this argument by highlighting differences between two offences in terms of *mens rea* and intended victims of the crime. Gravity of crimes against humanity notwithstanding, it cannot match the cruelty indicated through an offence of genocide where destruction of a group is the aim. Thus, persecution, extermination, torture, enslavement and other components of crimes against humanity are not genocide.[83]

2.2.4.4 Cultural Destruction as *actus reus* of Genocide

Although, traditional position has been to include physical or biological destruction in ambit of genocide, there has emerged a significant advocacy for inclusion of cultural destruction of a group as a separate genocidal act. Author Marco Odello makes a strong case for this position.[84] He makes a reference to definition proposed by Lemkin, the pioneer of term genocide. This definition included attacks on culture as one form of carrying out a genocidal campaign against a group.[85] Genocide Convention do not include attack on culture, author Marco Odello terms this

[82]According to ILC: "Political groups were included in the definition of persecution contained in the Nuremberg Charter, but not in the definition of genocide contained in the Convention because this type of group was not considered to be sufficiently stable for purposes of the latter crime. None the less persecution directed against members of a political group could still constitute a crime against humanity." Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996, UN Doc. A/51/10, 89.

[83] David L. Neserssian, *Genocide and Political Group* (New York: Oxford University Press, 2010), 179.

[84] Marco Odello, "Genocide and culture: Revisiting their relationship 70 years after the Genocide Convention" in *The Concept of Genocide in International Criminal Law*, ed. Marco Odello and Piotr Łubiński (New York: Routledge, 2020), 236.

[85] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress* (Carnegie Endowment for International Peace 1944), 79: "…. disintegration of the political and social institutions, of culture, language, national feelings…" among other acts as *actus reus* of genocide.

omission result of the specific political and historical context.[86] According to him many changes since 1948 have occurred in international law landscape which point to growing importance of culture and cultural rights of communities. These developments include United Nations Educational Scientific and Cultural Organization (UNESCO) Convention of 1954[87] and cases of ICTY[88]

Along with the above mentioned arguments, author Marco Odello countered the comments of ILC which asserts genocide as confined to physical or biological destruction.[89] According to him, Forcible Transfer Clause (FTC) clause and mental harm do not involve physical or biological destruction per se. Moreover, FTC clause actually has cultural implications as children constitute a vital intergenerational link for transferring cultural values, traditions and mores of a group.[90]

2.2.5 Crime of Genocide in Domestic Law

2.2.5.1 The USA

Although the US is not a party to Rome Statute, yet it includes crime of Genocide in its domestic law. The 18 U.S. Code § 1091 – Genocide talks about crime of genocide.[91] This offence is quite similar to that contained in the Rome statute. It however, restricts the *actus reus* of mental harm by delineating the ways in which it could be committed: "causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques."[92]

---

[86] Marco Odello, "Genocide and culture: Revisiting their relationship 70 years after the Genocide Convention" in *The Concept of Genocide in International Criminal Law*, ed. Marco Odello and Piotr Łubiński (New York: Routledge, 2020), 239.

[87] Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954.

[88] Discussion on ICTY cases of *Jokič* and *Strugar* in *The Concept of Genocide in International Criminal Law*, 253.

[89] David L. Neserssian, *Genocide and Political Group* (New York: Oxford University Press, 2010), 258.

[90] Ibid, 244.

[91] Section 1091 of Title 18, United States Code 1994.

[92] Ibid, clause 3.

2.2.5.2 China

China has ratified the Genocide Convention in 1983.[93] However, there is no domestic legislation which expressly gives effect to it. According to article 9 of the Chinese Criminal Code, the present code will apply when China exercises criminal jurisdiction as per its international obligations.[94]

2.2.5.3 The UK

The UK has promulgated The ICC Act in 2001 to give effect to the Rome Statute.[95] section 50 of the Act directly incorporates the definition of Genocide as contained in the Rome Statute. section 51 allows the UK courts to prosecute any act of genocide committed on UK territory or anywhere in the world by a UK national or resident.

2.2.5.4 France

France follows a dynamic approach while incorporating crime of genocide in its domestic law. As per its law, genocidal acts should be committed in pursuance of a coordinated plan.[96] It also enlarged the number of protected groups. According to its Penal Procedure Code, French courts can prosecute those alleged offenders who habitually resides on its territory.[97]

2.3 Crimes against humanity

2.3.1 Historical evolution of the concept

[93] Wenqi Zhu and Binxin Zhang ,"Expectation of Prosecuting the Crimes of Genocide in China", in *Confronting Genocide, Ius Gentium*: *Comparative Perspectives on Law and Justice*, eds. R. Provost, P. Akhavan (London: Springer, 2011), 179.

[94] Ibid.

[95] The International Criminal Court Act, 2001.

[96] Article 211-1 of Penal Code 1994 as amended in 2016.

[97] Article 689-11 of the French Code of Criminal Procedure, adopted on 9th August, 2010

Concept of crimes against humanity (henceforth CAH) can trace its roots to the age old notion of law of nature. Basic postulate of law of nature was that even a sovereign is bound by a supreme transcendental law and cannot persecute even his own subjects.[98] Reference can be found about laws of humanity in St. Petersburg Declaration of 1868, and in the famous Martens clause. 1919 Versailles Peace Commission also talked about crimes against laws of humanity in context of WWI.[99] Looking at these occurrences, Christopher K. Hall and Kai Ambos make the argument that prohibition on crimes against humanity was already part of customary international law.[100] London Charter of 1945 was just the first instance when CAH became part of positive international law.[101] CAH was also prosecuted by ICTY[102] and ICTR[103].

2.3.2 Crimes Against Humanity as Present in Rome Statute

Part II Article 7, of the Rome Statute deals with crimes against humanity quite comprehensively. It presents a definition which is believed to be the first ever comprehensive multilateral treaty definition of the crimes falling in this category.[104] Article 7 includes a number of elements from Article 6(c) of Nuremberg Charter,[105] Article 5 of the ICTFY Statute, and Article

3 of ICTR. However, Rome Statute includes a number of significant developments. It enumerates a list of crimes which must be "part of a widespread or systematic attack directed

[98] Robert Dubler and Matthew Kalyk, *Crimes Against Humanity in the 21st Century: Law Practice and Threats to International Peace and Security* (Boston: Brill, 2018), 2.

[99] M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (New York: Cambridge University Press, 2011), xxix.

[100] Christopher K. Hall, Kai Ambos, "Article 7: Crimes Against Humanity" in *The Rome Statute of the International Criminal Court: A Commentary*, ed. Otto Triefferterer and Kai Ambos (Oxford: Beck & Hart, 2016), 154.

[101] Robert Dubler and Matthew Kalyk, *Crimes Against Humanity in the 21st Century: Law Practice and Threats to International Peace and Security* (Boston: Brill, 2018), 1.

[102] Article 5 of ICTY Statute: "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character….."

[103] Article 3 of the ICTR Statute.

[104] "It was the first ever attempt at a global treaty definition." *Crimes Against Humanity in 21st Century*, 23.

[105] Charter of the International Military Tribunal, 59 Stat. 1544, 82 U.N.T.S. 279 of 8 August 1945.

against any civilian population". There must also be multiple commission of such "acts pursuant to or in furtherance of a State or organizational policy to commit such attack". Knowledge of the attack forms the requisite *mens rea*. The perpetrator must have knowledge of that widespread attack. The nexus between individual's act and a widespread or systematic attack helps prevent ICC from utilizing its resources and time on isolated acts of random violence which can be properly prosecuted at national level. Thus, Article 7 seems a successful performance of the role assigned to the ILC by UNO under Article 13 of the Charter, that is codification of the existing laws and also their progressive developments.[106]

Article 7 also provides protection at two levels: individual and international. As a core crime of international concern, it guards international peace and security.[107] Moreover, even though victims of crimes against humanity are communities, they nonetheless consist of individuals too. Thus, article 7, by penalizing violators of human life, freedom, dignity and honor also protects individuals and in turn the communities rendered vulnerable due to circumstances.[108]

Another positive aspect of article 7 is that it does not include a restrictive context of an armed conflict.[109] It acknowledges that such crimes can occur also during peace time. This is in contrast with the Nuremberg Charter[110] and ICTY statute which provided for an armed conflict nexus.[111] This evolution of the law seems recognition of the fact that in many instances, specially

---

[106] Christopher K. Hall, Kai Ambos, "Article 7: Crimes Against Humanity" in *The Rome Statute of the International Criminal Court: A Commentary,* ed. Otto Triefftерer and Kai Ambos (Oxford: Beck & Hart, 2016), 155.

[107] Para 3 of Preamble of Rome statute.

[108] Gerhard Werle and Florian Jebberger, *Principles of International Criminal Law* (London: Oxford University Press, 2020), 333.

[109] According to professor Bassiouni, war nexus for CAH only provided an element of internationality. Now that element is provided by "widespread or systematic" or "state or organizational policy". M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (New York: Cambridge University Press, 2011), 33.

[110] Robert Cryer et al., *An introduction to International criminal law and Procedure* (New York: Cambridge University Press, 2010), 231.

[111] Article 5 of ICTY statute.

of NIAC, persecution starts well before actual outbreak of hostilities. Thus, crimes against humanity can be committed during this time.

2.3.3 Jurisprudence of ICC on Crimes Against Humanity

2.3.3.1 Contextual Element of "Widespread or Systematic"

Both the ad hoc tribunals and ICC[112] have followed the approach that the attack need be either widespread or systematic. It need not be both. ICC Pre-Trial Chamber held that these contextual elements apply "disjunctively"[113]. Disjunctively means that these requirements are mutually exclusive. Fulfillment of one is sufficient. Authors Robert Dubler and Matthew Kalyk hold the opinion that under customary international law, an attack must reach a minimum threshold of scale and seriousness. This threshold can be reached if the attack is either widespread or systematic. According to authors, these requirements of scale and seriousness protects state sovereignty from unwarranted intervention.[114]

In jurisprudence of ICC, a widespread attack encompasses both elements of geographical scale and number of victims. According to Pre-Trial Chamber, an assessment is made on a case by case basis. So a widespread attack may be either the combined impact of a number of acts or singular effect of one act of extraordinary magnitude.[115]

---

[112] Prosecutor v Germain Katanga (Trial Chamber Judgment), ICC-01/04-01/07-3436- tENG (7 March 2014) para. 412. The Prosecutor v. Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, para. 82.

[113] Authorisation of an Investigation into the Situation in the Republic of Kenya (Pre-Trial Chamber II Decision), ICC-01/09-19 (31 March 2010), para. 94.

[114] Robert Dubler and Matthew Kalyk, *Crimes Against Humanity in the 21st Century: Law Practice and Threats to International Peace and Security* (Boston: Brill, 2018), 233.

[115] Authorisation of an Investigation into the Situation in the Republic of Kenya (Pre-Trial Chamber II Decision), ICC-01/09-19 (31 March 2010), para. 95. Chamber relied on previous ad hoc and ICC decisions.

As far as 'systematic' element was concerned, Pre-Trial Chamber noted that it concerns organization of the attack and can be indicated through patterns of crimes.[116] The chamber also noted definition of systematic as expressed by ICTR and ICTY.[117]

2.3.3.2 Civilian Population as the Target of Crimes Against Humanity

Both Ad hoc tribunals and ICC have followed the approach that 'directed against' means that civilian population should be the primary and intended target of attack.[118] The main controversy is regarding meaning of the term 'civilian' as it has not been defined either in Rome Statute or the Elements of Crimes.[119] Jurisprudence of ICC is also unclear as some Pre-Trial and Trial Chambers followed approach of ICTY *Kunarac* judgment which relied on International Humanitarian Law for definition of civilians[120] where distinction was drawn between civilians and members of the armed forces and other legitimate combatants. However, in *Katanga* decision, Pre- Trial Chamber I opted for a broader approach.[121] It cited ICTY *Tadic* and *Jelisic* decisions.[122] Both of these had acknowledged that those persons can be civilian who despite bearing arms did not participate in military activities.[123]

---

[116] Ibid, para. 96.

[117] Ibid.

[118] Ibid, para, 82, civilians were termed the "primary object of the attack in question and cannot merely be an incidental victim".

[119] Prosecutor v Germain Katanga (Trial Chamber Judgment), ICC-01/04-01/07-3436- tENG (7 March 2014), para 399, fn 511 (citing Roy Lee (Ed), *The International Criminal Court: Elements of Crimes and Rules of Evidence* (Transnational Publishers: New York, 2001) 78: "Most delegations quickly agreed that this was too complex a subject and evolving area in the law, better left to resolution in case law."

[120] The Prosecutor v. Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, para 78, fn 101. Authorisation of an Investigation into the Situation in the Republic of Kenya (Pre-Trial Chamber II Decision), ICC-01/09-19 (31 March 2010), para 82, fn 74. Prosecutor v Germain Katanga (Trial Chamber Judgment), ICC-01/04-01/07-3436- (7 March 2014), para 1102.

