International Criminal Court, Human Rights Violations and Amnesty Laws

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Criminal courts

Criminal jurisdiction


بسم الله الرحمن الرحيم

FINAL APPROVAL

It is certified that we have read the dissertation submitted by Mr. Sami Ullah Registration No. 134-FSL/LLMIL/F10 titled "International Criminal Court, Human Rights Violations and Amnesty Laws" as a partial fulfillment for the award of the Degree of LLM International Law. We have evaluated the dissertation and found it up to the requirements in its scope and in quality of the award of the degree.

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DEDICATION

To those innocent people who are the victims of terrorism

and human rights violations all over the world

DECLARATION

I Sami Ullah, hereby declare that this dissertation is original and has never been presented in any other institution or anywhere else. Furthermore, I declare that any information which I received from any source and utilized in this work has been duly acknowledged.

SAMI ULLAH

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LIST OF ABBREVATIONS

ASP	Assembly of States Parties
DRC	Democratic Republic of Congo
GC	Geneva Convention
IAHRC	Inter American Human Rights Convention
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ILC	International Law Commission
IMT	International Military Tribunal
LMG	Like Minded Group
LRA	Lords Resistance Army
NAM	Non Aligned Movement
NGO	Non Government Organization
NIF	National Islamic Front
OCHA	Office for the Coordination of Humanitarian Affairs
OTP	Office of the Prosecutor
SPLA	Sudan People's Liberation Army
UK	United Kingdom

UN	United Nations
UNSC	United Nations Security Council
UNGA	United Nations General Assembly
UPDF	Ugandan People Democratic Force
USA	United States of America
US	United States

ABSTRACT

This thesis is related to the recently established International Criminal Court (ICC). The thesis contains a brief overview, historical background, purpose, jurisdiction and its relationship with the United Nations. Human rights violations and crimes of international concern have been thoroughly observed in the light of conventional and customary international law and the tribunals established for the crimes of international concern have also been explained. It has also been observed that crimes of international concern and gross human rights violations must not go unpunished. The central question which has been focused in this work is that how much ICC has been successful in bringing to justice the authors of gross human rights violations and heinous crimes. The challenges faced by ICC in bringing to justice the authors of heinous crimes and the adverse effects upon the war torn societies of this novel institution of international prosecution has also been explained. The critical analysis of the compatibility of peace building measures and regional, local and cultural solutions with the Rome Statute and international law is a substantive part of this work.

This study demonstrates that ICC has proved inefficient in bringing to justice the authors of human rights violations and heinous crimes, to some extent adversely affected war torn societies, apparently caused prolongation of atrocities and has not been successful in achieving its legitimate judicial position. The notable causes for this inefficiency discovered in this study are, the lack of enforcement mechanism, dominant role of the UNSC, selective and politicized approach and lack of the cooperation of

international community. The study further demonstrates that international prosecution cannot be a good substitute for local, regional and cultural solutions. The study suggests improvements in ICC by providing it with a sound enforcement mechanism, coordinative and cooperative relationship with UNSC and other International bodies and pure judicial approach towards the cases and situations along with respect for regional, local and cultural solutions and other peace building measures within the domain of international law.

CHAPTER 1

INTRODUCTION

1.1. BACKGROUND OF THE INTERNATIONAL CRIMINAL COURT (ICC)

The International Criminal Court (ICC) was established under the Rome Statute, which was adopted by the Assembly of States Parties on July 17, 1998 and entered into force on July 1, 2002.[1] Its headquarters is in The Hague, Netherlands and it may do its functions anywhere it deems necessary.[2] The Court was established for the prosecution of those involved in the "crime of genocide, war crimes, crimes against humanity and the crime of aggression."[3] The Court consists of four parts; the Presidency, the Judicial Divisions, Office of the Prosecutor and the Registry.[4]

Although ICC was established after the adoption and entry into force of the Rome Statute, it took a very long time to achieve its present shape. The first proposal of an

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[1] Marc Weller, 'Undoing the Global Constitution: UN Security Council Action on the International Criminal Court' (Oct 2002) Vol. 78, No 4 Royal Institute of International Affairs 1944-), Blackwell Publishing , p 693-94

[2] "Rome Statute of the International Criminal Court" (Rome Statute) Article 3(1) and 3(3)

[3] Rome Statute Article 5(1)(d). The first Review Conference on the ICC held in June 2010 in Kampala, Uganda, regarding the crime of aggression. The conference agreed on the definition of the crime of aggression. However the jurisdiction of the Court was not extended to the crime of aggression until January 1, 2017 and then only after 30 states parties have ratified the amendment. It was also agreed to adopt a separate procedure to deal with the crime of aggression. (Resolution RC/Res.6 adopted on 11 June 2010)

[4] Rome Statute Article 34

international criminal court came from Gustave Monynier; one of the founders of the International Committee of the Red Cross (ICRC) in 1872 after the Franco-Prussian war.[5] After the First World War, the establishment of an International Tribunal was proposed during the Paris Peace Conference in 1919 by the Commission on Responsibilities.[6] The League of Nations also tried to establish a permanent international criminal court. The issue of establishment of an international criminal court was discussed and a convention was drafted in a conference held in Geneva under the League of Nations from First to Sixteen November 1937, but the issue could not solve and the world again jumped in to the Second World War.[7]

When the world witnessed the atrocities of the Second World War, it was strongly felt to establish a permanent court for the trial of those who involved in the most heinous crimes. "Henri Donnedieli De Vabres, a French Judge in the International Military Tribunal at Nuremberg" proposed the establishment of a permanent international criminal court.[8] In 1947, the "United Nations General Assembly (UNGA) entrusted the International Law Commission (ILC)" the drafting of the statute of ICC. In addition to ILC, the UNGA also constituted a committee of the representatives of Seventeen states in 1952 to draft a statute for the proposed court. The ILC prepared a draft in 1954, but the international community could not agree on different controversial issues such as the

[5] Christopher Keith Hall, 'The First Proposal for a Permanent International Criminal Court' International Review of the Red Cross, 38, (1998) p 57-74

[6] International Law Commission, 'Historical Survey of the Question of International Criminal Jurisdiction *'(Memorandum Submitted by Secretary General)* UNGA, ILC, Lake Success New York 1949 (UN Document: A/CN.4/7/Rev.1) p.7

[7] Myra Williamson, 'Terrorism, war and International Law: The Legality of the Use of Force Against Afghanistan in 2001' Asghate Publishing Limited 2009 p 50

[8] Atul Bharadwaj, 'International Criminal Court and the Question of Sovereignty' Strategic Analysis, Institute for Defense Studies and Analyses, Vol. 27 No. 1(Jan-Mar 2003) p 3

principle of sovereignty and the proper definition of the crime of aggression. Due to the clouds of cold war, further work on the ICC Statute stood still.[9]

During the Cold War era, the idea of an international criminal court remained alive in the minds of its proponents. "Benjamin B.Ferencz, the Chief Prosecutor of the United States at Nuremberg," in his book published in 1975, entitled "Defining International Aggression-The Search For World Peace" had strongly argued for an international criminal court. In 1989, "A.N.R. Robinson, the Prime Minister of Trinidad and Tobago" demanded the international community and proposed for a permanent international court. Although his demand was only for a court to deal with the criminals of illegal drugs, but this strengthened further the demand of an international criminal court.[10]

In 1990, the invasion on Kuwait by Iraq and the atrocities and human rights violations by the Iraqi forces further compelled the international community to consider the establishment of an international criminal court in order to deter and bring to justice those involved in human rights violations and heinous crimes. Similarly the humanitarian crises in the Former Yugoslavia and Rwanda further aggravated the situation. The UNSC made two ad hoc tribunals for the Former Yugoslavia and Rwanda in 1993 and 1994 respectively.[11]

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[9] ibid
[10] ibid
[11] ICTY Statute 1993, ICTR Statute 1994

In the decade of nineties of the last century, the world witnessed gross human rights violations and atrocities in different parts of the world. The Bosnian Genocide, the situation in the Sri Leone, DRC, Darfur situation and the Ugandan situations reached to alarming level and the international community could not manage to bring to justice those who were involved in the gross human rights violations, genocide, crimes against humanity and war crimes and to secure peace.[12]

The then prevailing situations in the world reminded the international community once again, to take solid steps for the establishment of an international judicial body with jurisdiction over serious human rights violations and heinous crimes of international concern and to punish the culprits and bring peace to the world.

The ILC under the mandate of the UNGA reinitiated work on the draft of the proposed court. The ILC worked on the original plan for a more comprehensive statute. In 1994, it prepared a draft statute and presented to the UN ad hoc committee. The UN ad hoc committee and the preparatory committee after a comprehensive look at the draft presented it to the "Diplomatic Conference on the Draft Statute" in 1998. The statute was adopted in Rome on 17 July 1998. The Rome Statute acquired the required ratification of 60 states by April 2002 and thus by July 2002, ICC came into existence. It started

[12] Weller (n 1) p 696

function in 2003 and started its first investigation of the situation in Uganda in June 2004.[13]

1.2. CONTROVERSIES REGARDING THE DRAFT

The journey towards the establishment of the ICC was not an easy one. This was almost a new experience for the international community to establish a permanent criminal court. There were a lot of controversial issues regarding the prospective court. The major issues for the international community included the crimes to be prosecuted, jurisdiction, effects on sovereignty and its relation with states and different bodies of the world including the United Nations (UN).[14]

The draft prepared by the ILC was a comprehensive document and almost consisted of those crimes which the international community was generally concerned; such as genocide, the crime of aggression, crimes against humanity, serious violations of the laws and customs applicable in armed conflicts and such other crimes established in treaties and agreed to be linked to the tribunal through an annexure to the Statute.[15]

The preparatory committee whose task was to prepare the final draft, met thrice from 1996 to 1998 to clear the textual issues. At last the preparatory committee prepared

[13]Marlies Glasius, 'What is Global Justice and Who Decides?: Civil Society and Victim Responses to the International Criminal Court's First Investigations' (May 2009) Vol. 31 No. 2 Human Rights Quarterly, Published by the Johns Hopkins University Press p 499
[14] Weller (n 1) p 695
[15] ibid

the final draft by 1998 with about 1400 points of disagreement in the Statute.[16] There were three different groups in the conference holding three different points of view for the prospective criminal court.

The first group which was known LMG or like minded group consisted of 55 states was in support of strong ICC. This group supported vast jurisdiction of the ICC regarding the prescribed crimes and was in favour to give an emergency trigger mechanism to the ICC along with primary and original jurisdiction with respect to the prescribed crimes. This group was in favour to subdue partially the national sovereignty principles in favour of the prospective court regarding the crimes upon which the court had jurisdiction.[17]

The second group which was known P-5 (five permanent members of UNSC) was in favour of strong role of the Security Council and was also stressing to strikeout nuclear weapons to be illegal in the Statute. This group recommended strong role of the United Nations Security Council (UNSC) and was in favour that ICC should only work further after the matter was referred to it by UNSC and the ICC should work under the control of UNSC with out having the power of self initiative.[18] This group consisted of USA, China and Russia. UK had left this group during the debate session and had joined the LMG group prior to the commencement of the conference.

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[16] Bharadwaj (n 8) p 3
[17] ibid p 4
[18]Cenap Cacmak, 'The international Criminal Court in Worlds Politics' (March 2006) International Journal on World Peace, Professors World Peace Academy Vol. 23 No 1 p 30

The third group was known as NAM which favoured a less powerful court as against the LMG. This group was not in favour of strong ICC, however at the same time it did not want too much weak court also.[19] USA was one of the strongest critics of the ICC. The main objections of USA were that:

(1) ICC would expose the US citizens to those crimes and criminal sanctions which were not recognized and established by the United States' legislature.
(2) The Rome Statute would expose the US citizens to such an international judicial mechanism which was not desired nor approved by the US people.
(3) The Rome Statute was antagonistic to the sovereign decision making power of the US government.
(4) The Rome Statute would create hindrances in those operations which were launched through out the world on the pretext of humanitarian and freedom grounds.
(5) It would also negatively affect its world wide efforts against terrorism.
(6) The ICC would be open to abuse due to lack of check and balance.
(7) The role of the prosecutor was irrational because a person could not be a judge to launch an investigation against a sovereign state or individual[20].

During the diplomatic conference, most of the concerns of USA were addressed in the Rome Statute such as the role of prosecutor had been curtailed by providing the

[19] Bharadwaj (n 8) p 4
[20] Weller (n 1) p 697-698

approval from the Pre-Trial Chamber in order to initiate an investigation. Further, the UNSC had been awarded the power of referral and deferral in the Rome Statute. It was also agreed that the role of ICC would be complementary to national criminal jurisdiction.