[121] Prosecutor v Katanga and Chui (Decision on the Confirmation of Charges), ICC01/04-01/07-717 (13 October 2008), para 399.

[122] Prosecutor v Germain Katanga (Trial Chamber Judgment), ICC-01/04-01/07-3436- tENG (7 March 2014), fn 513.

[123] In *Jelisic* decision, the collective aspect of the crime was emphasized more than the status of the victims, para. 54.

This ambivalence does not bode well for the law. According to authors Robert Dubler and Matthew Kalyk , restrictive approach results in a protection gap during peacetime where members of armed forces are not involved in armed hostilities as IHL does not apply and hence cannot offer any protection. Historical example include widespread killing of soldiers from Lango and Acholi tribes in Uganda in 1971 by the government of Uganda itself.[124] According to eminent author Gerhard Werle, any person deemed defenseless and in need of protection should be covered by CAH regardless of the fact whether the person is a civilian in strict sense of the word or member of the armed force.[125]

2.3.3.3. Requirement of a State or organizational Policy

Requirement of 'state' is self-evident. However, 'organizational' has created some difficulties with differences emerging as to does organization refers to non-state actors and if it does then what criterion should be formulated for these non-state actors to fulfill in order to qualify as an organization.

Majority judgment in the case of *Kenya Authorisation* acknowledged that Rome Statute is unclear about definition of 'organization'. According to Chamber, instead of formal nature and level of organization as the defining criteria, capability of the group to infringe upon basic human values should be the determining factor.[126] Chamber had reached the conclusion that non-state actors are covered by the term 'organization'. As far as the criteria which a group has to fulfill to qualify as an organization was concerned, according to the majority it was be decided on a case by

[124] , Robert Dubler and Matthew Kalyk, *Crimes Against Humanity in the 21st Century: Law Practice and Threats to International Peace and Security* (Boston: Brill, 2018), 675.

[125] Gerhard Werle, *Principles of International Criminal Law* (Asser Press: The Hague, 2005), 222.

[126] Authorisation of an Investigation into the Situation in the Republic of Kenya (Pre-Trial Chamber II Decision), ICC-01/09-19 (31 March 2010), para 90.

case basis. It also delineated a number of factors which could assist in making this decision. These factors included: responsible command and hierarchy, means to carry out widespread or systematic attack, control over territory, civilian population as the prime target of group's activities, etc.[127]

Majority in the case of Prosecutor v. Germain Katanga held that the organization may not be state-like, yet it must has set of structures or mechanism to carry out relevant attacks.[128] Majority took into account modern asymmetric warfare to rule out only quasi state groups falling in the organization category. For them, defining features of an organization were "…capacities for action, mutual agreement and coordination".[129]

In the case of Prosecutor v Laurent Gbagbo, Pre-Trial Chamber again termed the capacity of the group to be the defining criterion. Trial Chamber in the case of *Prosecutor v Jean-Pierre Bemba Gombo* followed the approach followed in Prosecutor v. Germain Katanga.[130]

The case of *Authorization of an Investigation into the Situation in the Republic of Kenya*[131] notes that neither Statute nor Elements of Crimes provide a definition of policy. However, it refers to previous decisions of Pre-Trial Chamber I. In the case against *Katanga and Ngudjolo Chui*, Pre-Trial Chamber held that policy need not be explicitly defined. It can be implied from an organized attack.[132] Same approach was followed in the case of *Prosecutor Against Jean-Pierre Bemba Gombo*.[133]

[127] Ibid, para 93.
[128] Prosecutor v Germain Katanga (Trial Chamber Judgment), ICC-01/04-01/07-3436 (7 March 2014), para 1119.
[129] Ibid, para 1120.
[130] Prosecutor v Jean-Pierre Bemba Gombo (Trial Chamber iii Judgment), ICC-01/05-01/08-3343, para 158.
[131] Authorisation of an Investigation into the Situation in the Republic of Kenya (Pre-Trial Chamber II Decision), ICC-01/09-19- Court (31 March 2010).
[132] Ibid, para 84.
[133] Ibid, para 85.

2.3.4 Crimes Against Humanity in Domestic Legislation

Authors Robert Dubler and Mathew Kalyk reviewed 31 countries to reach the conclusion that on balance, majority of them have incorporated same definitions or quite similar to that of Rome statute.[134] this enhances the status of Rome statute definition of crimes against humanity as reflective of customary international law.

2.4 War Crimes

2.4.1 Historical Evolution of the Crime

War crimes are in fact criminalization of certain serious violations of IHL norms for which an individual bears criminal responsibility.[135] Warfare in ancient times was a particularly bloody affair.[136] Although certain ancient civilizations provided standards for guiding conduct of combatants, yet according to many academics this did not amount to an international legal order.[137] Islamic civilization had played a crucial part in humanizing warfare.[138] Some national laws have also proved to be influential in prohibiting certain conduct during armed conflict. Lieber Code (1863), a guiding manual for Union forces, is one such example.[139] Efforts of Henri Dunant lead to the adoption of first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies on Field (1864). This delineated rules for humane treatment of parties to the conflict. In the wake of WWII, article 6 (b) of London Charter provided for prosecution for war crimes. It

---

[134] Robert Dubler and Matthew Kalyk, *Crimes Against Humanity in the 21st Century: Law Practice and Threats to International Peace and Security* (Boston: Brill, 2018), 559.

[135] Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, 2nd edition (New York: Cambridge University Press, 2010), 271.

[136] David M. Crowe, *War Crimes, Genocide, and Justice: A Global History* (New York: Palgrave Macmillan, 2014), 1-25.

[137] Ibid, 1.

[138] Muhammad Munir, *The Law of War and Peace in Islam: Causes and conduct of jihad and non-state Islamic actors under Islamic law*, (Islamabad: IRD, 2019) Chapter 7, 287-341.

[139] David M. Crowe, *War Crimes, Genocide, and Justice: A Global History* (New York: Palgrave Macmillan, 2014), 81.

included a non-exhaustive list of these crimes. Then four Geneva Convention (GC) of 1949 provided for 'grave breach' provisions for protected persons.[140] Further updates, both in IHL and war crimes law, came through Additional Protocols I and II to GC in 1977. Latter was important in context of non-international armed conflict (NIAC). UNSC also played its part through statutes of ICTY and ICTR. Both contained open ended list of war crimes. Article 8 of the Rome Statute contains fifty offences and can be termed a culmination of all the previous efforts as now an international and permanent court has jurisdiction over war crimes.

2.4.2 War Crimes Included in Part II of Rome Statute

Article 8 of the Rome Statute includes four categories of war crimes within the jurisdiction of ICC. These are as follows:

i) Grave breaches of Geneva Conventions (i-iv) of 12th August, 1949;

ii) Other serious violations of the laws and customs applicable in IAC, within the established framework of international law;

iii) Article 3 common to four Geneva conventions which deals with NIAC and

iv) Serious violations of laws and customs applicable to NIAC.

2.4.2.1 Arrangement of Crimes Under article 8

A two pronged criterion was followed while deciding which war crimes should be included in part II of the Rome Statute. First, that the crime should be recognized as such in customary international law and second that it should also entail an individual criminal responsibility under customary international law.[141]

[140] Wounded and sick at land; wounded, sick and shipwrecked at sea; prisoners of war and civilians.

[141] H. von Hebel and D. Roinson, "Crimes within the jurisdiction of the Court" in, *The International Criminal Court. The Making of the Rome Statute*, ed. R.S.Lee (The Netherlands: Brill, 1999), 104.

Article 8 contains an exhaustive list of war crimes with regard to ICC. This is in contrast with statutes of previous tribunals which had contained an open ended list. The exhaustive approach of Rome Statute is better as it is in accordance with the fundamental principle of criminal law, *nullum crimen sine lege* (no crime without law).

Drafters of ICC statute wanted to include customary law norms in order to minimize room for disagreement among the state parties. These considerations prompted inclusion of norms from widely accepted sources. However, the desire to include customary law norms and make the article as comprehensive as possible lead to considerable overlapping between different provisions in article 8, as provisions from a number of sources without any change in their wording were included. So the duplications in different instruments got replicated throughout article 8.[142] Eminent scholars of international criminal law have criticized the arrangement of war crimes article in ICC statute with M. Cherrif Bassiouni terming it as 'unwieldy'[143], and Lyal Sunga suggesting that drafters should have consolidated the different provisions with same substance rather than following the original source wholly to facilitate compliance.[144] However, despite room for conciseness, war crimes provisions are not utterly devoid of a coherent structure as war crimes have been categorized according to the two types of armed conflict and also according to the humanitarian law source from which it originates.[145] Moreover, these provisions also reflect consensus of states participating in preparatory stages of Rome Statute. Therefore, article 8 can be

[142] Robert Cryer et al., *An Introduction to International Criminal Law and Procedure,* 2nd edition (New York: Cambridge University Press, 2010), 289.

[143] M. Cherif Bassiouni, "Negotiating the Treaty of Rome on the Establishment of an International Criminal Court" (1999) 32 Cornell International Law Journal, 462.

[144] Lyal Sunga, 'The Crimes Within the Jurisdiction of the International Criminal Court' (1998) 6/4 European Journal of Crime, Criminal Law and Criminal Justice 377 at 393–4.

[145] Michael Cottier, "Article 8: War Crimes" in *The Rome Statute of the International Criminal Court: A Commentary*, ed. Otto Triffterer, Kai Ambos (Oxford: Beck & Hart, 2016), 318.

understood to be a reflection of the *opinio juris* of states vis-à-vis customary international law of war crimes.[146]

2.4.2.2 Meaning of in Particular

The wording of article 8 also sought to limit the number of cases brought before ICC by stating that the court will prosecute those crimes which were committed 'in particular' as part of a plan or policy or large scale commission. This requirement, however, does not mean that single acts cannot amount to war crime.[147] The phrase 'in particular' only guides the court to focus its attention on crimes which are committed on a large scale and thus have higher chance of becoming an international threat. At the same time this phrase also suggests that plan, policy and large scale commission are by no means prerequisites to prove a war crime and hence to trigger the jurisdiction of the court.[148]

2.4.2.3 War Crimes in Non-International Armed Conflict

Article 8 para (c), (d), (e), and (f) deals with internal armed conflict. There is a lot of overlap between the war crimes included in international and internal armed conflict. However, some significant gaps exist too e.g. provisions about internal armed conflict do not explicitly mention prohibition of intentionally starving civilian population, the use of chemical weapons, attacking civilian objects, and launching disproportionate attacks. Despite these lacunas, it must be acknowledged that part II of Rome Statute, by including provisions on internal armed conflict, helped to further develop international humanitarian law.

---

[146] Ibid, 311.

[147] Ibid, 321.

[148] Prosecutor v. Jean-Pierre Bemba Gombo, Case ICC-01/05-01/08, Pre-Trial Chamber II, 15 June 2009, para. 211. https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_04528.PDF accessed 16th November, 2022.

Eminent author of international criminal law, Antonio Cassese, termed Rome Statute as 'regressive' for still maintaining distinction between internal and international armed conflict.[149] These reservations about Rome Statute notwithstanding, it can also not be ignored that Rome statute could not have made this leap minus any legal developments in this direction by its predecessors in this field: statutes of ICTY and ICTR. Moreover, despite convergence in IAC and NIAC on a number of provisions dealing with criminal conduct, a concrete *opnio juris* for a complete removal of distinctions is still lacking.

As far as those provisions which are equally applicable to both types of conflicts are concerned, an argument can be made for their consolidation in interest of conciseness and for avoiding unnecessary complications.[150]

2.4.2.4 Controversy about Inclusion of Weapons of Mass Destruction

At the drafting stage of the article 8 there was disagreement among the delegates about the inclusion of prohibition on the use of nuclear weapons. Some states wanted to avail this opportunity to prohibit nuclear weapons once and for all. However, this was opposed by other states especially those possessing these weapons. In these circumstances, prohibition of chemical and biological weapons while not tackling nuclear weapons was interpreted by some states as akin to giving tacit approval to the use of the latter.[151] Thus, result of these considerations was a total exclusion of weapons of mass destruction from part II of Rome statute.[152] Article 8 (2)(b)(xx)

[149] Antonio Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections" (1999) 10 EJIL 149, 150.

[150] Robert Cryer et al., *An Introduction to International Criminal Law and Procedure,* 2nd edition (New York: Cambridge University Press, 2010), 279.

[151] Dörmann, K. "War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes", *Max Planck Yearbook of United Nations Law Online*, *7*(1), (2003), 362.

[152] Ibid

allows for inclusion of prohibition on more weapons by amending the statute. Although difficult to envisage at this point, yet a future prohibition on weapons of mass destruction through amendment to article 8 cannot be entirely ruled out under article Arts. 8(2)(b)(xx), 121 and 123.

2.4.3 Development in the Domain of War Crimes Law by Rome Statute

2.4.3.1 Gender Based violence

Part II of the Rome Statute also address gender based crimes as war crimes in article 8 (2) (b) (xxii).[153] Article 8 can be termed progressive in this regard as gender based crimes, which particularly targeted women during an armed conflict, were hitherto not explicitly addressed as war crimes. This avoidance was evident throughout the Nuremberg trials.[154] Tokyo trials fared little better in this regard.[155] Geneva conventions also did not term these offences as grave breaches.[156] Even when an international instrument mentioned these crimes they were referred to as offences against family honour.[157] This veiled referencing tended to downplay the sufferings of actual victims who were mostly women. Statute of ICTY mentioned rape as a crime against humanity and not as a war crime. Statute of ICTR was an improvement and explicitly mentioned rape and sexual violence as war crimes. The Rome statute has addressed this issue clearly by not only listing sexual offences as war crimes but also by including provisions which offer support to victims and take care of their privacy and other rights.[158]

---

[153] Article 8 (2) (b) (xxii): Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions

[154] Judge Gabriel Kirk McDonald, "The International Criminal Tribunals: Crime and Punishment in the International Arena", https://core.ac.uk/download/pdf/51092255.pdf (accessed 22nd December, 2022) , 676

[155] Ibid.

[156] Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, 2nd edition (New York: Cambridge University Press, 2010), 292.

[157] Ibid.

[158] Arts. 36(8)(b) (judges with expertise in violence against women and children), 42(6) (advisers on sexual and gender violence and violence against children), 44(2) (staff with such expertise), 54(1)(b) (prosecutor to respect

2.4.4 Jurisprudence of ICC on War Crimes

ICC, while deciding on war crimes also relied on past precedents of ad hoc tribunals. ICC trial Chamber II in the case of *Prosecutor v. Germain Katanga* relied on ICTY jurisprudence to determine the meaning of 'civilians' and for determining the *mens rea* element while deciding on the war crime of attack against civilians pursuant to article 8 (2)(e)(i).[159] Moreover, reference was also made to the Lieber code and ICTY cases to define 'military necessity'.[160] The Chamber also talked about importance of distinction between war crimes law as applicable in IAC and NIAC as a fundamental part of International Humanitarian law.[161]

The Prosecutor v. Ahmad Al Faqi Al Mahdi case[162] was also consequential as it was the first case[163] in which ICC applied Article 8(2)(e)(iv) which dealt with "Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives." Academic opinion on ICC judgement is split. Some consider it as a victory for the court and for cultural heritage law.[164] While others doubt its precedential value as it did not provide in depth guidance for subsequent similar cases.[165] Issue is also found with the judgement for failing to delineate qualities of buildings, apart from being UNESCO protected sites, which render them eligible for protection under Rome statute.[166] Moreover, article 8(2)(e)(iv) does

interests of victims and witnesses and take into account sexual violence, gender violence and violence against children), 68 (protection of victims and witnesses and participation in proceedings).

[159] The Prosecutor v. Germain Katanga, paras. 801-809.

[160] Ibid, para. 894.

[161] Ibid, para. 1175

[162] The Prosecutor v. Ahmad Al Faqi Al Mahdi, 27.9.2016.

[163] Ibid, para. 13.

[164] "International Criminal Court Imposes First Sentence for War Crime of Attacking Cultural Heritage" COMMENT ON: *Case No. ICC-01/12-01/15, Judgment & Sentence (Sept. 27, 2016)* Harvard Law Review, Vol. 130, Issue 7, 1978-1986, 1981.

[165] Ibid, 1982.

[166] Ibid.

not seem to include archeological sites within its ambit of protection and ICC judgement also did not rectify it.[167]

2.4.5 War Crimes in Domestic Legislation

2.4.5.1 The U.S.

The U.S. Congress has passed Justice for Victims of War Crime Act 2023 in the wake of Russian invasion of Ukraine. Under this Act, the U.S. can prosecute an alleged war criminal who is on its territory irrespective of the nationality of accused, victim or place of commission of crime.[168] This is in contrast to the previous War Crimes Act of 1996 which required that either victim or perpetrator must be a U.S. national or service member.[169] This allowed many alleged war criminals to easily enter and reside on the U.S. territory. Moreover, the new law also removes any statute of limitation for all war crimes.[170] This law allows U.S to fulfill its obligations under GC to try any alleged war criminal under its jurisdiction.[171] A strong message of deterrence is also sent along with one for other states to follow suit. However, this message gets a little diluted given the fact that the U.S. is not a state party of ICC, the only independent and permanent international court with jurisdiction over war crimes.

2.4.5.2 Russian Federation

Russia is not a member state of the ICC so it does not have obligation to implement the Rome Statute. Russia, however, is a party to four GC, two AP and other major treaties of

[167] Ibid, 1985.
[168] Grace Lin, "Expanding U.S. Prosecutorial Powers Over International War Crimes", The Columbia Journal of Transnational Law, February 14, 2023, https://www.jtl.columbia.edu/bulletin-blog/expanding-us-prosecutorial-power-over-international-war-crimes
[169] Ibid.
[170] Ibid.
[171] Ibid.

international humanitarian law.[172] The Criminal Code of 1996 incorporates a number of international humanitarian law provisions into national law.[173] Moreover, there are a number of military codes for guidance of armed forces and it is mandatory for military personnel to be aware of their legal obligations in order to secure a promotion.[174]

Russia, currently is also embroiled in allegations of serious violations of war crimes law during its ongoing armed conflict with Ukraine.[175] In this context it is highly unlikely that Russia will become a member of ICC as such a move will leave it vulnerable for any potential investigation and prosecution. Chief Prosecutor of ICC, Karim Khan, has in fact opened an investigation in the Ukraine situation.[176] Russia is also under a lot of criticism by human rights NGOs for passing a bill that includes a provision that an act deemed criminal under Russia and Ukraine's law will not be so if it is "aimed to protect interests of the Russian Federation".[177]

2.4.5.3 China

China is also not a state party to Rome statute, although it is to four Geneva Conventions. However, China does not have any special national law which gives effect to the latter as well.[178] "The Three Main Rules of Discipline and the Eight Points for Attention" are the only two rules in

[172] Bakhtiyar Tuzmukhamedov, "The implementation of international humanitarian law in the Russian Federation", 388. https://www.icrc.org/en/doc/assets/files/other/irrc_850_tuzmukhamedov.pdf (accessed October 30, 2023).

[173] Ibid, 389, 390.

[174] Ibid, 395.

[175] Human Rights Watch, "Ukraine: Apparent war crimes in Russia-controlled areas", April 3, 2022, https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas

[176] Investigation was opened on 2 March, 2022 pursuant to a referral by 43 state parties, https://www.icc-cpi.int/situations/ukraine

[177] Amnesty International, "Russia: Proposed Bill that Removes Criminal Liability for War Crimes is Impunity Made Law", December 16, 2022, https://www.amnesty.org/en/latest/news/2022/12/russia-proposed-bill-that-removes-criminal-liability-for-war-crimes-is-impunity-made-law/

[178] Liang Zhuo, "Culture, Ideology and Politics: The Shaping of China's Conception of International Humanitarian Law", p. 3, Policy Brief Series No. 112 (2020), Torkel Opsahl Academic EPublisher, https://www.toaep.org/pbs-pdf/112-liang/

Chinese law which contain war crimes provisions similar to IHL.[179] China was not happy about provisions of Rome Statute concerning NIAC which according to it exceeded not only customary international law but also APII, hence becoming a threat to the concept of state sovereignty.[180]

2.4.5.3 France

France is a state party to the Rome statute. On May 12, 2023 its Court of Cassation, the highest court in French Judiciary, upheld universal jurisdiction for certain core crimes, including war crimes, of international concern.[181] Human rights NGOs are hopeful that this ruling will curb impunity as victims who cannot get justice in their own country or cannot access ICC now have another platform to seek redress.[182]

2.4.5.4 The UK

The UK is a state party to Rome statute. It has enacted International Criminal Court Act 2001 to give effect to it. Certain human rights NGOs have raised concerns about alleged committal of war crimes by personnel of UK armed forces in Afghanistan and Iraq.[183] Moreover, Overseas Operations (Service Personnel and Veterans) Act 2021 has been criticized for including a statutory presumption against prosecution[184] and statute of limitation[185] for certain offences allegedly committed by armed personnel.

---

[179] Ibid.

[180] Ibid.

[181] Human Rights Watch, "France: Court Ruling Win for Syrian Victims", May 12, 2023, https://www.hrw.org/news/2023/05/12/france-court-ruling-win-syrian-victims

[182] Ibid.

[183] Amnesty International, "Afghanistan: Immediate Investigation Needed on Allegations of War Crimes by UK Special Forces", July 12, 2022, https://www.amnesty.org/en/latest/news/2022/07/afghanistan-immediate-investigation-needed-on-allegations-of-war-crimes-by-uk-special-forces/

[184] Section 2 Overseas Operations (Service Personnel and Veterans) Act 2021.

[185] Section 11 (4) (a), (b) of Overseas Operations (Service Personnel and Veterans) Act 2021.

2.5 Crime of Aggression

2.5.1 Historical Evolution of the Crime

The fact that Allies wanted to try the German King Kaiser Wilhelm for his aggressive conduct in context of WWI can be held as the starting point of historical evolution of the crime.[186] During interwar period, drafts of some treaties and some resolutions of League of Nations referred to war of aggression as an international crime. However, former were never ratified and latter did not possess a binding force.[187] The Kellog-Briand Pact 1928 was another significant step towards renunciation of aggressive wars as a facet of national policy and envisaged resolution of disputes through peaceful means.[188] However, this pact did not specifically defined aggression, keeping the term open to a number of different interpretations. This ambiguity along with lack of a strict enforcement mechanism of the obligation did not help prevent WWII.

The Nuremberg trial, for the first time in the history of international criminal law, indicted individuals for crime of aggression, termed crime against peace, and truly shaped this discipline for years to come.[189] The Nuremberg Judgment and subsequent UNGA resolution accepted war of aggression as an international crime with individuals bearing responsibility for it. Moreover, Charter of the International Military Tribunal for the Far East also mentioned waging of war of aggression as a crime.[190]

---

[186] Sergei Sayapin, *The Crime of Aggression in International Criminal Law*, (Asser press: The Hague), 2014, xvii.

[187] Draft Treaty of Mutual Assistance (1923) and the League of Nations Protocol for the Settlement of International Disputes (1924). Resolutions adopted by the League of Nations (1927).

[188] For text, see the Avalon Project. https://avalon.law.yale.edu/20th_century/kbpact.asp (accessed 1st January, 2023).

[189] Sergei Sayapin, *The Crime of Aggression in International Criminal Law*, (Asser press: The Hague), 2014,148.

[190] Article 5(a) of the Charter of IMTFE.

2.5.2 Crime of aggression in the Rome Statute

Crime of aggression was mentioned as one of the core crimes falling under jurisdiction of ICC. However, its definition and the conditions under which the jurisdiction gets triggered was not stated at the time of conclusion of the Rome statute.[191] It was decided that these essentialities will be decided at a later stage and made part of the Rome statute through amendments.[192] Till then the court was not to exercise its jurisdiction over any case even ostensibly of aggression.[193] Crime of aggression was made part of the Rome Statute through amendments adding articles *8bis*, *15bis* and *15ter* at Kampala Review Conference of year 2010. ICC's jurisdiction over crime of aggression was enacted on July 17, 2018.[194]

Actus reus for the crime is committing an act of aggression which "means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations".[195] Moreover, the statute also includes a substantial part from article 3 of the United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974 which had given a detailed definition of aggression. Military invasion, occupation, attack, blockade of ports, a state allowing its territory to be used for aggression, sending mercenaries-all constitute aggression.[196] The planning, preparation, initiation

[191] On the question of definition, one group of countries wanted a definition like the one contained in UNGA resolution A/RES/3314 (XXIX) of 14 December 1974. While other group wanted one which was more precise. There was also rifts on question of role of UNSC, if any, with regard to the crime of aggression. Andreas Zimmerman in *The Rome Statute of the International Criminal Court: A Commentary*, eds. Otto Triiffterer, Kai Ambos (Oxford: Beck & Hart, 2016), 120.

[192] Article 5, para. 2 of Rome Statute.

[193] Andreas Zimmerman in *The Rome Statute of the International Criminal Court: A Commentary*, ed. Otto Triiffterer, Kai Ambos (Oxford: Beck & Hart, 2016), 120.

[194] Dayna Ziukelis, "Establishing the Mens Rea of the Crime of Aggression in the Rome Statute of the International Criminal Court", 24 Austl. Int'l L.J. 135 (2018), 135.