United States signed the Rome Statute. However it was not ratified. In Bush era, USA declared and formally informed the UN that US had no intention of ratifying the Rome Statute and bore no responsibility regarding the signing, and thus unsigned the Rome Statute.[21]

The USA legislated the "American Service Members' Protection Act 2002"[22] which is popularly known among the proponents of ICC as "The Hague Invasion Act,"[23]and signed Article 98 agreements with most of the countries of the world to protect its citizens as well as non national in service of USA abroad from the ambit of ICC.[24] USA has declared that it will never take any action legitimizing the court.

Despite the disagreement of the powerful countries such as USA, China, Russia and other countries of the world, the international community adopted the Rome Statute in Rome on 17 July1998 by a vote of 120 to 7, with 21 abstentions. The international community thought that ICC would take decades to become functional upon the

[21] Cacmak (n 18) p 30
[22] 106th Congress, 2nd Session, H.R.4654; S. 2726, 14 June 2002.
[23] Cacmak (n 18) p 31
[24] Jason Ralph, 'International Society, the International Criminal Court and American Foreign Policy' (2005) Review of International Studies Vol. 31 p 44

ratification of the 60 members of the international community. But fortunately and unexpectedly, this target was achieved in a small span of time and the court became functional since July 2002.[25]

1.3. PRINCIPLES UPON WHICH THE ROME STATUTE WAS BUILT

The "Rome Statute of the International Criminal Court" is a comprehensive document consisting of thirteen parts and 128 articles. The Rome Statute was built upon the following four principles.

1.3.1. THE PRINCIPLE OF COMPLEMENTARITY

The first and the foremost principle of the Rome Statute is the 'Principle of Complementarity'. This principle gives precedence to national courts and national criminal jurisdiction of the state concerned to bring the criminals of international concern to justice and prosecute them in compliance with the principles of Rome Statute and general principles of customary international law. Article 1 of the Rome Statute has stated that the jurisdiction of ICC "shall be complementary to national criminal jurisdictions."

During the drafting session, different aspects of the court regarding its jurisdiction trigger mechanism and its effects on national sovereignty were considered.[26] Therefore in

[25] Weller (n 1) p 697

order to respect national sovereignty and national jurisdiction, it was agreed that the role of ICC would be complementary to national criminal jurisdiction. The 'Principle of Complementarity' is not exhaustive and may be waived in any one or more of the following situations. The ICC will assume jurisdiction in such situations.

(1) When the authorities of a state prosecute the criminals in a manner which is not compatible with the Rome Statute and international law; i.e. providing blanket protection to the offenders on the pretext of internal prosecution.

(2) When the country is leading to unreasonable delay in the prosecution.

(3) When the offenders are given concessions incompatible with the Rome Statute and the international law.

(4) When the situation is referred to ICC by UNSC and the prosecutor is satisfied that the situation needs to assume jurisdiction.

(5) When the authorities of a state are unwilling or unable to proceed against the offenders.[27]

1.3.2. JURISDICTION OVER CRIMES

The second principle is the confinement of Rome Statute to only four crimes which are the "crime of genocide, war crimes, crimes against humanity and the crime of

[26] Bharadwaj (n 8) p 7, 9
[27] Cacmak (n 18) p 23

aggression." These crimes have been exhaustively explained and defined by the Rome Statute.

It is notable that the crime of aggression was mentioned but left behind the jurisdiction of ICC till the time it was properly defined. The Assembly of States Parties to the Rome Statute met at Kampala, Uganda on 11 June 2010 and considered the crime of aggression. The definition of the crime of aggression was agreed upon. However the jurisdiction of ICC was not extended to this crime till 1st January 2017, and only after the ratification of the required thirty states.[28]

1.3.3. CUSTOMARY INTERNATIONAL LAW

The third principle upon which the Rome Statute relies is the application and living with in the boundaries of customary international law. Any part or provision of the Statute which is not in compliance with customary international law shall bear no effect except article 53 of the "Vienna Convention on the Law of Treaties 1969." Article 53 of the prescribed convention is regarding the treaties and under this article any treaty which is in "conflict with a peremptory norm of general international law" is void to the effect of its conflict. The Rome Statute is a treaty, but this can not be challenged on the basis of "article 53 of the Vienna Convention on the Laws of Treaties 1969".[29]

[28] Amendment in the Rome Statute, ASP at Kampala 11 June 2010
[29] Bharadwaj (n 8) p 5

1.3.4. INDIVIDUAL CRIMINAL RESPONSIBILITY

Another most important and most attractive principle of the Rome Statute is the individual criminal responsibility. Individual criminal responsibility had been on the agenda of the international community since the end of the Second World War. There was a strong demand from different quarters for holding individual accountable for human rights abuses. Five investigative commissions and four international ad hoc tribunals had been established since First World War.[30] Furthermore, the individual criminal responsibility was gaining a foot of principle in the minds of international community. The first instance in which the international law was applied to individual war criminals was at the "International Military Tribunal, 1945 at Nuremberg" in which the Nazi war criminals were prosecuted. The crimes of the Nazi war criminals were seen as a threat to the dignity and honour, existence and survival of humanity and the conviction of the Nazi war criminals developed the human rights regime.[31]

The principle of individual criminal responsibility was also incorporated in the statutes of ICTY and ICTR. "Article 7(1) of the ICTY Statute and Article 6 (1) of the ICTR Statute" have stated that, "a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime....shall be individually responsible for the crime." The offender has no ground of defense on the

[30] ibid p 10

[31] Katherine Ann Snitzer, 'Peace Through Justice?: Evaluating The International Criminal Court' (2012), Macalester College USA, Honors Projects, Paper 15

pretext of chain of command or superior orders, or that the crime was committed by subordinate. Each and every individual is responsible up to the level of his contribution to the crime, whether he is a superior officer or a junior officer or a soldier obeying the illegal orders of the superior or the superior failed to prevent the crimes of his subordinate.

In *Celibici Camp Case*, the Trial Chamber opined that "a superior is not permitted to remain willfully blind to the acts of his subordinate."[32] While in *Tadic Case* when it was not proved beyond doubt that Tadic was involved in the murder of five people, the Trial Chamber acquitted him.[33] But on appeal the Appeal Chamber revised the decision of the Trial Chamber and held that a "defendant who intends to participate in a common design may be found guilty of acts out side that design if such acts are a natural and foreseeable consequences of the effecting of that common design" and he was convicted.[34]

The Rome Statute is based on the principle of individual criminal responsibility with no exception of immunity, political expediency or any other norm. Article 25 (3) has explained very clearly that a person will be subjected to the jurisdiction and prosecution in the court if he or she commits or has committed crimes mentioned in the Rome Statute, "individually, jointly, or through another person, or orders, solicits, induces, aids, abets or assists the commission or the attempt to commit the crime in any way and by any means,

[32] Prosecutor v Delalic Celibici , Trial Chamber Judgment-IT-96-21-T (November 16, 1998)
[33] Prosecutor v Tadic, Judgment, ICTY Trial Chamber, Case No.IT-94-1-T, Para 373 (May 7, 1997)
[34] Prosecutor v Tadic, Judgment, ICTY Appeals Chamber, Case No. IT-94-1-A (July 15 1999)

or contributes to the commission or attempted commission by a group with common purpose intentionally or furthering the criminal activity or purpose of the group."

The crime of genocide which is the most heinous crime is specially mentioned in article 25 (3) (e), which states that along with the above, a person who "directly and publicly incites other people to commit the crime of genocide shall be responsible for that crime."

Article 25 (4) is related to the responsibility of the states. The states are presumed to perform their duties for which they are bound under international law. The states are not exempted from the actions of their individuals and they have also to face accountability in international law regarding their responsibility.

Previously individuals were not recognized under international law and they were only objects of international law, not subjects. Only states were recognized as subjects of international law.[35] The criminals of international concern escaped merely on the pretext of national sovereignty, state responsibility, national interest and superior commands and they were above any responsibility. The principle of individual criminal responsibility incorporated in Rome Statute brings the individuals in to direct accountability which is a major shift from the conventional concepts and a good sign for the international criminal justice.

[35]Bharadwaj (n 8) p 13

1.4. THE APPLICABLE LAW

The applicable and recognized laws in ICC are the Rome Statute, *jus cogen* norms, treaties and general principles of national laws. At first instance the contents of the Rome Statute will be applicable. At the second instance applicable treaties, rules and established principles of armed conflicts of international law will be applicable. At the third instance general principles of national laws not inconsistent with the Rome Statute and customary international law will be applicable. The court may also follow and rely upon its own precedents.[36]

1.5. PURPOSE OF THE COURT

Human beings have witnessed a lot of atrocities in the world. The atrocities of the First and the Second World War bore very deep impressions of sorrow on human mind. In Cold War era, the human rights violations and humanitarian crises were in progress. Violations of humanitarian laws were buried in the graveyard of political expediency, national sovereignty, military necessity and territorial integrity. The international community was helpless before the human rights violators. Both, state and non state actors were involved in human rights violations.

Prior to the establishment of ICC, the world had experienced different ad hoc tribunals for the prosecution of the most serious crimes. The tribunals established for the

[36]"Rome Statute" Article 21

First and Second World War criminals performed their judicial processes. These tribunals were not impartial and lacked international credibility. These tribunals were established by the victor powers and were delivering justice according to their will. In 1948 at the Tokyo Tribunal an Indian jurist, Justice Pal in his dissenting note had argued that "[s]o long as the international organization continues at the stage where trials and punishment for crime remain available only against the vanished in a lost war, the introduction of criminal responsibility can not produce the deterrent and preventive effect."[37]

Justice in those tribunals was seen as 'victor justice' and the world looked with great suspicion the process and procedure adopted in those tribunals. Different ad hoc tribunals such as the tribunal for the Former Yugoslavia and for the Rwanda had also not witnessed impartial justice. Furthermore, they were limited in jurisdiction and in tenure.[38] Due to these reasons, it was strongly needed to establish such a court which would be free from political interference and deliver an impartial and unbiased justice and having a permanent status.

It was also felt necessary by the international community to bring to justice those individuals, who indulged in war crimes and other human rights violations and who escaped from punishment simply on different pretexts. It was also considered necessary

[37] Bharadwaj (n 8) p 17
[38] Sylvia de Bertodano, 'Judicial Independence in the International Criminal Court' Leiden Journal of International Law, p 410, 414

to transfer the responsibility from states to individuals and from perpetrators till committers.[39]

Human rights violations and gross atrocities were committed not only in international armed conflicts, but also at civil and local level. There was a strong feeling of insecurity in the minority communities from the atrocities of majority in their states. So in such circumstances, it was strongly needed to establish a supranational legal body to address the issue. Thus a person dissatisfied with his own state and judicial system to address his fundamental human rights and security issues will have access to an international judicial body, which will satisfy his concerns in his own state.

Louise Arbour stated on December 8, 1997 before the Preparatory committee that; "Recourse to an international criminal forum will occur when horrendous crimes have been committed with the collusion or impotence of national authorities." The then UN Secretary General Kofi Annan, announcing the entry into force of the ICC Statute, called it "a great victory for justice and for world order- a turn away from the rule of brute force and towards the rule of law." Further he stated, "The process we are now witnessing marks a decisive break with the cynical world view."[40] Bill Pace, Coordinator of the NGO "Coalition for an International Criminal Court" stated, "ICC will save millions of humans from suffering unspeakably horrible and inhumane death in the

[39] Allison Martson Danner and Jenny S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' 2005 California Law Review.
[40] Bharadwaj (n 8) p 1 and 6

coming decades."[41] The UN Secretary General, while explaining the gravity of human rights violations and heinous crimes taking place in different parts of the world, stated:

> For nearly half a century...almost as long as the United Nations has been in existence... the General Assembly has recognized the need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many thought... that the horrors of the Second World War... the camps, the cruelty, the exterminations, the Holocaust...could never happen again. And yet they have. In Cambodia, in Bosnia and Herzegovina, in Rwanda. Our time... this decade even... has shown us that man's capacity for evil knows no limits. Genocide... is now a word of our time, too, a heinous reality that calls for a historic response.[42]

He called ICC "a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law."[43]

Thus the purposes behind the establishment of ICC were to put an end to immunity for the perpetrators of the most serious crimes, give universality to criminal sanctions, deter the human rights violators and punish those involved in the "crime of genocide, crimes against humanity, war crimes and the crime of aggression" and make the international criminal justice free from political interference as well as political expediencies.

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[41] Glasius (n 13) p 497
[42] http://untreaty.un.org/cod/icc/general/overview.htm accessed on 20 October 2012
[43] Glasius (n 13) p 496

1.6. TERRITORIAL JURISDICTION

The territorial jurisdiction of ICC extends to all those states which are parties to the Rome Statute, who have agreed to the jurisdiction of ICC in any particular case and to those situations which have been referred to it by UNSC.

ICC has direct jurisdiction over those states who are parties to the Rome Statute. ICC may assume jurisdiction when the state party is unwilling or unable to prosecute the authors of heinous crimes. ICC has jurisdiction over those crimes which have been committed on the land, atmosphere, sea or any vessel or aircraft, or committed by any state abroad or locally or its nationals abroad or on its own land, sea, air or vessel, aircraft etc.