[195] Article 8 bis (2) of the Rome Statute.

[196] Article 8 *bis* (2) of the Rome Statute.

or execution of an act of aggression by those in control of political or military action of a state constitute modes of the crime.

2.5.2.1 Exclusion of Non-State Armed Groups as Perpetrators of Crime of Aggression

Rome Statute does not include use of force by non-state armed groups. Author Sergey Sayapin holds that crime of aggression from very beginning has been linked with a state and although now liability for it has been extended to individuals, link with a state cannot be severed. He also thinks that any non-state armed group cannot commit aggression without explicit or implicit support of a state. Hence, this approach is justified.[197] However, it is not always the case that non-state armed groups have the support of a state. One case in point is the terrorist militant group of ISIS that arose in the political vacuum in the wake of 2003 invasion of Iraq by NATO forces. This group did not have backing of any state, yet waged war against many states and made considerable gains too. Some authors have also criticized this omission of non-state actors and hold the definition of aggression as backward looking, not cognizant of the current reality of international armed conflict.[198]

Author Carrie McDougall, however, lauds this approach. She gives two rationales for this decision. Firstly, crime of aggression is based on prohibition of use of force as found in Article 2(4) of the UN Charter. This article specifically caters to use of force by *states*. Secondly, there is a difference between crime of aggression (perpetrated by state) and terrorism (committed by non-state actors). Purposes of latter are coercion and pressurizing a government by terrorizing

[197] Ibid, 260.
[198] Michael Anderson, "Reconceptualizing Aggression", 60 *D*uke *L*aw *J*ournal 411-451 (2010).

population. This is in stark contrast with aggression. Hence, the decision to exclude violence committed by non-state actors from the ambit of crime of aggression.[199]

2.5.2.2 Threshold Requirement for an Act to Qualify as an Act of Aggression

An attack must be a manifest violation of the UNO Charter. The three components of character, gravity and scale form a cumulative requirement and must be satisfied together to fulfil the condition of 'manifest'.[200] Author Stephen Barriga states that this three tiered criterion excludes small-scale incidents and also acts whose illegal character might be debatable.[201] Latter incidents include instances of states rescuing its nationals from dangerous situations encountered in territory of other states and humanitarian interventions.

A number of commentators have opined that the 'manifest' qualifier suffers from ambiguity and vagueness which in turn violates the principle of *nullum crimen sine lege*. The Rome statute does not mention its definition.[202] Only Elements of Crimes state that 'manifest' is an objective qualification.[203] Given the fact that this qualification is new and was present neither in UN Charter nor in UNGA Resolution 3314,[204] a clear definition should have been provided. In these circumstances, ICC will need to clarify this provision through robust jurisprudence.

2.5.3 Influence of UNO on the Crime of Aggression

---

[199] Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press: New York, 2021), 137.

[200] Document RC/Res. 6, Annex III https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf (accessed 8th January, 2023).

[201] Stefan Barriga and Claus Kreß, *eds. THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION*, (Cambridge University Press: New York, 2012), 29. Some delegates at Special Working Group felt that this threshold will create two types of instances of aggression: one worthy of prosecution and one not.

[202] Oscar Solera, "The Definition of the Crime of Aggression: Lessons Not Learned", 42 Case W. Res. J. Int'l L. 801 (2010), 808.

[203] "This tries to illustrate that the interpretation of the term is independent from subjective opinions and not dependent on the opinion of the actors involved." Robert Heinsch, "The Crime of Aggression After Kampala: Success or Burden for the Future?", Goettingen Journal of International Law 2 (2010) 2, 713-743, 727.

[204] Ibid, 726.

Crime of aggression is inextricably linked with the act of aggression committed by a state so rules of international law governing responsibility of state for unlawful use of force play a pertinent role. Article 2(4) of the UN Charter is the fundamental legal principle in this discipline.[205] Hence, a reference to article 2(4) is necessary while determining lawfulness or otherwise of use of force by a state. Moreover, article 8 bis (1) specifically mentions a "manifest violation of the charter of the United Nations". Hence, a substantive connection to Article 2(4) of the Charter of the United Nations is created.

The second paragraph of Article 8*bis* makes a direct reference to UNGA Resolution 3314 (XXIX) of 14 December 1974 to define "an act of aggression". This is in contrast with other offences falling under jurisdiction of ICC. None of other crimes have made a reference to an instrument of soft law of non-binding nature. Crime of aggression does and elevates it to level of statutory law of a binding nature on its members.[206] Paragraph 2 also includes a list of acts, from sub para (a) to (g), which constitute specific examples of acts of aggression. These acts are reiterated from article 3 of the 1974 definition of aggression.

2.5.4 Role of the UNSC in Determining Occurrence of Crime of Aggression

The prosecutor while starting investigation either pursuant to a state referral or *proprio motu* [207], has to ascertain whether UNSC has made a declaration of aggression.[208] If it has then investigations could be conducted without delay. If not, then too prosecutor can proceed after six

[205] Art. 2(4) prohibits all threat or use of force. There are only two Chartered recognized exceptions to it: individual or collective self-defense (art. 51 of the UN Charter) and use of force authorized by UNSC acting under chapter VII of the UN Charter.

[206] 2 Sergei Sayapin, *The Crime of Aggression in International Criminal Law*, (Asser press: The Hague), 2014, 64.

[207] Article 14 and 15 of the Rome Statute.

[208] Article 15 bis (6) of the Rome Statute.

months of notifying Secretary General of UNO provided UNSC has not deferred such investigation.[209]

Some academics are of the opinion that crime of aggression with regard to its jurisdiction contravene some provisions of the UN Charter.[210] According to this opinion, UNSC alone can make a determinations as to crime of aggression as it is the sole organ which has the responsibility for maintenance of international peace and security.[211] Moreover, granting this responsibility to another international institution will contravene article 103 of the Charter[212] which gives primacy to obligations arising under UN Charter in event of conflict between Charter obligations and that arising under some other international instrument.

These arguments have faced various counter arguments. Author Mark S. Stein differentiates between on-going cases of aggression and those instances where aggression has occurred. He said that latter is the domain of ICC and it can make declaration on it in order to initiate a criminal trial.[213] Moreover, a declaration of aggression under article 39[214] is just an initial step which UNSC has to fulfil before making appropriate recommendations under article 41 and 42. It does not

[209] Article 15 *bis* (8) of the Rome Statute.

[210] Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press: New York, 2021), 262-267.

[211] Article 24 of the UN Charter.

[212] Article 103 of the UN Charter: In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

[213] Mark S. Stein, "The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression?" (2005) 16(1) *Indiana International and Comparative Law Review* 1, 5.

[214] Article 39 of the UN Charter: The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

prevent other international institutions from making this declaration for other purposes, say for initiating criminal trials.[215]

Some scholars of international criminal law cite a number of reasons for actively asserting that UNSC should have no role in state referrals or *proprio motu* jurisdiction. First of all, it is a widely accepted reality that UNSC is a political organization with an agenda shaped by geo-political interests of its members, especially permanent ones. Secondly, sometimes UNSC also refrains from making a declaration of occurrence of aggression in order not to detract from the process of reconciliation by damaging its image of an impartial arbiter.[216] Thirdly, UNSC under article 13 (b) already has power to refer instances it deems involve crime of aggression. Moreover, under article 16 UNSC can also defer investigations or prosecutions for a renewable period of 12 months provided it deems these proceedings as damaging to international peace and security. Thus, there was not any need to give additional powers to UNSC with regard to state referral and *proprio motu* too. However, some scholars hold the opinion that ICC need support of world community for tackling such an issue with implications on maintenance of international peace and security. Hence the need for determination of aggression from another body.[217]

2.5.5 Some Academic Debates on Crime of Aggression in the Rome Statute

2.5.5.1 Nature of the list of Acts of Aggression Stated in Article 8 *bis* : Exhaustive or not?

[215] Mark S. Stein, "The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression?" (2005) 16(1) *Indiana International and Comparative Law Review* 5.

[216] Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press: New York, 2021), 284.

[217] Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, 2nd edition (New York: Cambridge University Press, 2010),331.

There is an academic debate concerning the question whether list of acts mentioned as examples of aggression are exhaustive or not as SWGCA did not conclusively resolved the matter.[218] Author Carrie McDougall is of the opinion that this list is only illustrative and other acts can also constitute acts of aggression provided they fulfil the criteria stated in first sentence of Article 8bis, (2). According to her, words 'any of the following acts' do not suggest that this list is exhaustive. This is in contrast with article concerning war crimes which include the word 'namely' to indicate conclusively that list of war crimes is closed.[219] This view is in contrast with that of various other authors like that of Kai Ambos who held that asserting that list of acts is open-ended is against the principle of legality.[220] Carrie McDougall has concluded the debate amicably by holding that acts mentioned from (a) to (g) are so broad that they would most certainly accommodate any situation.[221]

2.5.5.2 An Argument for Expanding the Scope of the Crime of Aggression

Author Mark Drumbl made an argument about expanding the scope of crime of aggression in terms of proscribed actions and individuals. He stated that by proscribing aggression four interests are being protected, namely: stability, security, human rights, and sovereignty. These interests, according to M. Dumblr, face threats not only from inter-state armed conflict but also from internal armed conflicts, violent activities of terrorists and criminal gangs, debilitating cyber-

[218] June 2007 SWGCA Report, [51]. https://crimeofaggression.info/documents/6/2007_Princeton.pdf (accessed 21st January, 2023).

[219] Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press: New York, 2021),129.

[220] Kai Ambos, "The Crime of Aggression after Kampala" (2010) 53 *German Yearbook of International Law* 463, 487.

[221] Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press: New York, 2021), 131.

attacks and intentional long term environmental damage.[222] Thus, definition of aggression should be expanded to include these threats too.

M. Drumbl also advocated for including more number of individuals, apart from political and military leadership with effective control over policy making, as potential perpetrators of aggression.[223] He drew an analogy with ad hoc tribunals which convicted lower to middle ranking officials for genocide, war crimes and crimes against humanity. These convictions established certain facts and assisted the prosecutors in securing convictions for leadership. Similarly, aggression which is a difficult crime to prove can benefit immensely from prosecution of middle to higher ranking officials for the same offence.

2.5.6 Crime of Aggression in Domestic Legislations

The crime of aggression is a contentious one. Even those states which are parties to the Rome Statute have not ratified amendments giving ICC jurisdiction over this crime. The UK and France[224] are examples of it. The UK has not yet ratified the amendments accepting the jurisdiction of the ICC over crime of aggression. Subsequently, it has not promulgated any domestic legislation on crime of aggression.[225] The UK House of Lords had held in the R v. Jones in 2006 that prosecution for crime of aggression could not be brought as no Act of Parliament has yet criminalized it.[226] Situation in UK is essentially the same even after Kampala Resolution.

---

[222] Mark A. Drumbl, "The Push to Criminalize Aggression: Something Lost Amid the Gains", 41 Case W. Res. J. Int'l L. 321 (2009), 307.

[223] Ibid.

[224] Catherine Gegout, "The Crime of Aggression: The UK and France", May 2, 2018, *Open Democracy*, https://www.opendemocracy.net/en/can-europe-make-it/crime-of-aggression-uk-and-france-time-to-show-leadership-on-pri/ accessed October 30, 2023.

[225] Roger O'Keefe, "The Crime of Aggression and National Law: The UK" (December 4, 2019). SSRN: https://ssrn.com/abstract=3498263, (accessed October 30, 2023)

[226] Alexander Orakhelashvili, "The High Court and the crime of aggression", *Journal on the Use of Force and International Law*, 3.

Conclusion

All the core crimes have experienced significant developments throughout many decades. Part II can be termed as the pinnacle of all these developments as of now. However, eminent scholars also point out room for further reforms. ICC, while trying these core crimes have sought guidance from ad hoc jurisprudence. However, deviations are also present from ad hoc tribunals' approach. In domestic legislation, genocide and crimes against humanity are mostly in conformity with wording of Part II. Exceptions and immunities are provided for war crimes. Crime of aggression is the most contentious one and is not ratified by even two permanent members of UNSC who are parties to the Rome statute.

It can be safely concluded after researching subject matter jurisdiction of the ICC that a number of developments have been consolidated by the Rome statute such as removing war nexus in context of crimes against humanity and referring to gender based violence as one of war crimes. A number of human rights are also covered under subject matter jurisdiction of ICC which is commendable since no permanent international court for protection of human rights exits. It can also be held that as Rome statute was drafted after a lot of discussion and vast majority of countries are signatories to it, it reflects opinion juris of states with regard to crimes present in Part II.