ICC may also assume jurisdiction when the state concerned is not party to the Rome Statute but has agreed to the jurisdiction of ICC in any particular case. By assuming jurisdiction, ICC may proceed with its mandate in the Rome Statute. The agreeing state is bound to cooperate with the ICC according to part 9 of the Rome Statute.

ICC may also assume jurisdiction in those cases which are referred to it by the UNSC working under chapter VII of the UN Charter. It is a general principle of international law that the UNSC measures have binding force internationally. Therefore by UNSC referral of a case, ICC may assume jurisdiction irrespective of the fact that the concerned state is party or not to the Rome Statute or is not willing to the jurisdiction of

ICC.[44] Here it should be noted that the prosecutor may not proceed with any situation considering it in the interest of justice under Article 53 of the Rome Statute.

1.7. INVESTIGATION IN THE COURT

Investigation in ICC can be initiated by the complaint of any state party to the Rome Statute, by the *proprio motu* action of the prosecutor or by the referral of the UNSC.

The states parties to the Rome Statute can launch a complaint with ICC that such type of crime has occurred with in the jurisdiction of the Court. This complaint may be against crimes upon its own territory or it may be against the occurrence of crime over the territory of another state. The prosecutor upon satisfaction may initiate the proceeding in the Pre-Trial Chamber and upon the permission of the Pre-Trial Chamber, start investigation.

The prosecutor may initiate a proceeding *proprio motu* upon the analysis and satisfaction to the effect of the available information and submit a proposal to the Pre-Trial Chamber for permission of further proceeding. The Pre-Trial Chamber upon satisfaction to the effect may allow the prosecutor and thus he or she may proceed with further investigation.

[44] Rome Statute, Article 12

The prosecutor may initiate investigation upon the referral of any situation to it by the UNSC working under chapter VII of the UN Charter.[45]

1.8. RELATIONSHIP OF ICC WITH THE UNITED NATIONS (UN)

The relationship of the ICC with the UN is determined by the relationship agreement between UN and ICC. The Rome Statute in its article 2 has explained that the relationship of the ICC with the UN shall be determined by the "Negotiated Relationship Agreement" between the two. This relationship agreement between UN and ICC came in to existence in 2004,[46] when the UN Secretary General signed the relationship agreement with the ICC President. Through this agreement the UN and ICC have agreed to work together.[47]

1.9. ICC AND UNITED NATIONS SECURITY COUNCIL (UNSC)

The relationship of ICC and UNSC has not remained on good terms since the coming into existence of ICC. The three powers (USA, Russia and China) in the UNSC are in strong opposition to ICC. They are reluctant to accept the legitimate role of ICC in the international criminal justice system.

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[45] Rome Statute, Article13

[46] Dharmendra Chatur. 2011. "A Synergistic Failure between the UN Security Council and the International Criminal Court" The Selected Works of Dharmendra Chatur, available at: http://works.bepress.com/dchatur/7/ Christ University School of Law, accessed 15 July 2012

[47] "Negotiated Relationship Agreement Between the International Criminal Court and United Nations" Article 3

Although these powers are against the ICC, yet the Rome Statute has given the power of referral and deferral of cases to UNSC. The role of UNSC has been looked by most of the world people with doubts and they are suspicious that ICC will not be able to deliver free and fair justice; rather it will deliver justice according to the wishes of UNSC. The role of UNSC is explained in two articles of Rome Statute. Under article 13 (b) the UNSC working under chapters VII of the UN Charter may refer a situation to ICC. Under article 16, the UNSC is empowered to stop ICC from initiating or furthering any investigation and may defer a situation for a period of twelve months by a resolution and may renew the period by subsequent resolutions for as long as it wishes.

1.10. IMPLICATIONS OF UNSC ROLE

The role entrusted to UNSC under the Rome Statute has both positive and negative implications. It is an understood fact that the UNSC is not a universally representative body. It is almost controlled by five powers and in most cases it seems as furthering the vested interests of these powers instead of international concerns. Owing to these reasons, the critics of the role of UNSC consider that this body is politicizing ICC. There is no doubt that the role of UNSC is not welcomed by most of those people who are victims of the commissions or omissions of UNSC. The African countries are looking with doubt to ICC and consider it an instrument for furthering the vested interests of the five powers. Furthermore, UNSC has the power of "on and off" the proceedings of ICC which may create hindrances in the way of ICC. It is easy for the greater powers to reach a

compromise over the interest of the weak communities and stop ICC from exercising jurisdiction in order to protect their own interests.

On the other hand it is also a fact that the UNSC is the only international body which can bring peace and stop atrocities by might alone. The UNSC by its mandate under UN Charter is a body responsible for the establishment of international peace. It is a powerful body and has the powers to compel the warring parties to solve the issue through arbitration, mediation, good offices and dialogue, or by taking stern measures against them such as blockade, no fly zone, economic sanctions, funds freezing and even use of direct military force against the warring parties.

1.11. TOWARDS THE OBJECTIVE

The objects and purposes set out in ICC Statute are incredible and extraordinary which are voiced by the conscience of the international community, the proponents of ICC and the victims of the atrocities. The recourse to supra national legal body for justice is obviously a ray of hope for those who are the victims of unspeakable atrocities. But the important question is that how much these purposes are achievable with in the current parameters and scope of ICC? So keeping this question in mind, in the next chapters, the stand of the conventional and customary international law over the atrocities and punishment of human rights violations will be explained. The challenges faced by ICC in achieving its objectives will also be focused in the light of some cases handled by it. It will also be explained that whether there is any place for amnesties or immunities to the

human rights violations. And finally the conclusion will be drawn and suggestions will be forwarded for further improvement.

CHAPTER 2

HUMAN RIGHTS VIOLATIONS AND INTERNATIONAL LAW

2.1. INTRODUCTION

Human rights violations have remained an issue of great concern for human beings individually and collectively. The gross human rights violations occurred in the First World War and then after a short interval, in the Second World War, shook the conscience of human beings and compelled them to think for the prevention of those crimes. After the Second World War, United Nations was established "to save the succeeding generations from the scourge of war" and human rights violations.[48] Apart from the establishment of United Nations, the collective wisdom of the international community demanded to punish those who had been responsible for the atrocities of the Second World War.

Keeping in view the atrocities of the German forces in the Second World War, a conference was held in Moscow (Moscow Conference 1943) and a joint declaration was issued by United Kingdom, United States of America and Soviet Union that:

[48] UN Charter Preamble

> German officers and men and members of the Nazi Party, who have been responsible for, or have taken a consenting part in atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free government which will be created therein.[49]

This was the first bold step towards the foundation of the prosecution and punishment of human rights violators at international level. Pursuant to this declaration, in the London Agreement 1945, it was agreed to establish an international military tribunal for the prosecution and punishment of those who committed human rights violations. The Charter of the International Military Tribunal was drafted and two identical military tribunals were established at Nuremberg and Tokyo.[50]

2.2. CHARTER OF THE NUREMBERG MILITARY TRIBUNAL, 1945

Charter of the Nuremberg Military Tribunal, 1945 (Nuremberg Charter) in its article 6 explained the crimes over which the tribunal had jurisdiction. The Tribunal exercised jurisdiction over the "crimes against peace, war crimes and the crimes against humanity."

2.2.1. CRIME AGAINST PEACE

[49] Moscow Declaration 1943
[50] The London Agreement 1945 Article 1

Under article 6 (a) of the Nuremberg Charter, Crime against peace included those acts "namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing" acts.

2.2.2. WAR CRIMES

War crimes were defined by the Nuremberg Charter as:

> [V]iolations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.[51]

2.2.3. CRIMES AGAINST HUMANITY

Crimes against Humanity were defined by the Nuremberg Charter as:

> [N]amely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during war, or persecution on political, racial, or religious grounds in execution of or in

[51] Charter of the International Military Tribunal 1945 (Nuremberg Charter) Article 6 (b)

connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[52]

2.3. NUREMBERG CHARTER AND INDIVIDUAL RESPONSIBILITY

The Nuremberg Charter in its article 7 made it clear that no one could escape the responsibility on any ground such as official position, head of state, or other responsible officer from the crime committed by him. Last paragraph of article 6 explained that "leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan."

Upon the objection of the defense that the concept of conspiracy was well recognized and established in the Anglo American legal system. But was completely unknown and utterly alien to the thoughts and legal trends of the German legal system and the introduction of this concept in the present trial and convictions on its basis will be against the principle of justice and the principle of *nullem crimen sine lege*. The court (Nuremberg Military Tribunal) held that it was immaterial to consider that the conspiracy was formulated by the dictator and the subordinate official only obeyed the command of the superior. The contention of the defense that the conspiracy with the dictator is a contradiction was also rejected by the court and held that:

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[52] ibid Article 6 (c)

> [T]he argument that such common planning cannot exist where there is complete dictatorship is unsound. A plan in the execution of which a number of persons participate is still a plan even though conceived by only one of them and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it.[53]

2.4. ACTION ON BEHALF OF STATE

No action which amounts to be crime of international concern and gross human rights violations can be justified on the ground that the offender acted on behalf of state. This view was upheld by the Nuremberg Military Tribunal. Upon the contention of the defense that the individuals can not be called in to question on the pretext that they acted on behalf of the state and it is the sovereign will of the state according to which it deals with its citizen. The prosecution argued that "in no other sphere is it more necessary to affirm that the rights and duties of states are the rights and duties of men and unless they bind individuals they bind no one." The court conceded the arguments of the prosecution and rejected the defense by stating that, "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commits such crimes can the provisions of international law be enforced." The court went further that:

> [T]he principle of international law which under certain circumstances protects the representative of a state can not be applied to acts which are condemned as

[53] Nazi Conspiracy and Aggression, Opinion and Judgment: United States Government Printing Office, Washington 1947, p 52 , 54

> criminal by international law. The authors of these acts can not shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.[54]

The court ruled that he "who violates the laws of war can not obtain immunity while acting in pursuance of the authority of the state if the state is authorizing action moved outside its competence under international law."[55] So an individual who is carrying the orders of the competent authority of his state in accordance to the law of the state can not be saved from punishment if his acts are crimes under international law. Violation of article 6 of the IMT Charter cannot be excused in any circumstances whatsoever.

2.5. GRAVE BREACHES OF THE GENEVA CONVENTIONS, 1949

The Geneva Conventions 1949 in common article 2 paragraph 1 have stated that Geneva "Convention[s] shall apply to all cases of declared war or any other armed conflict which may arise between two or more High Contracting Parties even if the state of war is not recognized by any one of them."

The Geneva Conventions have imposed an obligation upon the high contracting parties in articles 49, 50, 51, 129, and 130 to prosecute or extradite those who commit grave breaches. States parties to the Conventions are bound to search those persons who

[54] ibid p 52
[55] ibid p 53

have allegedly committed or have ordered to commit grave breaches and bring them to justice irrespective of their nationalities or other criteria by investigating, prosecuting and if found guilty by punishing. It has been further clarified that if there is a strong case against a person who has allegedly committed or has ordered to commit such grave breaches in any other state which is interested in his prosecution and punishment, he must be handed over to that very state.[56]

The term 'Grave Breaches' has been defined as the "acts committed against the persons or property protected by Geneva Conventions" which are "willful killing, torture or inhuman treatment including biological experiments, willful causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."[57] The term 'Grave Breaches' has been incorporated in the ICC Statute in the definition of the war crimes.[58]

Article 49 of the first Geneva Convention has imposed on the parties "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering, to be committed any of the grave breaches of the present Convention" defined in the Convention. Further states are under duty to "take measures necessary for the suppression of all acts contrary to the provisions of the....[Geneva] Convention[s] other than the grave breaches" defined in the Convention.

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[56] Geneva Conventions of 12 August 1949 (First GC) Article 49
[57] ibid Article 50
[58] Rome Statute Article 8 (a)

The Geneva Conventions have also made it obligatory upon all states to make sure the protection of those who are non combatants including those civilians who are not taking active part in the ongoing conflict such as prisoners of war, shipwrecked, wounded and sick.[59] Those involved in the killing or other inhumane treatment such as torture etc are punishable under the grave breaches regime.

2.6. INTERNAL ARMED CONFLICT AND HUMAN RIGHTS VIOLATIONS

As far as the internal armed conflict[60] is concerned, some commentators[61] are of the view that internal armed conflict is not covered by Geneva Conventions because there is no any explicit provision in the Geneva Conventions. Neither common article 3 nor its Additional Protocol II makes it obligatory upon the states parties to investigate, prosecute and if found guilty, punish those who were involved in human rights violations in internal armed conflict.[62] But this view is not correct because the purpose of Geneva Conventions is not to draw any clerical assumptions and leave the issue for which it was adopted.

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[59] Geneva Conventions of 12 August 1949, Common Article 3

[60] Internal armed conflict may be referred to those situations of non international character "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups, which under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [Additional Protocol II]." (Article 1(1) of Additional Protocol II to Geneva Conventions)

[61] Denise Plattner, the Legal Advisor of ICRC wrote that "IHL applicable to non-international armed conflicts does not provide for international penal responsibility of persons guilty of violations." Denise Plattner, The Penal Repression of Violations of International Humanitarian Law Applicable in Non-international Armed Conflict, Vol. 30 International Review of Red Cross 1990 p 409, 414

[62] Theodor Meron, The International Criminalization of Internal Atrocities, American Journal of International Law, Vol. 89 No. 3 July 1995 p. 554-577

Article 3 has explicitly provided for the protection of those who are non combatants, sick, wounded and detained; that be treated in all circumstances humanely with out any discrimination on the basis of race, color, religion, sex or any other criteria. Violence to life and person, murder, mutilation, cruel treatment, torture, hostage taking, humiliation, sentence and execution extra judicially etc are explicitly prohibited.[63] The purpose of Geneva Conventions is to uphold the protection of non combatants, the dignity of human beings and the protection of property from unnecessary loss.

International law abides by its objects and purposes. Technical issues bear no relevance in international law. Article (31) 1 of the "Vienna Convention of the Laws of Treaties 1969" states that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose." Geneva Conventions have a clear object and purpose of protecting human beings and property from destruction. This can be achieved only by declaring illegal a destructive conduct and by imposing a duty upon all states to punish those who spread destruction and commit gross human rights violations. There can be no any reasonable justification for the human rights violations and destruction of property merely on the pretext of internal armed conflict. Common article 3 of the Geneva Conventions applies to all situations other than the international armed conflict and guarantees the protection of all persons irrespective of their colour, creed, religion, ethnicity, nationality or sex, wealth or any other criteria from every form of inhumane and degrading treatment including torture, murder, hostage etc.

[63] Geneva Conventions of 12 August 1949, Common Article 3

This issue was raised in the *Nicaragua case* in ICJ. The court held that common article 3 bears "elementary considerations of humanity and this must be upheld in every armed conflict regardless of its nature that whether this is internal conflict or international conflict."[64] The spirit of common article 3 is further protected by the fourth Geneva Convention. Article 147 of the said Convention refers more generally to protected persons instead of those mentioned in Article 4 and says the "persons or property protected by the present Convention" which also include article 3 being part of the Convention. Therefore the killing, torture and other inhumane acts in internal armed conflict must be considered as grave breaches of the Geneva Conventions. Furthermore, article 146 of the Fourth Geneva Convention has made it obligatory upon all states to make sure the investigation, prosecution and punishment of all those who committed human rights violations and atrocities other than grave breaches.

2.7. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR) AND INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY) STATUTES AND PUNISHMENT FOR HUMAN RIGHTS VIOLATIONS

The Statutes of ICTR and the ICTY give power to the tribunals to investigate prosecute and punish those who involved in gross human rights violations such as genocide, war

[64] Nicaragua v. United States of America 1986 ICJ 14

crimes and crimes against humanity. Article 4 of the ICTR statute specially gives powers to the tribunal for the prosecution and punishment of those who committed serious violations of article 3 of the Geneva Conventions and its Additional Protocol II 1977. This means that human rights violations in internal armed conflicts can not be excused on any ground.

The norms of common article 3 have acquired the status of customary international law. This view was upheld by the ICTR in *Prosecutor versus Akayesu*, in which the court ruled that most of the states have criminalized in their domestic penal laws the acts committed in international armed conflicts which constitute the violations of common article 3 of the Geneva Conventions. The court held further that individual criminal responsibility as it was established by international customary law was not limited to violation of common article 3 of the Geneva Conventions only, but also extended to article 4 of the Additional Protocol II,[65] which provided guarantee for the protection of honour, dignity and humanely treatment for non and disabled combatants and also the protection of children.[66]

It is notable that there has been no provision in the ICTY Statute regarding the violations of common article 3. But the tribunal confirmed in the *Prosecutor versus Tadic*, upon the challenge of the defense that the tribunal had no jurisdiction with respect to the crimes and human rights violations in internal armed conflict, that the authors of

[65] Prosecutor v Jean Paul Akayesu, Judgment 2 September 1998, Case No.ICTR-96-4-T. pp 242-259
[66] Additional Protocol II Article 4

gross human rights violations, whether in internal or international armed conflict, must be investigated, prosecuted and punished if found guilty. The tribunal however conceded that the provisions of Geneva Conventions which were related to grave breaches, were applicable in international armed conflict, but held that the tribunal was empowered by article 3 of the Statute to investigate, prosecute and punish those who violated laws and customs of war, Geneva Conventions' grave breaches provisions, common article 3 and Additional Protocol II in internal as well as in international armed conflicts.[67]

2.8. OTHER INFRINGEMENTS

Infringements of Geneva Conventions other than grave breaches are also articulated by the Geneva Conventions. States are bound "to take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches."[68]

From the above details it is an unambiguous position of international law that crimes whether covered under the grave breaches of Geneva Conventions or otherwise come under its common article 3 must be investigated, prosecuted and if found guilty, be punished severely and there is no derogation allowed from this position.

[67] Prosecutor v Tadic, Case No.IT-94-1-AR 72, Appeal on Jurisdiction, (2 October 1995)
[68] Geneva Conventions of 12 August 1949, Article 49 (First GC)

2.9. INTER AMERICAN HUMAN RIGHTS CONVENTION (IAHRC) AND THE DUTY TO PROSECUTE

The prosecution and punishment of gross human rights violation is an obligation upon states. This view was supported by the "Inter American Court of Human Rights." The court held in the *case of Velasquez Rondriguez* with respect to the disappearance and abduction of people that the "Inter American Human Rights Convention" Article 1 (1) imposed a duty on Honduras to make sure and protect the free, full and without any let or hindrance, the exercise of those rights recognized under the convention, to every person under its jurisdiction. According to the court, the adequate compensation and other remedy to those whose rights had been violated, was the duty of the Republic of Honduras.

The court further held that the acts committed by an identified or unidentified individual could not be attributed only to that individual. The state must also be held responsible for that very act because of its failure to keep deep vigilance upon those who were violating human rights. So the court imposed the duty upon state to investigate, prosecute and punish those who violated human rights and also compensate those who were victims of human rights violations. In view of the court, the state breaches

international law if its lawful act such as amnesty etc leads to immunity to war criminals.[69]

2.10. COMMISSION OF CRIME AND OMISSION TO PROSECUTE

The commission of an act of crime or human rights violation and the state omission to prosecute makes two different types of violations of international law. An act recognized under international law as crime remains crime from the day from which it was declared as crime. The states can not excuse on the pretext that it acceded to the treaty or to the convention later and the crime occurred earlier and therefore investigation of the previous violations is not binding on it. The state commits breaches of international law as and when it refuses to investigate the crime. This claim was forwarded by the Latin American countries regarding their responsibilities to investigate the crime of torture. Their plea was that they entered the Torture Convention later; therefore they were not obliged to prosecute those crimes which were committed prior to their entry in to the torture convention. Their plea was rejected.[70]

The view of Latin American countries was against the norms of customary international law because torture is a crime recognized by the civilized community since the Geneva Conventions and those who commit this crime are bound to be brought to justice by the states irrespective of the fact that they have entered into the Torture

[69] "Velasquez Rondriguez Case, Inter American Court of Human Rights," Serious C No.4 29 July 1988, Para 166

[70] Inter American Commission on Human Rights, Annual Report 1992-1993 Report No 29/92, 2 Oct 1992

Convention later and the crime has occurred earlier. This view is further supported by the "Responsibility of States for Internationally Wrongful Acts 2001" in its article 14 (2) that "[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation." This simply means that states are committing breach from the time when they refuse to investigate, prosecute and punish the human rights violators.

It should also be noted that the responsibility of state to prosecute can not be excused just on the pretext that this was the responsibility of the predecessor regime or the new revolutionary regime refuses on any other grounds. The responsibility of state continues as long as the state exists and if it is unwilling or incapable, then it may hand over human rights violators to another state or to an international tribunal for prosecution. But the crimes of international concerns must not go unpunished.[71]

2.11. CRIMINALIZATION OF SERIOUS HUMAN RIGHTS VIOLATIONS

States are under duty to enact proper legislation for those crimes which are crimes under international law. Article 5 of the "Convention on the Prevention and Punishment of the Crime of Genocide 1948" obliges states parties to legislate according to their respective constitutions for the enforcement of the convention and provide punishment for those

[71] Responsibility of States for Internationally Wrongful Acts 2001 Article 10

who are guilty of genocide or who conspire, incite directly and publicly, attempt or play complicit role in the commission or the attempt to commit the crime of genocide.

Article 2(3) of the ICCPR 1966 imposes a duty upon states to provide effective remedy and redress the grievances of those whose rights and freedom recognized in the Covenant, have been violated.

The Convention against Torture in its article 4 makes it obligatory upon states to enact such legislation or any other measure which ensure the acts of torture as heinous crimes punishable under domestic criminal law according to its gravity. Article 8 of the "Universal Declaration on Human Rights 1948" obliges states to make sure the right of effective remedy for every person whose fundamental rights have been violated.

2.12. PRINCIPLES OF UNITED NATIONS AND PUNISHMENT OF HUMAN RIGHTS VIOLATIONS

United Nations has time and again formulated the basic principles for the investigation, prosecution and punishment of the most heinous crime. These principles provide a guide line for the upholding of the basic human rights and punishment for their violations. The "Principles of International Cooperation in Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity" have made it obligatory upon all states to provide for a sound mechanism of investigation, prosecution and punishment of those who committed or perpetrated these crimes. Under these principles,

states are bound to co-operate each other in tracing, arrest, extradition and punishment of those who have committed these crimes.[72] Under article 18 of the "Declaration on the Protection of All persons from enforced Disappearances" states are bound to refrain from such acts which lead to exemption from criminal proceeding against those who have allegedly indulged in the enforced disappearance of persons.[73] "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment" obliges the states to investigate acts of unlawful detention and punish those who are involved in this criminal practice.[74]

The "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" requires from state the enactment and enforcement of such legislation which define those acts which lead to and constitute serious abuses. States are bound to make sure that serious abuses not happen and punish those indulge in this practice[75]

The "Responsibility of States for Internationally Wrongful Acts 2001" obliges states to cooperate in elimination of serious breaches committed by them, through lawful means.[76] The "Vienna Declaration and Program of Action" obliges states to abrogate those laws which provide protection to human rights violators and punish those who indulge in human rights violations.[77]

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[72] UNGA Res. 3074 (XXVIII), 3 December 1973, Principle 1 and 5
[73] UNGA Res. 47/133, 18 December 1992, Article 18
[74] UNGA Res. 43/173, 9 December 1988
[75] UNGA Res. 40/34, 29 November 1985
[76] Article 41 of the Act.
[77] UN Doc.A/CONF. 157/24 (part 1) Para 60. "Adopted by the UN World Conference on Human Rights," 25 June 1993.

The "Principles against Impunity" requires from states to make sure that there is no immunity for the perpetrators and committers of heinous crimes. The states are duty bound to detect, arrest, investigate, prosecute and punish if found guilty those who indulge in human rights violations. The states are further bound to provide satisfaction to the victims by proper compensation and through other available remedies along with making sure that such violations will not occur again.[78]

2.13. UNIVERSAL JURISDICTION OVER CRIMES OF INTERNATIONAL CONCERN

The determination of the international community as a whole to investigate, prosecute and punish the crimes of international concern has made it obligatory upon all states of the international community to exercise their criminal jurisdiction over these crimes. In *Pinochet-Case*, it has been established that the perpetrators of serious human rights violations can be subject to investigation and prosecution in foreign courts, irrespective of the fact that they have been granted amnesty domestically or exercise the diplomatic immunity under "Vienna Convention on Diplomatic Relations 1961."

Most of the states have incorporated the principle of universal jurisdiction over the most serious violations of human rights in their legal systems and have granted

[78] UN Doc.E/CN.4/ sub.2/1997/20 Rev.1, 2 October 1997

universal jurisdiction to their courts to try cases such as genocide, crime against humanity etc, that are crimes under international law. Spain, France, Canada, and Belgium have drafted the same.