CHAPTER 3

Procedural Law Governing the Relationship of ICC with UNSC and State Parties

3.1 Introduction

ICC is an important organ in international system which needs to have constructive links with the UNSC and states in order to perform its desired function efficiently. UNSC is the principal organ for maintenance of international peace and security. Primary aim of ICC is to eliminate impunity for core crimes which is one of the prerequisites for attainment of world peace. Hence, both organs have alignment in their desired functions. Relationship of ICC and UNSC is governed primarily by power of the latter to refer situations to the former or defer investigations or prosecutions underway. Judicious use of these powers can assist ICC in improving its function. As far as relationship of ICC with states is concerned, complementarity regime plays a significant role which places primary responsibility for prosecution of international crimes on states and invites them to take ownership of the process.

3.2 Procedural Law Governing Relationship of ICC with UNSC

3.2.1 Power of Referral of the UNSC

The power of referral is governed by article 13 (b) of the Rome Statute. It is considered as a successor to the power of UNSC to establish ad hoc tribunals while acting under Chapter VII of the UNO Charter.[227] In this context, ICC is viewed as effectively furthering the aim of UNSC to

[227] Deborah Ruiz Verduzco, "The Relationship between the ICC and the United Nations Security Council", in *The Law and Practice of the International Criminal Court*, ed. Carsten Stahn, (New York: Oxford University Press, 2015), 32. Preamble of the Rome Statute recognizes grave crimes as a threat to international peace, security and well-being of mankind and UNSC is the main organ in international arena with responsibility for maintenance of international peace and security.

maintain international peace and security by holding accountable perpetrators of most heinous crimes.[228] However, excessive use of power of referral, especially when three of the five permanent members are not state parties to Rome Statute, might jeopardize impartiality and independence needed for performing judicial function. ICC could be viewed as an organ furthering political agendas of some powerful Western states.[229] Former ICTY Prosecutor Louise Arbour has criticized UNSC referral in following words:

> "Two referrals by the Security Council to the ICC….have done little to enhance the standing and credibility of the ICC, let alone contribute to peace and reconciliation in their respective regions."[230]

Another compelling argument against referral of situations by UNSC is express exclusion of nationals of certain states not parties to Rome Statue from jurisdiction of ICC. UNSC referred situation in Sudan (2005) through resolution 1593 and Libya (2011) through resolution 1970 to ICC. Both were not members of Rome Statute. These referral resolutions expressly excluded jurisdiction of ICC for nationals of certain non-member states.[231]

Another contention with referral by UNSC is that the concerned resolutions to date did not explicitly term the obligation of non-state parties to cooperate with the ICC. Resolution 1593 and 1970 obligated governmental authorities and other parties to the conflict in Sudan and Libya

[228] The Russian delegate referred to ICC by holding that "the Council has a serious new tool with which to achieve the goal of bringing persons guilty of particularly serious crimes under international law." In Statement of Ambassador Churkin, 2012 Open Debate on Peace and Justice UNSC 6849th meeting, 19. https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_6849.pdf (accessed 24th August, 2023)

[229] Deborah Ruiz Verduzco, "The Relationship between the ICC and the United Nations Security Council", in *The Law and Practice of the International Criminal Court*, ed. Carsten Stahn, (New York: Oxford University Press, 2015), 33

[230] Louise Arbour, 'Doctrine Derailed: Internationalism's Uncertain Future' (International Crisis Group Global Briefing, 28 October 2013), https://www.crisisgroup.org/global/doctrines-derailed-internationalism-s-uncertain-future (accessed 24th August, 2023).

[231] Resolution 1593 (2005), para. 6. Adopted by the Security Council at its 5158th meeting, on 31 March 2005. A quasi-identical provision is contained in para. 6 of SC Resolution 1970 (2011).

respectively to cooperate, yet other states were only "urged" to do so.[232] This provides a loophole for fugitives to exploit and evade prosecution by absconding to non-state parties. This lack of obligation iterated by UNSC referral resolutions run counter to the very reason for which UNSC, and not some other organ of international system, was given the power of referral.[233]

3.2.2 Power of Deferral of the UNSC

Article 16 of the Rome Statute governs deferral by UNSC of any investigations or prosecutions being conducted by ICC. This article governs any potential conflict between maintenance of international peace and attainment of international criminal justice. It resolves this predicament by giving precedence to peace.[234]

This article seems to confer the ultimate power on UNSC through which to control the working of ICC. Due to this power of UNSC, concerns were raised about independence of ICC being undermined. However, this is not an arbitrary power and there are some conditions which need to be fulfilled before UNSC can invoke this article. UNSC has to pass a resolution of deferral under Chapter VII of the UNO Charter which deals with threats to peace, breaches of peace or acts of aggression. This shows that only a compelling reason will allow UNSC to pass such a resolution.

UNSC in Resolution 1422 (2002)[235] and in Resolution 1487 (2003)[236], had deferred any potential investigation or prosecution with regard to personnel, both former or current, of any

[232] Deborah Ruiz Verduzco, "The Relationship between the ICC and the United Nations Security Council", in *The Law and Practice of the International Criminal Court*, ed. Carsten Stahn, (New York: Oxford University Press, 2015), 42.

[233] The UN Security Council and the International Criminal Court, *International Law Meeting Summary, with Parliamentarians for Global Action*, Chatham House, 8. https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/160312summary.pdf

[234] Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, 2nd edition (New York: Cambridge University Press, 2010),170.

[235] Resolution 1422 (2002) Adopted by the Security Council at its 4572nd meeting, on 12 July 2002.

[236] Resolution 1487 (2003) Adopted by the Security Council at its 4772nd meeting, on 12 June 2003.

contributing state in a UN established or authorized mission. Both the resolution did not specify a certain investigation or prosecution nor did it specify a particular threat to international peace. However, in preamble it mentioned the importance of facilitating the ability of states to contribute to UNO peace missions.

There is a need to regularize the use of article 16 to maintain independence and impartiality of ICC. Right of the accused to an expeditious trial is also at stake and so is that of victims to justice and reparation.[237] All of these contentions require a delicate balancing act with more transparency during discussion and decision making stages of UNSC.[238]

3.3 Relation of ICC with State Parties

3.3.1 Complementarity

3.3.1.1 Meaning of Complementarity

The concept of Complementarity forms a cornerstone for interaction of domestic jurisdiction of states and the Court.[239] It is an important part of the admissibility criteria and provides that a case will not be admissible unless the state is unable or unwilling to investigate or prosecute the same. This concept is mentioned in preamble and article 1. It is then elaborated in articles 17-20 of the Rome Statute. It is based on the argument that states have the primary responsibility for prosecuting international crimes with ICC performing a more ancillary role. Complementarity regime is both an acknowledgement of importance given to the concept of state

[237] Deborah Ruiz Verduzco, "The Relationship between the ICC and the United Nations Security Council", in *The Law and Practice of the International Criminal Court*, ed. Carsten Stahn, (New York: Oxford University Press, 2015), 60.

[238] Ibid, 63.

[239] Mohamed M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Leiden: Martinus Nijhoff Publishers, 2008), 158.

sovereignty[240] and to the factors of effectiveness and efficiency since a state where crime has occurred is better suited to try a large number of alleged perpetrators due to better access to evidence.[241] Moreover, this principle helps bridge the 'impunity gap' which may emerge with ICC focusing on officials on higher tiers of command and lower tier going scot free.[242]

3.3.1.2 Complementarity in Practice

Although complementarity gives primacy to the domestic jurisdiction, yet it also ensures that states do not misuse the concept to conduct sham trials in order to shield the alleged perpetrators from prosecution by ICC.[243] Moreover, complementarity enables the Court to fill the gap where states are genuinely not able to carry out trials. ICC pre-trial chamber in the case of Prosecutor v. Thomas Lubanga held that it will not just check whether state with jurisdiction is investigating, trying or has already done so.[244] Rather, it will check whether the state is unwilling or unable genuinely to do so.[245] According to the pre-trial chamber, it is a prerequisite that domestic investigation or trial encompass same person and same charges as are before the Court.[246]

3.3.1.3 Issues with Complementarity Regime

[240] Oscar Solera, "Complementary Jurisdiction and International Criminal Justice", 84 *International Review of the Red Cross* (2002): 145- 172, 147.

[241] Paper on Some Policy Issues before the Office of the Prosecutor, September 2003, p. 4. https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf (accessed 23rd August, 2023).

[242] Ibid, 3.

[243] Mohamed M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Leiden: Martinus Nijhoff Publishers, 2008), 158.

[244] Prosecutor v. Thomas Lubanga Dyilo, Decision on the Prosecutor's Application for a Warrant of Arrest, Art. 58, No. ICC-01/04-01/06-8-US-Corr, 10/02/2006, para. 29. The second limb of admissibility concerned gravity of the situation

[245] Ibid, para. 32.

[246] Ibid, para. 37. Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali-Abd-Al-Rahman, Decision on the Prosecution Application under Article 58(7) of the Statute, No.: ICC-02/05-01/07-1-Corr, 27/04/2007, para 24-25 also held the same prerequisite.

Complementarity regime of the Rome Statute envisages states as having the primary role for prosecution of international core crimes. However, neither this regime nor any other article of the Statute obligate states to establish national jurisdiction over Rome Statute crimes.[247] This weakens the purpose of complementarity as domestic criminalisation is essential for effective complementarity.[248] A number of comments have been made by eminent personalities of international criminal law which stresses upon the obligation of the states to prosecute but these are couched in terms of moral duties or responsibility as compared to having legal sanctions.[249] Moreover, Rome statute does not provide for inter-state cooperation of state parties.[250] Resultantly, states cannot cooperate effectively especially in absence of a multilateral treaty regime for cooperation on core crimes.[251]

3.3.1.4 Positive Aspect of Complementarity Which Counters Influence of UNSC

When UNSC refers a situation to ICC, even then the court checks admissibility under article 17 of the Rome Statute. An example of non-admissibility despite referral of UNSC was the case of *Gaddafi and Al- Senussi* arising from the situation in Libya. ICC acknowledged control of Libya over one of the accused and hence deemed the case inadmissible.[252]

3.4 Factors Straining Relationship of ICC with States and the UNSC

[247] Dire Tladi**, "**Complementarity and cooperation in international criminal justice: Assessing initiatives to fill the impunity gap," *Institute for Security Studies* paper 227 (2014) Policy paper, 3.

[248] Ibid.

[249] Ibid.

[250] Ward Ferdinandusse, "Improve interstate cooperation for the national prosecution of international crimes: towards a new treaty?" *American Society of International Law* 18, https://www.asil.org/insights/volume/18/issue/15/improving-inter-state-cooperation-national-prosecution-international accessed October 30, 2023.

[251] Ibid.

[252] Otto Triefftерer, Michael Bohlander, *The Rome Statute of the International Criminal Court: A Commentary*, eds. Otto Triefftерer, Kai Ambos (Oxford: Beck & Hart, 2016), 19.

ICC faces a number of challenges while performing its function of eradicating impunity for core crimes of international concern. ICC cannot function at its optimum without cooperation by states. While, such assistance is more often forthcoming, sometimes it is not so. Moreover, lack of cooperation by UNSC evidenced through non-member status of three of its permanent members poses further problems as UNSC is undoubtedly a powerful organ in international community. Further, attitude of UNSC has also varied according to changes in political agenda of P5. It erodes credibility of ICC by fanning allegations that the court is just another instrument of powerful western states wielded against weaker ones. The court also faces difficulties at evidence gathering and investigation stages. It has also faced tensions inherent in the justice versus peace debate. This chapter will delineate different hurdles experienced by ICC.

3.4.1 Non-cooperation by States with the ICC

Report of the Court on issue of cooperation stated that generally states' approach is forthcoming.[253] However, outstanding arrest warrants indicate lack of cooperation in some particular instances.[254] The Court faces particular difficulties in case of tracing and seizure of assets.[255] According to Fatou Bensouda, previous Chief prosecutor of ICC, States particularly resists cooperation in case of UNSC referral as the state objects to the referral and jurisdiction of ICC in such instances.[256]

3.4.2 Lack of Cooperation by UNSC with the ICC

[253] Report of the Court on Cooperation, ICC Doc. ICC-ASP/18/16, 21 October 2019, [25].
[254] Ibid [44].
[255] Ibid [54].
[256] Fatou Bensouda, "Challenges Related to Investigation and Prosecution at the International Criminal Court" in *International Criminal Justice: Law and Practice from Rome Statute to its Review*, ed. Roberto Bellelli (Surrey: Ashgate Publishing Limited, 2010), 141.