In Spain the Spanish courts can investigate, prosecute and punish those who commit crimes of genocide, terrorism and other gross human rights violations on the basis of universal jurisdiction enshrined in article 23(4) of the Spanish Courts Law. The Highest Spanish Criminal Court (Audiencia Nacional) rejected the challenge of the prosecutor regarding the jurisdiction of the court to try General Pinochet and ruled that the court had jurisdiction to try General Pinochet under the universal jurisdiction clause.[79] Similar provisions can be found in the Canadian Criminal Code. Section 7 (3.71) of the Canadian Criminal Code gives powers to its courts to try those non Canadians who are involved in heinous crimes of international concern. This power has been exercised over non Canadians in crime against humanity cases.[80]

The French Code also gives power to the French courts to try cases and crimes of international concern. In *Barbie case*, the *French Court d' Appel* held that "by reason of their nature crime against humanity with which Barbie is indicted don't simply fall with in the scope of French municipal law, but are subject to international criminal order to which the notions of frontiers and extradition rules arising there from are completely

[79] Amnesty International (1998), The Case of General Pinochet, Universal Jurisdiction and the Absence of Immunity for Crimes against Humanity. London, Amnesty International, 3 November 1998.
[80] Regina vs. Finta, 82, ILR (1989) 424.

foreign." Barbie was later awarded punishment by the *French Court d' Cassation* for crimes against humanity.[81]

2.14. CRIMES DURING PEACE

Crime during peace is equally punishable and condemnable in international law. The "Convention on the Prevention and Punishment of the Crime of Genocide 1948" in its article 1 has declared genocide a crime irrespective of its occurrence in time of war or peace and the parties to the convention have undertaken to prevent the occurrence of this crime and to punish those who are guilty of genocide or conspire, incite directly and publicly, attempt or play complicit role in the commission or the attempt to commit the crime of genocide.

In *Prosecutor versus Tadic*, the Appeal Chamber held that customary international law "no longer requires any nexus between crime against humanity and armed conflict." Crime against humanity occurs almost during war and peace equally.[82] The principle of Nuremberg Charter is that crime not recognized by domestic law or committed during peace can not be left with out punishment. This principle was further affirmed by the 11th December 1946 UNGA resolution. The significance of this resolution was emphasized by Lord Nicholls in Pinochet case when he stated, "From this time on no head of state could have been in any doubt about his potential personal

[81] Barbie Case, International Law Reports, Vol. 78, 1988, p. 124.
[82] Tadic Case, Appeal Chamber, Para 78

liability if he participated in acts regarded by international law as crime against humanity."[83] This means that a person who is committing act regarded as crime in international law will be punishable irrespective of the commission of the crime in time of war or peace.

2.15. CRIMES UNDER ROME STATUTE

The Rome Statute deals with the "crime of genocide, crimes against humanity, war crimes and the crime of aggression." Article 5 of the Statute gives jurisdiction to ICC over these crimes.[84]

2.15.1. THE CRIME OF GENOCIDE

The crime of genocide was for the first time defined in the "Convention on the Prevention and Punishment of the Crime of Genocide 1948." Article 2 of the said Conventions states:

> [G]enocide 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;

[83] Regina v Bartle and others (ex parte Pinochet) and Regina v Evans and others (ex parte Pinochet) judgment of the House of Lords, 25 November 1998

[84] For convenience, the crimes given here under the title "Crimes under Rome Statute" have not been explained in detail as given in the Rome Statute. Further these crimes have been incorporated here with some minor changes of format and details. Therefore for details the relevant articles of the Rome Statute may be consulted.

(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 with in the group;

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

Along genocide, all other acts which lead to the commission of this crime such as "the conspiracy, direct and public incitement, attempt to commit, and the complicity in genocide" are punishable under the same Convention. This definition of genocide has been incorporated in article 6 of the Rome Statute.

The prevention and punishment of the crime of genocide have acquired the status of *jus cogens* norm. It is a part of customary international law and no derogation from it can be allowed or justified by any ground whatsoever including by treaties and conventions.

It is the duty of every state to investigate, prosecute and punish the crime of genocide under universal jurisdiction or it may extradite those who are involved in the crime of genocide.

2.15.2. CRIMES AGAINST HUMANITY

The Rome Statute in article 7 mentions the following acts as crimes against humanity:

> Murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, enforced disappearance of persons, the crime of apartheid, other inhuman acts of a similar character, internationally causing great suffering or serious injury to body or to mental or physical health.

It is notable that these acts were not newly included crimes and were already covered as crimes against humanity in different statutes such as the Nuremberg Charter, Statutes of ICTR and ICTY etc. An act will be qualified as crime against humanity if it is "a part of a widespread or systematic attack, directed against any civilian population, with knowledge of the attack."[85]

2.15.3. WAR CRIMES

War crimes included in Nuremberg Charter, ICTR and ICTY statutes; have been incorporated with some modifications in ICC Statute. Under article 8 of the Rome Statute, war crimes include:

> Grave breaches of the Geneva Conventions of 12 August 1949, serious violations of laws and customs applicable in international armed conflicts, serious violations of article 3 common to four Geneva Conventions in internal armed

[85] Rome Statute Article 7

conflicts, serious violations of laws and customs applicable in non international armed conflicts.

These crimes have been explained in detail in article 8 of the Rome Statute.

2.15.4. THE CRIME OF AGGRESSION

The crime of aggression was defined in a Review Conference on ICC and means:

> 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.

The Court can not exercise jurisdiction over the crime of aggression before 2017.[86]

2.16. ROME STATUTE AND PUNISHMENT FOR HUMAN RIGHTS VIOLATORS

The Rome Statute in its preamble has affirmed that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation." Parties to the Rome Statute have shown their determination

[86] Resolution RC/Res.6 adopted on 11 June 2010

for the prevention and punishment of the prescribed crimes and ending immunity for the perpetrators of these crimes.

The Rome Statute is based on the principle of complementarity. Therefore it has recalled the international community and has imposed a duty upon every state to investigate, prosecute and punish those who are or were responsible for crimes of international concern by invoking their local criminal jurisdiction. The ICC may assume jurisdiction upon the failure of states to exercise their local jurisdiction. The jurisdiction of ICC extends to all crimes committed in internal armed conflict, international armed conflict or in time of peace. It should be noted that the prosecution or extradition of those who involved in crimes recognized under Rome Statute, is also binding upon those who are not party to the Rome Statute, under customary international law.

2.17. CONCLUSION

It may be concluded that conventional and customary international law have established the norm that the gross human rights violations must not go unpunished. There can be no option for legalized criminality neither there can be any foundation of crininal behaviour for a legal system. There can be no immunity from criminal proceeding to the organizers, perpetrators, conceivers, and participants on any ground including head of state, diplomats etc in the most serious crimes. International law does not accept the principle of exemption from liability on the ground that the crime was not recognized as crime

under domestic law. Once a crime is recognized in international law remains crime irrespective of the fact that the domestic law of the state has not recognized that act as crime. States are bound to search, arrest, investigate, prosecute and punish those who are involved in gross human rights violations. All crimes of international concern are equally punishable and condemnable whether committed in international armed conflict, non international armed conflict or during peace.

CHAPTER 3

PROSECUTION OF HUMAN RIGHTS VIOLATIONS: CHALLENGES FOR INTERNATIONAL CRIMINAL COURT (ICC)

3.1. INTRODUCTION

It is an established position of international law that crimes of international concern wherever and whenever occur, must not go unpunished. ICC, the newly established permanent international court bears a huge responsibility of bringing to justice those who are involved in gross human rights violations.

ICC was established to end immunity and bring to justice those involved in the heinous crimes. It was believed that punishing the offenders leads to peace and prosperity and letting the offenders leads to further atrocities and destruction. "Justice Robert Jackson, the Chief Prosecutor at the Nuremberg Trial," stated that, "letting major war criminals live undisturbed to write their 'memoirs' in peace would mock the dead and

make cynics of the living."[87] So it is believed that justice is required for peace and those political systems which are based on the free and liberal exercise of the principles of justice remain peaceful.[88] Regarding the role of justice in bringing peace, "Benjamin B. Frencz, a former Nuremberg Prosecutor," stated that, "there can be no peace with out justice, no justice with out law, and no meaningful law with out a court to decide what is just and lawful under any given circumstances."[89] The proponents of the 'peace through justice' theory consider that the universal rule of law will guarantee peace.

The concept that peace can only be guaranteed when the offenders get punished was the *raison d'etre* of the adoption of Rome Statute. This concept of peace and justice is verbally very sweet and attractive. However its practical implementation on the earth seems not easy. This concept is faced with the global and regional political realities which make difficult the implementation of this concept.

The global political, social, economic and cultural interests are more divergent and more extended beyond the boundaries of the states. These interests are in complete competing position with the realities of international criminal justice and ultimately it leads to the defeat of justice. It is also notable that the warring parties and the criminals of global concern, in most cases show no readiness to leave their criminal activities and face the trial. Because no human rights violator with a slight wave of prudence will prefer to face trial at The Hague instead of fighting for his cause. Such phenomenon can lead to

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[87] Katherine Ann Snitzer, 'Peace Through Justice?: Evaluating The International Criminal Court' (2012), Macalester College USA, Honors Projects, Paper 15 p 15

[88] ibid p 16

[89]The International Jurist, Perspective on International law, Comparative Law and the Human Rights Blog Review: Issues and Discussions Surrounding Resolution 1970 (2011) and the ICC Involvement in Libya http://untreaty.un.org/cod/icc/general/overview.htm accessed on 5th September 2011

the prolongation of atrocities which may create an embarrassment for ICC and a conflict between the raising voices for peace and its mandate for enforcing international justice.

Peace remains a central demand in every conflict. The first and the foremost important thing for the victims of conflicts is peace. The sufferings of the victims increase when the long run interests of the human rights violators collide with the mandate of ICC. In such scenario the victims consider that their interests are treated as secondary to global interests and that they are used as a sort of "Guinea pigs in the global justice experiment."[90] So the problem of the ICC is that on one side it is faced with the politics and on the other side it is faced with further atrocities. On one side it tries to remedy the past atrocities while on the other side it leads to the prolongation of atrocities. So keeping in view these difficulties, the challenges faced by ICC in bringing to justice the criminals of international concern will be observed along with the establishment of peace.

3.2. DOMINANT ROLE OF UNITED NATIONS SECURITY COUNCIL (UNSC)

The international community has seen many ad hoc tribunals and their delivery of justice. Most of the tribunals have not delivered free and fair justice. Regarding the performance and justice in the ad hoc tribunals, the Nuremburg prosecutor Jackson has said, "However unfortunate it may be, there seems no way of doing anything about crimes against the

[90] Snitzer (n 87) p 15

peace and against humanity except that the victors judge the vanquished."[91] All the ad hoc tribunals established prior to ICC were intoxicated with politics and delivered victor justice. Critics of ICC are of the view that ICC is subservient to the most powerful international political body: the Security Council. Lous Arbour has stated, "That there is little hope for the promotion of the role of law internationally if the most powerful international body makes it subservient to the rule of political expediency." She further stated:

> International criminal justice cannot be sheltered from political considerations when they are administered by the quintessential political body: the Security Council. I have long advocated a separation of justice and political agendas, and would prefer to see an ICC that had no connection to the Security Council. But this is neither the case nor the trend.[92]

The dominant role of UNSC can best be explained by the Libyan crisis.

3.3. ICC AND THE LIBYAN CRISIS

The popular Arab Spring entered into Libya on February 15, 2011 and demonstrations against the Qazafi Regime started in Benghazi. The demonstrators were demanding the resignation of Muhammad Muammar Al Qazafi, the president of Libya who had occupied this position since 1969. The demonstrators used violent methods and attacked

[91] ibid p 26
[92] Sylyia De Bertoodano, 'Judicial Independence in the International Criminal Court' Leiden Journal of International Law (2002) p 410

government installations and security forces. The Libyan government started actions against the demonstrators and almost used brutal force against the demonstrators. In a little time, the demonstrations converted in to a civil war and both sides used force.

Interestingly, the international community took immediate notice of the situation and convened the UNSC meeting on February 26, 2011. The UNSC adopted its resolution No. 1970 (2011) on the Libyan situation and referred the situation of Libya to the ICC.

The UNSC resolution No. 1970 (2011) contained such paragraphs which were not in conformity to the rule of law and independence of the ICC. It portrayed a very nice picture of the powerful states' designs to use ICC for their vested political interests.

The preliminary of this resolution recalled article 16 of the Rome Statute, which states that the UNSC can defer a situation from the investigation of ICC for a period of 12 months and subsequently for the next times as long as the UNSC wishes. It seems that there was no need for recalling article 16; rather the need was for recalling article 12. But the UNSC in this resolution reminded its own power, and sent a message to the ICC that ICC had not too much free hand in dealing its matters. Paragraph 4 to 8 is regarding the referral of the situation to ICC. The wording of Paragraph 6 goes as:

> Decides that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subjected to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations

in the Libya Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State; [93]

This paragraph very clearly depicts political agendas of the powerful nations. This paragraph was inserted on the resistance of United States of America and the purpose behind this paragraph was to search blanket immunity for the crimes if any committed by the US or other Western forces. It is also notable that the rebels in Libya also indulged in gross human rights violations,[94] but the UNSC only targeted Qazafi regime. It has been clearly established from the actions of the international community that it was not interested in bringing Qazafi to justice; rather it was interested in overthrowing the Qazafi regime.[95]

On 17 March 2011 the UNSC passed another resolution under which it authorized the establishing of no fly zone, measures for the protection of civilians and to freeze the assets of Qazafi regime. Interestingly, this resolution allowed the weapons supply to rebels which was banned under paragraph 9 of the resolution 1970 (2011).[96] The Security Council also recognized the National Transitional Council of Libya on 16 September 2011 which was formed on 27 February 2011.

These steps of the UNSC denoted that the powerful nations in UNSC were not actually concerned with the bringing to justice those who involved in war crimes. They were interested to overthrow the Qazafi regime and to secure their interests in the region.

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[93] S/RES 1970 (2011, 26 February 2011

[94] http://www.bbc.co.uk/news/world-africa-14135530 also on http://www.globalresearch.ca/nato-enabling-human-rights-abuses-libyan-rebel-ethnic-cleansing-and-lynching-of-black-people/25622 accessed 25 Oct. 2012

[95] ibid

[96] S/RES/ 1937 (2011)

This was further clarified by the actions of NATO forces, the establishment of no fly zone and the arming of the rebel groups by the NATO and Western forces against Qazafi regime.

In Libyan crisis the ICC played its role for only providing a moral support to the Western powers so that they may attack Libya and overthrow Qazafi regime and secure their own interests in the region. The UNSC as well as the powerful countries such as USA, UK and France expressed no further interest in the prosecution of those who were previously indicted by the ICC. The US stated that it had no interest for Saif ul Islam to be dragged into The Hague, while the UK also expressed the same view stating that we "want to see a process that respect international standards without demanding Saif ul Islam's transfer to The Hague.".[97] The Libyan government challenged the jurisdiction of ICC, and the court has stopped the proceeding further.[98]

3.4. ICC AND SYRIA

The Arab Spring entered in to Syria on 15 March 2011 and demonstrations against Bashar al Assad regime started. The Assad regime also took strong measures against rebels and used force against them. Since that time, both sides have been using brutal force against each other which has so far claimed more than 100,000 lives; mostly

[97] Lawrence Moss, The UN Security Council and the International Criminal Court: Towards more Principled Relations p 10

[98] http://edition.cnn.com/2012/10/09/world/africa/netherlands-saif-gadhafi-appeal/index.html accessed 15 Nov. 2012

civilians. More than two million Syrians have migrated to neighbouring countries and about four million are internally displaced, while more than 6.8 million people are in urgent need for humanitarian assistance. The situation in Syria is worsening every next day and there is no chance of improvement in the near future.[99]

The international community is helpless before the Syrian atrocities. The reason behind this is the economic and military relations of China and Russia with Assad regime.[100] Three resolutions over the situation of Syria have been vetoed by the respective countries. Russia has vowed that it would never be a part of such a measure which would lead to sanctions or other strict action against the Syrian government.[101] The crisis of Syria continues till this time.

It is notable that ICC has no direct jurisdiction over the situation of Syria. But the fact is that atrocities and gross human rights violations occur and the Assad regime has failed to respect and ensure respect of the international humanitarian law.

3.5. SELECTIVE APPROACH

[99] http://www.un.org/apps/news/story.asp?NewsID=45423&Cr=Syria&Cr1=#.UeroNawizAo accessed 21 July 2013
[100] Bertodano (n 92) P 410
[101] http://www.guardian.co.uk/world/2011/dec/13/syria-un-international-criminal-court accessed 12 Oct. 2012

The ICC approach toward a case is almost selective and based on political agendas. It is believed that ICC is championed by the western countries and especially Europe,[102] but its area of interest lies some where else. The African community is facing very bitter experience with the ICC and they consider it as a tool for furthering western interest.[103] In June 2009, when meeting of African countries including 30 members of ICC held, some countries including Senegal, Djibouti and the Comoros called on African countries to withdraw from the membership of ICC on the pretext that ICC was playing double standard, specially targeting the African nations and leaving others aside.[104] This resentment was further aggravated by the arrest warrant of Sudanese president Omar ul Bashir. The "Peace and Security Commissioner of the African Union", Ramtane Lamamra commented that ICC was applying "a double standard in pursuing cases against some leaders while ignoring others."[105] The African countries are of the view that the powerful nations in the UNSC such as USA, Russia and China who are not party to the Rome Statute are strongly shaping the policy and face of the ICC and justice at ICC has virtually become a private good of these powerful nations.[106]

The selectiveness of ICC regarding the selection of people to be prosecuted is also a notorious experiment. The ICC has so far kept itself away from those situations in

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[102] Marlies Glasius, 'What is Global Justice and Who Decides?: Civil Society and Victim Responses to the International Criminal Court's First Investigations, Human Rights Quarterly, Vol. 31, Number 2, May 2009, Published by The Johns Hopkins University Press, p 501-506

[103] Dharmendra Chatur, 'A Synergistic Failure Between the United Nations Security Council and the International Criminal Court. 2011, Christ University School of Law

[104] 'A Universal Court with Global Support available' at http://www.iccnow.org/?mod=universalcourt accessed 24 Nov 2011

[105] ibid

[106] Mark Kersten, 'UN Security Council and ICC: Between a Rock and Hard place' available at http://justiceinconflict.org/2011/05/06/the-un-security-council-and-the-icc-between-a-rock-and-a-hard-place/ accessed 05 Sept. 2011

which the allies of USA are involved. This is considered by most of the people that ICC has adopted this attitude of not touching those who are the allies of USA such as the "National Resistance Movement" in Uganda or the Kagame government in Rwanda for its "involvement in the conflicts in the eastern ports of the Democratic Republic of Congo"[107] in order to gain its long term acceptance from USA.

It is also notable that ICC has adopted to avoid the prosecution of crimes committed by both the warring parties. The ICC has so far adopted the attitude to indict the criminals of one party and seek the cooperation of another party in the arrest and investigation etc, and leaving the crimes of the other party unnoticed. In Sudan it has looked and focused mainly on Omar ul Bashir regime and has turned a deaf ear to the atrocities of the rebels. In Uganda it has indicted the Lord Resistance Army's leadership while the Ugandan government enjoys its favour. The crimes committed by the international forces in different parts of the world also go unnoticed by ICC.

3.6. COOPERATION OF THE INTERNATIONAL COMMUNITY

International institutions can get its due place when the international community wholeheartedly supports it. The international community is reluctant to cooperate with the ICC because of their political considerations. USA has adopted a rival attitude

[107] ibid

towards ICC and tries to block it from working when it endangers the interest of USA. The US Ambassador to UN during voting on Resolution No. 1422 stated that:

> Our Declaration of Independence states that....governments are instituted among men, deriving their just powers from.... the consent of the governed.... We have built up in our two centuries of constitutional history a dense web of restraints on government, and of guarantees and protection of our citizens.... The history of American law is very largely the history of that balance between the power of the government and the rights of the people. We will not permit that balance to be overturned by the imposition on our citizens of a novel legal system they have never accepted or approved, and which their government has explicitly rejected.[108]

When the ICC issued arrest warrant of Sudanese President Omar ul Bashir, he not only brought stress in his activities against the rebels, but also traveled to friendly countries. Since his indictment, he has traveled to Eritrea, Egypt, Qatar, Saudi Arabia, Chad, Kenya, Djibouti, Malawi, China, Libya, Iraq and Iran.[109] The African Union is completely behind Omar ul Bashir and they consider the ICC role for furthering western interests. The African Union has become very much disappointed from ICC and they are not ready to cooperate with the ICC because of their objections regarding its partiality.

3.7. EFFECTS ON PEACE

[108] Jason Ralph, 'International Society, the International Criminal Court and American Foreign Policy' Review of International Studies (2005), 31 p 42

[109] http://blog.foreignpolicy.com/posts/2012/09/17/the_worlds_most_mobile_war_criminal accessed on 1 January 2012

Another major challenge faced by ICC is that of its adverse effects on peace. Due to political approaches, the claim of ICC as an independent judicial body and its moral and legal authority in the minds of its proponents and victims becomes suspicious. The investigations of ICC have so far not yielded good results in different cases and have increased the stubbornness of the criminals in the conflict zones which has led to sharpness in their criminal actions and human rights violations because of their reluctance to lay down arms and face trial at The Hague.

Peace remains the primary concern and need of the war torn societies. United Nations Charter's preamble in its very first line has stated the determination of the international community "to save succeeding generations from the scourge of war" which "has brought untold sorrows to the mankind". The purpose of the Rome Statute was to establish peace by punishing those who were involved in heinous crimes. But ICC has not been successful in achieving this purpose; rather it proved counterproductive. Two situations, one of Uganda and the other of Darfur are referred here and it will be observed that how much ICC has been successful in stopping human rights violations, prosecution of the authors of heinous crimes and bringing peace to the war torn societies.

3.8. ICC AND SITUATION IN UGANDA

The situation in Uganda has been deteriorating since 1986 and has claimed thousands of lives along with gross human rights violations. The charismatic warlord Joseph Kony's

Lord's Resistance Army (LRA) mainly consisting of child soldiers continue to fight against the government forces. Joseph Kony, whose demand is the establishment of a state ruled by the Ten Commandments, claims to represent the grievances and problems of those Acholis, living in Northern Uganda, is barbarously involved in war crimes and mostly against the same tribe.[110] His forces have been mainly involved in raping and mutilating women, children and government soldiers as well as the children soldiers are exposed to continuous threat of sexual abuse and even killing from their commanders.[111] More than 1.5 million people have been driven out of their homes in the Northern Uganda. The Ugandan government had offered amnesty to LRA members in 1998 and in 2002 under amnesty act which gave the rebels chance to surrender unconditionally with out facing prosecution. Under this offer about 14000 LRA members surrendered till 2004,[112] however the situation could not be reconciled.

3.8.1. REFERRAL TO ICC

In January 2004 the Ugandan government referred the situation in Northern Uganda to ICC and called for the trial of LRA members and leaders.[113] The Prosecutor announced the investigation in February 2004 and by July 2004 applied to the Pre-Trial Chamber for

[110] Payam Akhavan, Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political realism, (August 2009) Human Rights Quarterly, Vol. 31, No. 3 p 641-642
[111] Krishanu Sengupta, Peace or Justice, The Dilemma of the International Criminal Court, (2008) Lethbridge Undergraduate Research Journal , Vol. 3 No. 1
[112] Ibid
[113] Glasius (n 102) p 499

the arrest warrant of five LRA leaders. The Pre-Trial Chamber unsealed the five warrants by October 2005.[114]

The first difference regarding the ICC role rose in 2004 between the Ugandan government and the Office of the Prosecutor (OTP) was that the Ugandan government wanted only the investigation of those atrocities committed by the LRA while the Prosecutor informed that he would investigate all the crimes committed by the LRA and UPDF. However later the Prosecutor in order to secure the cooperation of the Ugandan government did not insist on the prosecution of Ugandan forces involved in war crimes. The referral of case by the Ugandan President to ICC was looked with bad eyes inside Uganda by different groups and was considered as an instrument for the prolongation of war.[115]

3.8.2. INVESTIGATION OF ICC AND PEACE TALKS

Upon the request of President Museveni, the Prosecutor started his investigation in February 2004. The Chief Prosecutor of ICC Luis Moreno-Ocampo stated the prospective plan to investigate against LRA and specially its leader Kony.[116] The Ugandan civil society and the government amnesty commission were strongly against the investigation and made it clear upon the Prosecutor that the investigation was counterproductive to

[114] Ibid p 499-500
[115] Sengupta (n 111)
[116] Glasius (n 102) p 499

peace in the Northern Uganda which was the nexus of conflict. However the response of the Prosecutor was that his responsibility was to consider the interest of justice.[117]

Initially the investigation produced some good results. First it compelled the LRA members to think more seriously regarding the amnesty so that to avoid any prosecution. Secondly it compelled the Sudanese government to stop support to LRA. On the other hand UPDF war against LRA produced good results and the LRA was substantially weakened.[118] In November 2004, OCHA reported that:

> The weakening of LRA in southern Sudan and northern Uganda by the Ugandan army, the apparent lack of control by the leader of LRA over his troops in northern Uganda and the numerous defections of LRA commanders and foot soldiers since April 2004 has brought... a ray of hope that the end of this long ordeal is getting closer.[119]

Due to its weak position, the LRA seriously considered talking for peace. Different rounds of peace talks occurred and gestures of good will exchanged.[120] The President of Uganda even stated that he would ask ICC to stop investigation if the negotiations succeeded. In 2005 the UPDF unilaterally observed cease fire as the LRA attack had died down.[121]

On 14 October 2005, the ICC Pre-Trial Chamber issued five arrest warrants on the OTP's request about five leaders of LRA who were supposedly involved in the crimes

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[117] Sengupta (n 111)
[118] Akhavan (n 110) p 642, 643
[119] Ibid
[120] ibid
[121] Sengupta (n 111)

against humanity and war crimes. These arrest warrants were issued against the top leadership of LRA which included Juseph Kony, Raska Lukwiya, Okot Odhiamo, Dominic Ongwen and Vincent Otti.[122] These were the first people who were indicted since the existence of ICC. Among these five Raksa Lukwiya had died and the Court terminated the proceeding against him on 12 August 2006.[123] It has also been declared that Vincent Otti has been killed by Kony.[124] However there is no verification from an independent source of his death; therefore the proceeding against him is in progress.[125]

Upon these warrants, the LRA responded quickly and demanded the Ugandan government to get the warrants back, otherwise it would recourse to war again.[126] The LRA launched massive attacks on government forces, NGOs, humanitarian assistance organizations, government installations and civilians.