The Security Council also shows less than cooperative behavior towards ICC. This is evident by the fact that only two permanent members, France and UK, are member parties to the Rome treaty. USA, Russia and China are not member states. Although UNSC referred the situation in Darfur, Sudan in 2005 and of Libya in 2011 to ICC, yet it did not give any meaningful diplomatic response to referrals made by ICC about non-cooperation of states.[257]

3.4.3 Hostile attitude of the USA towards ICC

Attitude of USA towards ICC has been particularly hostile. It withdrew its signature from the Rome Statute in 2002. Moreover, it also passed an Act, American Service-members Protection Act of 2002. This Act authorizes President of the USA to take all possible measures including an armed intervention to take a US citizen or that of an ally out of ICC custody. That is why this Act has been termed as The Hague invasion Act. This Act also prevents any court in the USA from extraditing any USA citizen for prosecution before ICC. Curtailing military support to the states who have ratified the Rome Statute is also one provision of the Act.[258]

USA also went on a campaign to sign bilateral non-surrender agreements with other states. This prevented even the state parties from extraditing USA citizens for prosecution before ICC.[259] According to USA, this policy is in accordance with article 98 of the statute.[260] However, it has been held by many academics that article 98 only provided recognition to those agreements which

---

[257] Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press: New York, 2021), 374.

[258] American Service-members Protection Act of 2002 https://www.govinfo.gov/content/pkg/COMPS-3074/pdf/COMPS-3074.pdf this Act, however, does not prevent USA cooperating with the ICC in its investigations with regard to other countries.

[259] Jason Ralph, *Defending the Society of States* (Oxford: Oxford University Press, 2007), 156.

[260] Article 98 Cooperation with respect to waiver of immunity and consent to surrender (2): The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

had been concluded before entry into force of the Rome statute. This article should not be seen as a permission to enter into agreements as a way to hinder work of the court.[261]

Under Trump administration, threats to sanction prosecutor and different officials of ICC were issued. This was because chief prosecutor, Fataou Bensouda, had indicated an inclination to open investigations in USA's attack, invasion and occupation of Afghanistan. The then secretary of state and national security adviser threatened to arrest ICC officials and held ICC to be a court without jurisdiction, legitimacy and authority.[262]

3.4.4 Allegations of ICC being political

Subject matter jurisdiction of ICC consists of most serious crimes which are usually committed by official support. Resultantly, there is concerted effort by governments to conceal their involvement in these international crimes. In order to do so they accuse ICC of political inclinations and bipartisan attitude. This can mar reputation of ICC.[263] In this context, ICC becomes victim of power politics.[264] Consequently, human rights and justice become its casualties.

3.4.5 Hurdles During Investigation and Prosecution

Geographical distance between ICC and the concerned situation creates logistics and financial challenges as investigation teams have to travel to war torn areas to gather evidence.[265] Moreover, this geographical distance also creates issues of visibility of justice seen to be done in

[261] Jason Ralph, *Defending the Society of States* (Oxford: Oxford University Press, 2007), 156.

[262] Rebecca Gordon, Why Are We Above International Law?, THE NATION (Mar. 26, 2019) https://www.thenation.com/article/archive/rebecca-gordon-international-criminal-court-john-bolton/

[263] Louise Arbour,'Doctrine Derailed: Internationalism's Uncertain Future' (International Crisis Group Global Briefing, 28 October 2013).

[264] Key note by H.E. Judge Dr. jur. h. c. Hans-Peter Kaul Second Vice-President of the International Criminal Court On 8 August 2011 delivered at Salzburg Law School on International Criminal Law, 9.

[265] Fatou Bensouda, "Challenges Related to Investigation and Prosecution at the International Criminal Court" in *International Criminal Justice: Law and Practice from Rome Statute to its Review*, ed. Roberto Bellelli (Surrey: Ashgate Publishing Limited, 2010), 138.

order to assuage the sufferings of victims. Besides these hurdles, prosecutors also have to contend with cultural sensitivities[266] and language barrier. Sometimes, sufferings of victims cannot be accurately translated into the four neat corners of legal language.[267]

3.4.6 Tension Between Investigations/Prosecutions and Conflict Resolution Initiatives

Arguments of peace versus justice have also posed significant hurdles for ICC.[268] Justice and peace occasionally reinforce each other.[269] However, there are also some situations where perusal of justice can jeopardize chances of peace.[270] This can happen in transitional societies emerging from conflict.[271] In these situations, alleged perpetrators of crime may still retain considerable power.[272] In some instances, prospects of a future criminal trial can dissuade alleged perpetrators from pursuing peace talks.[273] In this context, ICC may face challenges in carrying out its work as an opinion can emerge that ICC is impeding progress towards peace by its one-dimensional focus on conducting criminal trials at the expense of exploring alternative course of actions.

3.4.7 Limited use of Powers of the Prosecutor to Initiate Investigations-Proprio Motu

[266] Ibid, 139. This is particularly so in context of child soldiers and sexual assaults.
[267] Ibid, 139. This was experienced while investigating situations in Uganda, DRC and Sudan.
[268] Leslie Vinjamuri, "The ICC and the Politics of Peace and Justice" in *The law and Practice of International Criminal Court*, ed. Carsten Stahn (Oxford: Oxford University Press, 2015) 14.
[269] Ibid, 16.
[270] Diba Majzub, "Peace or Justice? Amnesties and the International Criminal Court," *Melbourne Journal of International Law* 3 (2002),
[271] Ibid, 3.
[272] Ibid, 5.
[273] Ibid.

Till date, prosecutor has used *proprio motu* powers in a limited number of situations: Kenya[274], Cote de Ivoire[275], Georgia[276], Burundi[277], Myanmar[278] and Afghanistan[279]. Some writers are of the view that pre-trial chamber follow a more stringent criterion while authorizing the prosecutor to pursue proprio motu investigations.[280] It in fact defines the scope of investigation whereas it is only permitted to authorize the investigation.[281]

3.5 Possible Reforms in The Rome Statute of ICC to Improve Cooperation of States and the UNSC with the ICC

A number of reforms proposed by different authors were considered throughout this thesis. This chapter will exclusively focus on some reforms in order to increase legitimacy and independence of ICC.

3.5.1 Creation of Ad Hoc Chambers

Ad hoc chambers which consist of both international and domestic judges could be considered for addition in the court structure. Judges from countries under investigation can be inducted. This will require an amendment in the Rome Statute.[282] The rationale behind this

---

[274] Robert Dubler and Matthew Kalyk, *Crimes Against Humanity in the 21st Century: Law Practice and Threats to International Peace and Security* (Boston: Brill, 2018), 346.

[275] Ibid, 348.

[276] Ibid, 352.

[277] Andrés Morales, The Scope of Proprio Motu Investigations at the International Criminal Court and Why We Should Care, May 11, 2021, *Jus Cogens: The International Law Podcast & Blog.* https://juscogens.law.blog/2021/05/11/the-scope-of-proprio-motu-investigations-at-the-international-criminal-court-and-why-we-should-care/Accessed October 30, 2023.

[278] Ibid.

[279] ICC, "Situation in the Islamic Republic of Afghanistan". https://www.icc-cpi.int/afghanistan accessed October 30, 2023.

[280] Andrés Morales, The Scope of Proprio Motu Investigations at the International Criminal Court and Why We Should Care, May 11, 2021, Jus Cogens: The International Law Podcast & Blog. https://juscogens.law.blog/2021/05/11/the-scope-of-proprio-motu-investigations-at-the-international-criminal-court-and-why-we-should-care/Accessed October 30, 2023.

[281] Ibid.

[282] As per Article 122 of the Rome Statute, an amendment of an institutional nature could be proposed by any State Party to allow for the participation of ad hoc judges.

proposal is to increase legitimacy of the ICC among states, particularly those who consider ICC stocked with elements hostile to their national interests. This amendment can improve rate of accession to the court as well.[283] The domestic judges due to their knowledge about local languages and culture can help make hybrid chamber more efficient.[284]

3.5.2 Countering Influence of UNSC

The power of deferral can be curtailed by incorporating changes in the Rome Statue which gives the Assembly of State parties (ASP) the power to override this deferral, if being used continuously by UNSC, by adopting a resolution to this effect with a three-fourth majority. Although it is difficult to amend the statute, yet it is a worthwhile proposal if ASP wants to preserve independence of ICC.

Conclusion

A discussion on relationship of ICC with UNSC and states have revealed positive aspects of these concepts. However, there is room for improvement too. It can be concluded that there is a need for UNSC to own the investigations or prosecutions launched subsequent to its referral by obligating all UNO member states to cooperate with ICC. Moreover, adoption of a consistent, criteria driven and transparent approach to deferral will go a long way in improving credibility and independence of UNSC and ICC respectively. Furthermore, complementarity is both an important and realistic concept cognizant of limitations of ICC vis-à-vis finances and work load of ICC but issue of lack of any obligation for domestic criminalization needs to be solved.

[283] "Modernising the International Criminal Court: Crimes against the Environment, Trafficking in Human Beings, Hybrid Justice and Corporate Accountability", Report by Parliamentarians for Global Action, 8.

[284] Ibid, 10.

This chapter has also discussed various hurdles being faced by ICC. This discussion showed that while states might desire to remove impunity, sometimes they are reluctant to cooperate with ICC when confronted with questions of sovereignty or domestic political considerations. Moreover, USA has been actively engaged in undermining any action taken by ICC against its military personnel or officials. Fluctuation in attitude of UNSC towards ICC in accordance with its political interests has not bode well for credibility of ICC. There are also some hurdles which are inherent in the structure of the court such as geographical distance between its seat in Hague and the situations under investigation. This makes evidence-gathering and investigation an arduous process.

Looking at current working of ICC, one can safely conclude that it needs to increase its legitimacy among some nations especially those belonging to African Union. Hence a proposal to include ad hoc chambers with judges from countries under investigation. Moreover, with changing global circumstances, subject matter jurisdiction can be widened to accommodate current issues of concern. Lastly, ICC needs to preserve its independence from UNSC while also maintaining workable cooperation with it.

CHAPTER 4

Conclusion and Recommendations

4.1 Conclusion

Part II of the Rome Statute 1998 is a particularly important component of this international instrument. It delineates the four core crimes. It also mentions the relationship of ICC with UNSC and the States. A number of academic debates surround these core crimes. These were dealt with in chapter number 2 of this thesis. Rome statute not only consolidates many elements of these core crimes but also introduces a number of developments. Jurisprudence of the ICC, guided by that of ad hoc tribunals, has played an important role in explaining different elements of the core crimes.

Relationship of ICC with UNSC is shaped by the latter's power of referral and deferral of investigations and prosecutions. A balance needs to be maintained while exercising these powers in order to allow ICC to maintain its legitimacy and independence. The concept of complementarity governs relationship of ICC with state parties. It acknowledges the primacy of concept of state sovereignty.

ICC also grapples with a number of challenges. Allegations of bias and politicization are cast by those states with situations being investigated by ICC. Non-cooperation by UNSC is another issue where three of its permanents members are not members of ICC. Amendments giving ICC jurisdiction over Crime of aggression have not been ratified by the UK and France.

Many academics advocate for widening the subject matter jurisdiction of ICC. However, further research is needed in this area as this reform can be difficult for some states to accept. Inclusion of ad hoc judges from states under investigations and increasing the powers of ASP to counter balance those of UNSC are some of the reforms worth considering.

Signing of the Rome Statute on 17th July, 1998 was a culmination of all the efforts spanning many decades. Unfortunately, this venture has started without the support of some major powers which are host to large percentage of world population and also have considerable influence on world politics. Genuine concerns of these states should have been more adequately addressed at the drafting stage. However, hope should not be shelved about these states becoming signatories in the future. In order to do so, Assembly of State Parties (ASP) should periodically engage with these states. Discussions on concerns of states should continue. By solving genuine concerns of these states, membership of the ICC can increase. This will in turn increase legitimacy of the court's work.

All the core crimes have experienced significant developments throughout many decades. Part II can be termed as the pinnacle of all these developments as of now. However, eminent scholars also point out room for further reforms. ICC, while trying these core crimes have sought guidance from ad hoc jurisprudence. However, deviations are also present from ad hoc tribunals' approach. In domestic legislation, genocide and crimes against humanity are mostly in conformity with wording of Part II. Exceptions and immunities are provided for war crimes. Crime of aggression is the most contentious one and is not ratified by even two permanent members of UNSC who are parties to the Rome statute.

It can be safely concluded after researching subject matter jurisdiction of the ICC that a number of developments have been consolidated by the Rome statute such as removing war nexus in context of crimes against humanity and referring to gender based violence as one of war crimes. A number of human rights are also covered under subject matter jurisdiction of ICC which is commendable since no permanent international court for protection of human rights exits. It can

also be held that as Rome statute was drafted after a lot of discussion and vast majority of countries are signatories to it, so it reflects opinion juris of states with regard to crimes present in Part II.

A discussion on relationship of ICC with UNSC and states have revealed positive aspects of these concepts. However, there is room for improvement too. It can be concluded that there is a need for UNSC to own the investigations or prosecutions launched subsequent to its referral by obligating all UNO member states to cooperate with ICC. Moreover, adoption of a consistent, criteria driven and transparent approach to deferral will go a long way in improving credibility and independence of UNSC and ICC respectively. Furthermore, complementarity is both an important and realistic concept cognizant of limitations of ICC vis-à-vis finances and work load of ICC but issue of lack of any obligation for domestic criminalization needs to be solved.