These developments created uncertainty and led to a break in the peace negotiations. Further, the Uganda President announced no cooperation with the ICC. In July 2006, the Minister of Internal Affairs and the government chief negotiator in the peace talks announced that ICC would not be allowed to impede the peace talks. In the same month the government announced that it would ask the ICC to suspend the arrest warrants till the peace negotiations.

Upon these steps of government, the LRA also softened its behaviour and resumed peace talks. On 8 July it was announced by Otti that Kony and his LRA had

[122] www.haguejusticeportel.net accessed on 5 Sept. 2011
[123] http://www2.icc-cpi.int/Menus/ICC/ accessed on 5 Sept. 2011
[124] Akhavan (n 110) p 644
[125] http://www2.icc-cpi.int/Menus/ICC/ accessed on 5 Sept. 2011
[126] Sengupta (n 111)

shown readiness to accept amnesty and thus the rebels stopped war by August 2006. In September 2006 Otti and Kony both demanded the withdrawal of ICC warrants and stopping of ICC investigation. In the same month President Museveni declared that he would approach African's Union Peace and Security Council for an amnesty shielding LRA from ICC prosecution.[127]

In February 2008, a series of peace negotiations held between the Ugandan government and the LRA by the mediation of the Sudanese Vice President Riek Machar, and a number of documents were signed between the two. However the LRA stance was that the final peace deal would be signed only when the Ugandan government got the charges dropped against the LRA in ICC.[128]

On March 10 2008, the LRA delegation met with the ICC officials and proposed the withdrawal of arrest warrants and charges against LRA and its leadership in favour of traditional judicial mechanism within the Ugandan judicial system. But it was responded that ICC "is a neutral organ that facilitates fair trial, the Registry does not engage in substantive discussions with any of the parties on the merit of the case before the court."[129]

3.8.3. OFFICE OF THE PROSECUTOR (OTP) STANCE ON THE SITUATION

[127] ibid
[128] www.haguejusticepotal.net accessed on 5 Sept. 2011
[129] ibid

In May 2006 Moreno-Ocampo stated that the Ugandan government should fulfill its duties and obligation under Rome Statute. It was further stated that any truce which was in contravention to the Rome Statute would not be accepted by ICC. It was also stated by the spokesman of the OTP that the Government of Uganda, Sudan and Democratic Republic of Congo were bound under the Rome Statute to execute the arrest warrants and that the OTP had no concern with domestic negotiations.[130] In July 2006 the Chief Prosecutor stated that the LRA leadership and specially Kony would eventually face trial. In a meeting of the Court's legislative body in November 2006, the Chief Prosecutor said that lasting peace could only be established when there would be no immunity and warned that the conclusion of peace talks must be compatible with the Rome Statute.[131]

3.8.4. ROLE OF ICC IN UGANDA

The role of ICC is not much appreciable on certain grounds. ICC assumed jurisdiction in this case on the pretext of incapability of Ugandan government. However ICC proved at the same footing; rather Uganda is in better position and its judiciary is in better position to prosecute the LRA leadership than ICC. The problem is that the LRA leadership can not be apprehended.

The second notable point is that Uganda was actually not serious in ICC prosecution process. The Ugandan government was not seeking justice for victims. It was

[130] ibid
[131] ibid

seeking moral superiority over the LRA and its blackmailing and wanted to use ICC as a bargaining chip in negotiation with the LRA.[132]

The warrants issued against the LRA leadership remained to be executed. One out of five indicted has died; therefore proceeding against him has been stopped. Another one is also presumably dead while the other three have not been found out. The credibility of ICC as a judicial body in the eyes of Ugandan people has been lost.[133]

3.9. ICC AND THE DARFUR CRISIS

Darfur has experienced civil wars since 1956. These civil wars existed in one form or another till the government of President Omer ul Basher and his political party National Islamic Front (NIF). The NIF continued to fight against non Arab and non Muslim Sudan's People Liberation Army (SPLA). A peace deal was concluded between NIF and SPLA in February 2005.[134]

In the western regions of the country, two rebel groups of non Arab attacked government installation in 2003 in protest of economic and political marginalization. Omar ul Basher government in order to suppress the rebels and to discourage such sort of rebellious activities in future launched a full fledged operation against the rebel forces. Mass scale brutalities against the rebels were taken and by 2006, approximately two

[132] Snitzer (n 87)
[133] ibid
[134] Sengupta (n 111)

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[132] Snitzer (n 87)
[133] ibid
[134] Sengupta (n 111)

hundred thousand people were killed and more than two million people were compelled to leave their homes.[135]

3.9.1. UN RESPONSE TO THE DARFUR SITUATION

The United Nations called the Darfur situation the "worst humanitarian crisis in the world." The UN immediately in 2004 formed an International Commission of Inquiry (under the mandate of UNSC Resolution No. S/RES/1564 (2004))[136] on Darfur in order to investigate that the crime of genocide occurred in Darfur or not. The commission investigated the issue and found that genocide had not occurred. However the systematic attacks and killings were declared as crimes against humanity.[137]

Upon the finding of the commission it was considered to station international peace keeping troops in Darfur, but due to the lack of consensus in the UNSC, the peace keeping troops were not deployed. However the UNSC approached the issue from another side and on 31 March 2005 referred the issue to ICC in order to bring the culprits to justice.[138] It was an unprecedented move of the UNSC to refer the case to ICC. Therefore this was an appreciable situation for ICC to have both the support of international community as well as of the UNSC to bring the culprits to justice.

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[135] ibid
[136] S/RES/1564 (2004) adopted on 18th September 2004 at UNSC 5040th Meeting Paragraph 12
[137] Sengupta (n 111)
[138] S/RES/1593 (2005) adopted on 31 March 2005, at UNSC 5158th Meeting Para 1

3.9.2. KHARTOUM'S RESPONSE TO UNSC REFERRAL

The referral of the case of Darfur to the ICC by the UNSC was strongly condemned by Khartoum. The government of Sudan refused to extend any cooperation and declared that no investigator would be allowed nor any accused would be extradited. The Sudanese representative in UN called ICC a "tool to exercise cultural superiority" and warned that it would "complicate the situation on the ground." The representative also pleaded for complementarity and stated that the Sudanese courts were holding trial of the accused and punishing the offenders.[139] The Sudanese foreign minister warned that the "referral would become another Iraq in terms of arrest and abductions of foreigners".[140]

The UN Secretary General after one month of the referral reported to the UNSC that the attacks of the Sudanese forces had increased tremendously upon civilian as well as aid workers and considered that a possible result of the referral and added that the Sudanese officials who were on the list of International Commission of Inquiry up to the level of Vice President Ali Osman Taha were potentially "destabilizing the region more generally through violence" as a response to referral.[141] This is also a notable point that the referral has virtually made the situation in Darfur worst which is the negation of the notion that the deterrence of ICC will lead to establishing peace and upholding of human rights.

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[139] UNSC 5158th Meeting on Resolution 1593 pp12-13, 31 March 2005
[140] Sudan, A Climate of Impunity in Darfur,Refugees International, March 2, 2005
[141] kofi Annan, monthly Report of the Secretary General on Darfur, April 12, 2005

3.9.3. INVESTIGATION OF ICC

On 5th June 2005, the OTP decided to open the investigation of the alleged crimes against humanity and war crimes occurred in Darfur. The OTP stated that the investigation would be a part to stop violence in Darfur and further added that local level reconciliation and traditional African mechanism would be complementary to ICC's work to restore long lasting peace.[142]

The Chief Prosecutor submitted his 4 biannual reports to the UNSC as were mandated by Resolution No 1593 of UNSC. In his first biannual report to the UNSC, the Chief Prosecutor devoted all his time and energy to the question of the interest of justice. He said that, "the investigation was intended to end immunity and that the OTP had no reason to believe that it would not serve the interest of justice." In his closing remarks he stated that OTP would cooperate with different actors regarding the maintaining of peace and ending conflicts. However he clarified that the OTP role would be only cooperative and would never take responsibility for the same.[143] Upon a question in press he stated that peace was the responsibility of UNSC while justice was the responsibility of ICC.[144] In his second report he reminded the same responsibilities of both the institutions, and

[142] " The Prosecutor of the ICC Opens Investigation in Darfur" ICC Press Release , June 6 2005
[143] Luis Moreno-Ocampo, "First Report of the Prosecutor of the ICC to the Security Council mandated under S/Res 1593 (2005) p 6, 29 June 2005
[144] Sengupta (n 111)

added that his contribution in the peace and stability was up to the level to pursue accountability of the most serious crimes.[145]

One month prior to the third report of the prosecutor, a peace deal was concluded between the Sudanese government and the rebels in May 2006.[146] The President issued an amnesty decree in June 2006 under which amnesty was granted to the rebels as well as government official involved in serious crimes.[147] In the third report to the UNSC in June 2006, he failed to mention the presidential decree as well as the amnesty granted to the violators. Instead he insisted that justice and accountability were essential for peace in Darfur. He referred to resolution 1593 and the resolution of April 2006 by summarizing that accountability of criminals was essential for the prevention of crimes and was an approach toward peace. Further he solidified his position round justice and disclaimed any role or cooperation in peace as was present in his early reports. In his fourth report he stated that peace was the concern of UNSC. The ICC can only help toward peace by administering justice. The prosecutor was successful in achieving arrest warrant of the interior minister and a commander of Janjaweed.[148] ICC has not been so far successful in arrest, prosecution and punishment of human rights violators in Darfur.

3.10. THE WAY AHEAD

[145] Luis Moreno-Ocampo, "Second Report of the Prosecutor of the ICC to the Security Council mandated under S/Res 1593 (2005) p 11, 13 December 2005
[146] Darfur Peace Agreement, 5 May 2005
[147] http://www.sudantribune.com/spip.php?article16128 accessed on 15 Jan 2013
[148] Sengupta (n 111)

From the foregoing cases it can be safely concluded that ICC faces great difficulties to establish its credibility as a purely judicial body. It has proved inefficient in the prosecution and punishment of most heinous crimes and human rights violations. The role of ICC has also proved detrimental to peace and to some extent caused further atrocities. The proponents of an independent judicial body are right up to their own extent. But the fact is that the current social and political scenario of the world has made it very difficult to reach the required target. ICC can not overcome the power politics of the world because it lacks the implementation mechanism of its own actions and rely only on the cooperation of the states parties to the Rome Statute, whose cooperation is almost based on the ratio of political interests. The politicized actions of the ICC have proved detrimental to the peace in the concerned regions. ICC role in furthering atrocities and conflicts have almost endangered its credibility and status in the eyes of the victims.

Peace is the primary need in the conflict and war torn society. For establishing peace, a compromise is needed between the warring parties. This compromise can be achieved through peace processes, amnesty, truth commission; arbitration etc. In the next chapter we will observe that how much peace processes, amnesty, immunity, truth commission and arbitration are compatible with the Rome Statute and with international law.

CHAPTER 4

PEACE BUILDING MEASURES: COMPATIBILITY WITH INTERNATIONAL LAW

4.1. INTRODUCTION

ICC has so far not succeeded in arresting those against whom arrest warrants have been issued, to initiate proceedings and issue arrest warrants against those who are involved in most heinous crimes and to act purely judicial. These failures of ICC are not in the interest of those communities who are suffering from the atrocities of war criminals. The ICC has virtually lost its credibility in the eyes of those who are directly suffering from the atrocities of those criminals.

Critics argue that the punitive justice cannot heal societies broken by war. They are of the view that criminal trials are selective, politicized, and prevent social and ethnic reconciliation by bringing polarization among the warring groups. For example in Uganda, the local religious and cultural leaders have advocated 'forgiveness and community reconciliation' as a more beneficial alternative. In Northern Uganda, a bishop

while criticizing the role of ICC in Uganda and its implications stated that peace processes demand a lot of confidence and ICC is hindrance in reaching to that level of confidence.[149]

The ICC prosecutor while referring to the situations stated that peace negotiations, international justice and national justice were one and the same thing and they must go together. One commentator in Uganda has stated that ICC in search of justice and peace will lose these both. Peace and justice are both needed by the victims. As a bishop in Uganda said that he needed peace and justice both. It is not the same that he wanted only one while leaving the other aside.[150] Responding to the prosecutor statement that we will try to bring Mr. Kony to justice live or dead; one commentator in Uganda said that should we wait for his arrest or resume fighting till his arrest![151]

In this confusion and stalemate, the problems of the victims increase and they suffer more harshly from the brutality of the warring parties. In this chapter the compatibility of peace processes, reconciliations, immunity and amnesty, to the Rome Statute and their role in the disputes' settlement and bringing peace to the war torn societies will be explained.