The discussion showed that while states might desire to remove impunity, sometimes they are reluctant to cooperate with ICC when confronted with questions of sovereignty or domestic political considerations. Moreover, USA has been actively engaged in undermining any action taken by ICC against its military personnel or officials. Fluctuation in attitude of UNSC towards ICC in accordance with its political interests has not bode well for credibility of ICC. There are also some hurdles which are inherent in the structure of the court such as geographical distance between its seat in Hague and the situations under investigation. This makes evidence-gathering and investigation an arduous process.

Looking at current working of ICC, one can safely conclude that it needs to increase its legitimacy among some nations especially those belonging to African Union. Hence a proposal to include ad hoc chambers with judges from countries under investigation. Moreover, with changing global circumstances, subject matter jurisdiction can be widened to accommodate

current issues of concern. Lastly, ICC needs to preserve its independence from UNSC while also maintaining workable cooperation with it.

4.2 Answers to Research Questions

i) Comparison of significant cases of ICC with that of previous international criminal tribunals. Is ICC opting for a similar approach while interpreting norms of international criminal law? This question will help to ascertain any developments introduced by the International Criminal Court in international criminal law.

This question was answered in chapter II. ICC has sought guidance from Jurisprudence of ad hoc tribunals while explaining a number of elements of different crimes. This is understandable given the overlaps between subject matter jurisdiction. Matters where ICC followed approach of ad hoc tribunals included: *dolus specialis* (special intention) of genocide, disjunctive Crimes against Humanity elements of either widespread or systematic, definition of systematic, and definition of civilians for purposes of war crimes. However, significant deviations could also be found. ICC in the *Al Bashir* case categorically held the list of protected groups for crime of genocide to be exhaustive. This was at variance with views of ICTR in *Akayesu* case.

ii) How independent is the International Criminal Court from influence of the United Nations Security Council? This question will be answered by researching implementation of the United Nations Security Council's power of referral and deferral of situations to the International Criminal Court.

This was answered in chapter III. United Nations Security Council has referred situation in Darfur to ICC in 2005 and in Libya in 2011. China and Russia vetoed a resolution referring the situation in Syria to the ICC on 22 May 2014 due to political considerations. UNSC has passed two

resolutions of deferral. They did not contain any express reference to any investigation or prosecution. Rather these were adopted to remove personnel of non-member states participating in any UNSC mandated military operations from jurisdiction of ICC. After researching this question, it can be stated that exercise of UNSC's power of referral and deferral is marred by political considerations. There is also a lot of inconsistency where a number of situations such as Palestine and Kashmir is ignored. In short, the international criminal court is not completely a political tool of the United Nations Security Council. However, cooperation from UNSC which can increase competence of ICC is still lacking.

iii) How proactive has been the role of prosecutor under article 15?

This question was answered in chapter III. The role of prosecutor has not been overly active. However, it has not entirely abdicated its responsibilities. Pre-trial chamber on its part has strictly curtailed the scope of investigations arising from article 15. Prosecutor started investigations in Kenya, Ivory Coast, Georgia, Burundi, Myanmar, Afghanistan. However, some serious situations such as Kashmir and Palestine have not been investigated.

iv)What legislative measures have been passed by states for repression of international crimes? How do these measures compare with that of Part II of the Rome Statute?

This question was answered in chapter II. Focus was on domestic legislation of P5 countries. Three out of them are not members of ICC. However, penalization of international core crimes in domestic law could have highlighted their status as responsible members of international community. The crime of genocide and crimes against humanity are found in almost all the domestic legislations reviewed. They are also largely in conformity with the wordings of Part II of the Rome Statute. The US has strengthened its domestic legislation on war crimes in wake of Russian military offensive on Ukraine. Russia on its part has provided safeguards under domestic

law to any acts done in the interest of the country. The UK has also included provisions in its law to shield its own armed personnel. As far as crime of aggression is concerned, even the UK and France have not ratified the amendments giving jurisdiction to ICC.

4.3 Recommendations

1. Subject matter jurisdiction of ICC can be expanded to include crimes such as ecocide and human trafficking. This can make Rome Statute more in line with the changing circumstances of the contemporary world. Both climate change and human trafficking have become increasingly important issues in today's world.
2. An amendment to include non-state actors as perpetrators of crime of aggression can be added. A parallel can be drawn with the crimes against humanity where non-state organizations can be its perpetrators. Such an amendment will be more reflective of changing circumstances of the world where non-state actors such as Islamic State of Iraq and Syria (ISIS) can perpetrate large scale aggression. This will better enable ICC to achieve its aim of reducing impunity for heinous crimes.
3. There can be an amendment in the Rome statute providing for inter-state cooperation among state parties. This provision will enable states to cooperate on issues such as evidence gathering, extradition and execution of arrest warrants. Consequently, impunity for core crimes will be curbed.
4. There can be an amendment in provisions dealing with complementarity regime to obligate state parties to criminalize core crimes within domestic legislation. Ambit of this criminalization should not be narrower than that of the Rome statute. Domestic criminalization will make complementarity regime more effective, reduce impunity and will lead to improved realization of the aims of ICC.

5. Amendments in article dealing with UNSC's power of referral can also be considered, whereby UNSC obligates non-state parties to cooperate fully with ICC. This will prevent alleged offenders from absconding to non-member states, help in gathering of evidence, execution of arrest warrants and effective implementation of law.
6. There should also be a more criteria driven approach for exercising UNSC's power of deferral. This criterion can be decided by UNSC, prosecutor and ASP through discussions. This criterion can either be included in the Rome statute through an amendment or can exist as a separate Understanding issued subsequent to the discussions. This will enable ICC to retain its independence and legitimacy. More states will also become party to the Rome statute when they realize that ICC is not a political tool of UNSC.
7. An amendment can be considered to curtail UNSC from potential continuous renewal of resolution of deferral. Through this amendment, Assembly of State Parties may be given the power to quash any resolution when three-fourth members of the Assembly of State Parties votes in this favour. Consequently, ICC will retain its independence from UNSC. It will perform its functions to curb impunity for heinous crimes.
8. States parties to the Rome Statute should legislate to have jurisdiction over alleged offenders who reside on their territory. This will prevent the territories of state parties from becoming safe havens for absconders. Resultantly, ICC will be able to better perform its functions of prosecuting individuals for criminal behavior.
9. It is also worth considering that Assembly of State Parties engage constructively with states not parties to the Rome statute. Assembly of State Parties members can exchange ways in which core crimes have been incorporated in their domestic legislations. These discussions can also eliminate any reservations non-members might have with regard to ICC. Rate of

accession to Rome statute can be increased in this way which will in turn increase legitimacy of the ICC and its work.

10. Assembly of State Parties can enable secretariat of ICC to initiate more outreach programmes for the communities affected by the core crimes. An increase in involvement of the communities in the working of the court will increase support for it at the grass root levels. This support can be an effective counter against allegations of ICC performing a political role.

Annexure

PART 2.
JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5[1]
Crimes within the jurisdiction of the Court

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

Article 6
Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Article 7
Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

1 Paragraph 2 of article 5 ("The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.") was deleted in accordance with

2. For the purpose of paragraph 1:

   (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

   (b) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

   (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

   (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

   (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

   (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

   (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

   (h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

   (i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8[2]
War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

   (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

      (i) Wilful killing;

      (ii) Torture or inhuman treatment, including biological experiments;

      (iii) Wilfully causing great suffering, or serious injury to body or health;

      (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

      (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

      (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

2 Paragraphs 2 (e) (xiii) to 2 (e) (xv) were amended by resolution RC/Res.5 of 11 June 2010 (adding paragraphs 2 (e) (xiii) to 2 (e) (xv)).

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(xiii) Employing poison or poisoned weapons;

(xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 8 *bis*[3]
Crime of aggression

1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

3 Inserted by resolution RC/Res.6 of 11 June 2010.

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Article 9[4]
Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 *bis*. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

   (a) Any State Party;

   (b) The judges acting by an absolute majority;

   (c) The Prosecutor.

   Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 11
Jurisdiction ratione temporis

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12
Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

   (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

   (b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

4 As amended by resolution RC/Res.6 of 11 June 2010 (inserting the reference to article 8 *bis*).

Article 13
Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14
Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 15
Prosecutor

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental 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.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 15 *bis*[5]
Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.

2. 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.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, 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.

5 Inserted by resolution RC/Res.6 of 11 June 2010.

4. 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 withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.

6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article16.

9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Article 15 *ter*[6]
Exercise of jurisdiction over the crime of aggression (Security Council referral)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.

2. 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.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, 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.

4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Article 16
Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 17
Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

   (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

6 Inserted by resolution RC/Res.6 of 11 June 2010.

(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, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 18
Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

Article 19
Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.
2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
   (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
   (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
   (c) A State from which acceptance of jurisdiction is required under article 12.
3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.
4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).
5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.
6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.
7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.
8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:
   (a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;
   (b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and
   (c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.
9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.
10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.
11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Article 20[7]
Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
   (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
   (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Article 21
Applicable law

1. The Court shall apply:
   (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
   (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
   (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

7 As amended by resolution RC/Res.6 of 11 June 2010 (inserting the reference to article 8 *bis*).

Select Bibliography

Articles

Alejandro, Teitelbaum. "Statute of the International Criminal Court: A Critique." Social Justice 26, no. 4 (78) (1999): 107-14.

Ambos, Kai. “The Crime of Aggression after Kampala” (2010) 53 German Yearbook of International Law (2010): 463-487.

Anderson,Michael. “Reconceptualizing Aggression.” 60 Duke Law Journal 60 (2010): 411-45.

Bassiouni, M. Cherif. “Negotiating the Treaty of Rome on the Establishment of an International Criminal Court” Cornell International Law Journal 32 (1999): 443-472.

Bassiouni, M. Cherif. “Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice” Virginia Journal of International Law 42 (2001): 82-166.

Bassiouni, M. Cherif. “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court.” 10 Harv. Hum. Rts. J. 11, 62 (1997)

Boister, Neil. "Treaty Crimes, International Criminal Court?" New Criminal Law Review: An International and Interdisciplinary Journal 12, no. 3 (2009): 341-65.

Cassese, Antonio. “The Statute of the International Criminal Court: Some Preliminary Reflections.” European Journal of International Law 10 (1999): 144-172.

Cenap, Cakmak. "The International Criminal Court in World Politics." International Journal on World Peace 23, no. 1 (2006): 3-40.

Clark, Roger S. “Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court, Kampala, 31 May-11 June 2010.” Goettingen Journal of International Law 2 (2010): 689-710.

Dörmann, K. “War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes” *Max Planck Yearbook of United Nations Law Online, 7*(1) (2003), 341-407**.**

Drumbl, Mark A. “The Push to Criminalize Aggression: Something Lost Amid the Gains.” Case Western Reserve Journal of International Law 41 (2009): 291-320.

Elshtain, Jean Bethke. "The Third Annual Grotius Lecture: Just War and Humanitarian Intervention." American University International Law Review 17, no. 1 (2001): 1-25.

Heinsch, Robert. “The Crime of Aggression After Kampala: Success or Burden for the Future?” Goettingen Journal of International Law 2 (2010): 713-743.

Kirsch, Phillipe. “The Role of the International Criminal Court in Enforcing International Criminal Law”, American University International Law Review 22 (2007): 539-547.

Kreß, Claus. “The ICC’s First Encounter with the Crime of Genocide: The Case against Al Bashir.” https://kress.jura.uni-koeln.de/sites/iipsl/Forschung/Anlagen_Juli_2018/A8.pdf

Kranzbuhler, Otto. “Nuremberg Eighteen Years Afterwards,” DePaul Law Review 14 (1965): 333-347.

Lee,Roy. “The International Criminal Court: Contemporary Perspectives and Prospects for Ratification”, 16 N.Y.L. Sch. J. Hum. Rts. 16 (2000): 500-533.

Mazub, Diba Majzub. “Peace or Justice? Amnesties and the International Criminal Court,” Melbourne Journal of International Law 3 (2002): 1-33

McDonald, Gabrielle Kirk. “The International Criminal Tribunals: Crime and Punishment in the International Arena” Columbia Journal of Transnational Law (2000): 668-688.

Mindua, Antoine Kesia-Mbe.“Article 16 of the Rome Statute and its Impact on Independence and Autonomy of International Criminal Court”.

Pauls, Andreas. “Second Thoughts on the Crime of Aggression”, *The European Journal of International Law* Vol. 20 no. 4, (2009):1117-1128.

Prakash, K.P. "International Criminal Court: A Review." Economic and Political Weekly 37, no. 40 (2002): 4113-4115.

Sadat, Leila Nadya. “Reforming the International Criminal Court: ‘Lean In’ or ‘Leave’.” Washington University Journal of Law & Policy. Vol. 62 (2020): 51-78.

Scharf, Michael P. "Universal Jurisdiction and the Crime of Aggression" (2012) 746 Case Western Reserve Journal of International law 53 (2012): 358-393.

Solera, Oscar. “The Definition of the Crime of Aggression: Lessons Not Learned.” 42 Case Western Reserve Journal of International Law 42 (2010): 801-825.

Aggression: How Exclusive is the Security Council’s Power to Determine Aggression?” Indiana International and Comparative Law Review 16 (2005): 1-36.

Sterio, Milena. “The International Criminal Court: Current Challenges and Prospect of Future Success. “Case Western Reserve Journal of International Law 52 (2020): 467-480.

Sunga, Lyal. “The Crimes Within the Jurisdiction of the International Criminal Court” European Journal of Crime, Criminal Law and Criminal Justice (1998): 377-402.

Tladi, Dire. **"**Complementarity and cooperation in international criminal justice: Assessing initiatives to fill the impunity gap," *Institute for Security Studies* paper 227 (2014).

Tournaye, Cécile. "Genocide Intent before ICTY." The International and Comparative Law Quarterly Vol. 52, No. 2 (Apr., 2003): 447-462.

Tuzmukhamedov, Bakhtiyar. "The implementation of international humanitarian law in the Russian Federation." ICRC Current Issues and Comments.

Verdirame, Guglielmo. "The Genocide Definition in the Jurisprudence of the ad hoc Tribunals." The International and Comparative Law Quarterly Vol. 49, No. 3 (Jul., 2000): 578-598.

Vernon, Richard. "What is Crime Against Humanity?", The Journal of Political Philosophy, Vol. 10, number 3 (2002): 231-249.

Williams, Glanville. "Convictions and Fair Labelling." The Cambridge Law Journal Vol. 42, No. 1 (Apr., 1983): 85-95.

Ziukelis, Dayna Ziukelis. "Establishing the Mens Rea of the Crime of Aggression in the Rome Statute of the International Criminal Court", Austl. Int'l L.J. 24, (2018**):** 63-78.

Books

Barriga, Stefan. Claus Kreß, eds. *THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION*. New York: Cambridge University Press, 2012.

Barriga, Stefan, Claus Kreß, eds. *Crime of Aggression: A Commentary*. Cambridge: Cambridge University Press, United Kingdom, 2017.

Bassiouni, M. Cheriff, William A. Schabas, eds. *The Legislative History of the International Criminal Court*, 2nd ed. Leiden: Brill Nijhoff, 2016.

Bassiouni, M. Cherif. *Crimes Against Humanity: Historical Evolution and Contemporary Application*. New York: Cambridge University Press, 2011.

Bellelli, Roberto, ed. *International Criminal Justice: Law and Practice from Rome Statute to its Review*. Surrey: Ashgate Publishing Limited, 2010.

Cassese, Antonio. *Cassese's International Criminal Law*. Oxford: Oxford University Press, 2003.

Cassese, Antonio and Paola Gaeta, eds., *Cassese's International Criminal Law*, 3rd ed., Oxford University Press: Oxford, 2013.

Cassese, Antonio, Paola Gaeta and John R.W.D. Jones, eds. *The Rome Statute of the International Criminal Court: A Commentary (Oxford: Oxford University Press, 2002).*

Crowe, David M. *War Crimes, Genocide, and Justice: A Global History*. New York: Palgrave Macmillan, 2014.

Cryer, Robert. et al, eds. *An Introduction to International Criminal Law and Procedure*. New York: Cambridge University Press, 2010.

Dinstein, Yoram. *War, Aggression and Self Defence*. Cambridge: Cambridge University Press, 2001.

Dormann, Knut, Louise Doswald-Beck, Robert Kolb. *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*. Cambridge: Cambridge University Press, 2003.

Dubler, SC Robert, Klayk Mathew. *Crimes against Humanity in the 21st Century: Law, Practice and Threats to International Peace and Security*. Brill: The Netherlands, 2018.

Engdal, Ola, Pla Wrange, eds. *Law at War: The Law as it Was and the Law as it Should Be*. Leiden: Martinus Nijhoff Publishers, 2008.

El Zeidy, Mohammed M. *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*. Leiden: Martinus Nijhoff Publishers, 2008.

Henckaerts, Jean-Marie, Louise Doswald-Beck. *ICRC Customary International Humanitarian Law*. New York: Cambridge University Press, 2005.

Klamberg, Mark. ed. *Commentary on the Law of the International Criminal Court*. Brussels: Torkel Opsahl Academic EPublisher, 2017.

Lemkin, Raphael. *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress.* Carnegie Endowment for International Peace, 1944.

Ralph, Jason. *Defending the Society of States*. Oxford: Oxford University Press, 2007.

McDougall, Carrie. *The Crime of Aggression under the Rome Statute of the International Criminal Court*. New York: Cambridge University Press, 2021.

Moir, Lindsay. *The Law of Internal Armed Conflict*. Cambridge: Cambridge University Press, 2004.

Munir, Muhammad. *The Law of War and Peace in Islam: Causes and conduct of jihad and non-state Islamic actors under Islamic law*. Islamabad: IRD, 2019.

Murphy, Sean D. *The Crime of Aggression at the ICC* in Oxford Handbook on the Use of Force, Marc Weller, ed., Oxford: Oxford University Press, 2013.

Neserssian, David L. *Genocide and Political Group*. New York: Oxford University Press, 2010.

Odello, Marco, Piotr Łubiński, eds. *The Concept of Genocide in International Criminal Law: Developments after Lemkin*. Odello. London: Routledge, 2020.

Pompe, Cornelis Arnold. *Aggressive War: An International Crime*. Martinus Nijhof, 1953.

Provost, R. P. Akhavan, eds. *Confronting Genocide, Ius Gentium*: *Comparative Perspectives on Law and Justice*. London: Springer, 2011.

R.S. Lee. ed., *The International Criminal Court*: *The Making of the Rome Statute*. The Netherlands: Brill, 1999.

Sayapin, Sergey. *The Crime of Aggression in International Criminal Law*. The Hague: Asser press, 2014.

Schabas, William A. *Genocide in International Law: The Crime of Crimes*, 2nd ed. Cambridge: Cambridge University Press, 2009.

Stahn, Carsten, ed. *The Law and Practice of the International Criminal Court*. New York: Oxford University Press, 2015.

Trieffterer, O, K. Ambos, ed. *The Rome Statute of the International Criminal Court: A Commentary*. Oxford: Beck & Hart, 2016.

Werle, Gerhard, Florian Jebberger, eds. *Principles of International Criminal Law*. London: Oxford University Press, 2020.

Cases

Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons Case (1996) 1 ICJ Rep 226 (8 July 1996).

The Prosecutor v. Ahmed al Faiq Al- Mahdi

The Prosecutor v. Bashir, Case No. 02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009.

The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, ICTR Trial Chamber 3.12.2003.

The Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T, Trial Chamber Judgement.

The Prosecutor v. Jean-Pierre Bemba Gombo, Case ICC-01/05-01/08, Pre-Trial Chamber II, 15 June 2009.

The Prosecutor v. Jelisic Appeals Chamber decision.

The Prosecutor v. Kayishema and Ruzindana Trial Chamber decision.

The Prosecutor v. Kupreki et al., IT-95-16-T, 14 January 2000.

The Prosecutor v. Krstic´. Judgment, Appeals Chamber.

The Prosecutor v. Tadic decision on the defence motion for interlocutory appeal on jurisdiction, Appeal Chamber, 2 October 1995.

The Prosecutor v. Tadic, No. IT-94-1-T, Opinion and Judgment, Trial Chamber, 7 May 1997.

The Prosecutor v. Thomas Lubanga Dyilo, ICC PTC-I, 29.1.2007.

The Prosecutor v. Tolimir (IT-05-88/2-T), Judgment, 12 December 2012.

PROSECUTOR v. ZLATKO ALEKSOVSKI, ICTY Appeals Chamber. 24.3.2000

Documents

American Service-members Protection Act of 2002

Elements of Crimes of Rome Statute 1998

Charter of the United Nations 1945

Charter of the International Military Tribunal 1945.

Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954

Convention on the Prevention and Punishment of the Crime of Genocide 1948

Convention on the Suppression and Punishment of the Crime of Apartheid 1973

Key note by H.E. Judge Dr. jur. h. c. Hans-Peter Kaul Second Vice-President of the International Criminal Court On 8 August 2011 delivered at Salzburg Law School on International Criminal Law. 9

Office of the Prosecutor, Policy Paper on case selection and prioritisation, International Criminal Court, 15 September 2016.

Preparatory Committee Decisions Feb. 1997.

PrepCom I (25 March – 12 April 1996).

Report of the Court on Cooperation, ICC Doc. ICC-ASP/18/16, 21 October 2019.

Report by Parliamentarians for Global Action, "Modernising the International Criminal Court: Crimes against the Environment, Trafficking in Human Beings, Hybrid Justice and Corporate Accountability."

Report of the Commission on the responsibility of the Authors of the First World War and on Enforcement of Penalties 1919.

Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996, UN Doc. A/51/10,

Statute of the International Criminal Tribunal for Former Yugoslavia 1993

Statute of the International Criminal Tribunal for Rwanda 1994

Statute of the International Court of Justice 1945

June 2007 SWGCA Report

The IV Geneva Conventions of 12 August 1949

The Kellog Briand Pact 1928

The International Convention on the Suppression of Terrorist Bombings 1997

The UN Security Council and the International Criminal Court, *International Law Meeting Summary, with Parliamentarians for Global Action*, Chatham House.

The International Criminal Court Act, 2001 of UK.

UNGA Resolution 96 (I), 1946.

UNGA resolution A/RES/3314 (XXIX) of 14 December 1974

UNSC Resolution 955 (1994).

UNSC Resolution 1593 (2005).

UNSC Resolution 1422 (2002).

UNSC Resolution 1487 (2003).

Online Sources

Amnesty International, “Russia: proposed bill that removes criminal liability for war crimes is impunity made law”, December 16, 2022, https://www.amnesty.org/en/latest/news/2022/12/russia-proposed-bill-that-removes-criminal-liability-for-war-crimes-is-impunity-made-law/

Amnesty International, “Afghanistan: Immediate investigation needed on allegations of war crimes by UK Special Forces”, July 12, 2022, https://www.amnesty.org/en/latest/news/2022/07/afghanistan-immediate-investigation-needed-on-allegations-of-war-crimes-by-uk-special-forces/

Arbour, Louise. ‘Doctrine Derailed: Internationalism’s Uncertain Future’ (International Crisis Group Global Briefing, 28 October 2013), https://www.crisisgroup.org/global/doctrines-derailed-internationalism-s-uncertain-future

Dapo Akande, Antonios Tzanakopoulos. “Treaty Law and ICC Jurisdiction Over the Crime of Aggression”. file:///C:/Users/DELL/Downloads/SSRN-id3226408.pdf

Gegout, Catherine. “The Crime of Aggression: The UK and France”, May 2, 2018, *Open Democracy*, https://www.opendemocracy.net/en/can-europe-make-it/crime-of-aggression-uk-and-france-time-to-show-leadership-on-pri/

Human Rights Watch, “Ukraine: Apparent war crimes in Russia-controlled areas”, April 3, 2022, https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas

Human Rights Watch, “France: Court Ruling Win for Syrian Victims”, May 12, 2023, https://www.hrw.org/news/2023/05/12/france-court-ruling-win-syrian-victims

ICC. “Situation in the Islamic Republic of Afghanistan”. https://www.icc-cpi.int/afghanistan

Lin, Grace. “Expanding U.S. Prosecutorial Powers Over International War Crimes”, The Columbia Journal of Transnational Law February 14, 2023, https://www.jtl.columbia.edu/bulletin-blog/expanding-us-prosecutorial-power-over-international-war-crimes

Liang, Zhuo. “Culture, Ideology and Politics: The Shaping of China’s Conception of International Humanitarian Law”, p. 3, Policy Brief Series No. 112 (2020), Torkel Opsahl Academic EPublisher, https://www.toaep.org/pbs-pdf/112-liang/

Morales, Andrés. “The Scope of Proprio Motu Investigations at the International Criminal Court and Why We Should Care, May 11, 2021, *Jus Cogens: The International Law Podcast & Blog.* https://juscogens.law.blog/2021/05/11/the-scope-of-proprio-motu-investigations-at-the-international-criminal-court-and-why-we-should-care/

O’Keefe, Roger. “The Crime of Aggression and National Law: The UK” (December 4, 2019). SSRN: https://ssrn.com/abstract=3498263.