4.2. UNITED NATIONS (UN) CHARTER AND RECONCILIATIONS

[149] Katherine Ann Snitzer, 'Peace Through Justice?: Evaluating The International Criminal Court' (2012), Macalester College USA, Honors Projects, Paper 15. p 63
http://digitalcommons.amcalester.edu/intlstudies_honors/15
[150] ibid
[151] ibid

Article 33 of the UN Charter specifies the methods of settlement of disputes. It has enumerated that all disputes must be settled between or among the parties through peaceful means which include "negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." Here we are concerned with the crimes mentioned in the Rome Statute. The plain language of the Charter leads us very straight toward the purpose. But the important question for us is that can we incorporate local and sovereign immunity, amnesty for peace and truth commissions etc. in international law for those crimes mentioned in the Rome Statute? Answer to this question can be found by analyzing these instruments under international law.

4.3. IMMUNITY TO INDIVIDUALS

Different human beings in this world are immune by the laws of the land. For example, in almost all of the countries of the world, the head of states are immune from any criminal proceeding whatsoever. Furthermore, there exist immunity clauses for different officials in local laws in pursuing their duties in their states or beyond. The chain of command is based on the principle of command and obedience. Therefore, the orders of the superiors are obeyed with out any hesitation by the juniors irrespective of the illegality of the order and this is specially followed in the armed forces when they are fighting in the battlefield.

This immunity is recognized by the local laws of the land. However international law has a different approach towards this type of immunity. Different international statutes have clarified that there is no place for any immunity in international law for gross human rights violations.

The Nuremberg Charter in its article 7 stated that "[t]he official position of the defendants, whether as Head of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."

The "Convention on the Prevention and the Punishment of the crime of Genocide 1948" states in its article 4 that "[p]ersons committing genocide or any of the other acts enumerated in article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

The ICTR Statute has stated in article 6 (2) and the ICTY Statute in Article 7 (2) has stated that "[t]he official position of any accused person whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

Rome Statute of the ICC in its article 27 has stated that:

Irrelevance of official capacity

1. This Statute shall apply equally to all persons with out any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and on behalf, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

International law has developed some principles which form a body of *jus cogens* norms from which no derogation is permissible. These *jus cogens* norms include "the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture."[152] In *Furundzija Case*, the ICTY held that "every state is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction."[153] In *Pinochet Case*, (who was accused of torture) the House of Lords held that "sovereign immunity does not attach to such crimes, as they can never be legitimate functions of state officials."[154]

4.4. AMNESTY IN INTERNATIONAL LAW

[152]Yasmin Naqvi, ' Amnesty for War Crimes: Defining the Limits of International Recognition' IRRC September 2003 Vol. 85 N 851, p 609
[153] Prosecutor v Anto. Furunduzija, Judgement IT-95-17/1-T, 10 December 1998
[154] "Regina v Bartle and others (ex parte Pinochet) and Regina v Evans and others (ex parte Pinochet)" judgment of the House of Lords, 25 November 1998

In international law there is no proper place or limit for amnesty to war criminals and other crimes of international concern. War crimes, crimes against humanity and the crime of genocide are not waived nor pardoned in international law. The principle of *aut dedere aut judicare* is applicable regarding these crimes internationally and is a part of customary international law and is binding upon all states.

In 1968, the UNGA stated that, "no statutory limitations would apply to war crimes, crimes against humanity or genocide."[155] In another resolution passed in 1973, the UNGA held that it is an obligation upon states to search, arrest, investigate or extradite and if found guilty punish those involved in war crimes and crimes against humanity. [156] The Geneva Conventions 1949 and its Additional Protocol I oblige states to ensure respect of the Conventions by[157] bringing to justice those involved in grave breaches.

4.5. AMNESTY AND STATES DUTY UNDER DIFFERENT SETS OF LAWS

States are bound by three sets of laws. The first one is its internal law. The second one is the treaty laws and the third one is customary international law.

[155] "Convention on non Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity," General Assembly Resolution No. 2391, 26 November 1968
[156] GA/ Res 3074 (xxviii) of 3 Dec. 1973 Para 9
[157] Geneva Conventions Article 1 and 1(4) of Additional Protocol 1

The internal laws of states are constitutions and acts of Legislature etc. The state exercising its sovereign powers can amend the constitution; drafts amnesty laws and regulate its own deal according to its internal situations.

In treaty laws, states are bound under the treaty obligations. It is general principle of treaty laws that a state which has treaties with another state may bar prosecution of the criminals of another state which is subject to amnesty in another state.[158]

The responsibility of states under customary international law can not be waived nor pardoned. In dealing international crimes, states are either bound to prosecute or entitled to prosecute. The states are bound to prosecute or extradite if the crime committed amounts to grave breaches.[159] In such case the foreign courts are not bound to accept the amnesty granted by the state.[160] Grave breaches of Geneva Conventions, violations of Common article 3 and Additional Protocol I cannot be excused and states are bound by the principles of *aut dedere aut judicare* that either prosecute or extradite.[161] A refusal to cooperate in the arrest, investigation, extradition and punishment of those who committed these violations is clearly contrary to the general principles of customary international law.

4.6. DOMESTIC LAWS, JUDICIAL DECISIONS AND INTERNATIONAL CRIMINALS

[158] "Vienna Convention on the Law off Treaties1969" article 31
[159] "Geneva Conventions of 12 August 1949" and its Additional Protocol I
[160] Naqvi (n 152) p 593
[161] Geneva Convention Article 49 (First GC)

Historically it has been proved that domestic laws and judicial decisions cannot exempt an international criminal from prosecution internationally. In 1919 when the First World War ended and the allied forces decided to bring to justice those involved in the grave crimes against humanity, the "Commission on the Responsibility of the Authors of the War and on Enforcement and Penalties" stated that, "no trial or sentence by a court of the enemy country shall bar trial and sentence by the tribunal or by a national court belonging to one of the allied or Associated States."[162]

The Charter of the International Military Tribunal 1945, the trials at Nuremberg and the Allied Control Council Laws have established that no one can escape on the pretext that there was a trial conducted of him in national courts or his acts were in conformity with his domestic law or he has been granted any pardon, immunity or amnesty under domestic law.[163]

According to the "Responsibility of states for Internationally Wrongful Acts 2001," there can be no bar to the international obligations of state by any domestic law.[164]

In *Barcelona Traction case* the ICJ held that "the prohibition in international law of acts of aggression, genocide and the rule concerning the basic rights of the human

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[162] Naqvi (n 152) p 590

[163] Allied Control Council Law No. 10, 31 January 1946, Art. II(5).
Note: "The principle of Nuremberg Charter and the judgments recognize that if domestic law of a state does not recognize an act as crime or has not imposed any penalty for that act, does not relive the person who has committed that act from responsibility under international law."

[164] Responsibility of States for Internationally Wrongful Acts 2001 Article 3

persons are of such a nature that they are obligation *erga omnes*."[165] This means that due to the utmost importance attached to these rights, all states and the international community have a legal interest in ensuring the protection of these rights.

Therefore domestic laws and judicial decisions can not exempt nor can provide any shield to the criminals of international concern from prosecution internationally.

4.7. AMNESTY TO CRIMES UNDER ROME STATUTE

The Rome Statute of the ICC has no place for amnesty laws. This has been explicitly explained in article 25 (3) that, "a person shall be criminally responsible and liable for punishment for a crime with in the jurisdiction of the Court if" he or she commits such crime individually, jointly, or through other person. Further, he will be criminally responsible and liable to punishment if he or she orders, solicits, induces, facilitates, aids, abets or in any other way contributes to the commission of that crime or the attempt to commit that crime or furthers the criminal activity or criminal purpose of a group to the commission of that crime or having the knowledge of the intention of the group to commit that crime.

Justice Akiiki Kiiza, the head of the international War Crime Court in Uganda, commenting on the Ugandan amnesty offer, stated that amnesties granted by the Ugandan government were equivalent to unwillingness mentioned in Rome Statute article 17(1)a

[165] Barcelona Traction Case, ICJ Reports 1970, 3 p 32

and ICC did not recognize locally granted amnesties.[166] Amnesties and pardons granted to the offenders of the crimes of international concern go against the responsibility of states to prosecute the perpetrators of heinous crimes. He said that ICC would proceed the case and the Ugandan government would be under obligation to re-arrest and forward to The Hague those who were the beneficiaries of the amnesty offer, irrespective of the amnesties granted under local laws.

4.8. ADDITIONAL PROTOCOL II 1977 TO GENEVA CONVENTIONS AND AMNESTY

The proponents of amnesty laws are of the view that amnesty can be considered in conformity with international law on the basis of the Addition Protocol II to Geneva Conventions 1949. The "Additional Protocol II 1977 to Geneva Conventions" has stated that "[a]t the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict...."[167] However, the ICRC has interpreted that the amnesty required by Protocol II of Geneva Conventions is not for war crimes, crimes against humanity and genocide, it is only for domestic law offences of rebellion and sedition and otherwise relatively minor transgressions of international humanitarian law only. It provides combatant immunity

[166] http://www.newvision.co.ug/news/628413-We-don-t-recognize-local-amnesty---Judge.html accessed 15 March 2013
[167] "Additional Protocol II 1977" Article 6 (5)

when the combatant fought and respected international law. Therefore he cannot be prosecuted merely that he took part in hostility.[168]

4.9. UN PEACE BUILDING MEASURES AND RECOGNITION OF AMNESTY

The concepts of national reconciliation and international prosecution are standing at the two opposite poles. But the trends and practices of the UN have shown that with out giving place to peace processes and reconciliation, it is difficult to establish peace and deliver justice. UN has generally felt free in endorsing amnesty for peace deal.[169] The best example of this is the UN approach towards the peace deal in El Salvador in which the UN was actively engaged in the peace accord. Under the auspices of the UN, the Mexico Agreement was signed on 27 April 1991 for the establishment of truth commission consisted of three individuals appointed by the UN Secretary General, for the serious violations in El Salvador from 1980 to 1991.[170]

After the report of the truth commission, the El Salvador government issued amnesty for the criminals including those mentioned in the report. The UN did not adopt any hostility nor condemned the amnesty and supported peace deal.[171]

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[168] Naqvi (n 152) p 605
[169] Carsten Stahn, 'United Nations Peace-Building, Amnesties and Alternative Form of Justice: A change in Practice? IRRC March 2002 Vol.84 N 845 p 191
[170] Ibid 192
[171] ibid 193

The UN also helped to negotiate another agreement known as Governor Island Agreement under which President Aristide returned to Haiti after agreeing to the amnesty by the military leader who had occupied the government. UNSC approved the peace deal along with the amnesty clauses.[172]

Another example of the amnesty recognition by the UN is the conclusion of the Guatemalan Peace Accord in which limited amnesty was accepted and excluded those crimes from the effects of amnesty which were punishable under treaties to which Guatemala was a party. This amnesty was also accompanied by a truth commission whose task was to identify the human rights violations and acts of violence that had caused the Guatemalan population to suffer.[173]

In 1999 the UN supported the conclusion of the Lusaka Ceasefire agreement in the DRC in which along with the arrest and prosecution of the mass killers and perpetrators of crimes against humanity, the granting of amnesty and political asylum was also provided except for the genocidaires.[174] This practice of the UN has proved very beneficial approach towards the conflict resolution by granting recognition to the amnesty clauses.

4.10. POSSIBLE INFERENCE FROM ROME STATUTE

[172] Report of the United Nation Secretary General, "The Situation of Democracy and Human Rights in Haiti" UN Doc. A/47/975, S 26063, 12 July 1993, pp.2-3
[173] R. Grote, "The United Nations and the Establishment of a New Model of Governance for Central America" the Case of Guatemala, Max Planck yearbook of United Nations Law, Vol. 2 1998 p 239
[174] Lusaka Ceasefire Agreement of 10 July 1999, UN Doc.S/1999/815 of 23 July 1999

In Rome Statute, no limits of amnesties have been mentioned. During the drafting session of the Statute, it was suggested to give a clause of amnesty laws so that to make the ICC adoptable with the current legal and political trends. But most of the countries were against this proposal on the pretext that granting amnesty legal status in Rome Statute would defeat the purpose of law, because the very purpose of the Rome Statute was to end immunity and bring to justice those who were criminals of international concern. Therefore it was agreed that the UNSC role, the prosecutor discretion, and permission from Pre-Trial Chamber would provide sufficient time to look into the situation and the validation of any amnesty laws if any in the interest of justice.[175]

Inference can be made from three different articles of the Rome Statute in favour of amnesty laws. First article 17 (1) b provides that a case will be not admissible if, "[t]he 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."

This article is regarding the jurisdiction of the court. However from this an inference can be made that amnesty laws may be considered competent under this article subject to the provision that the state does not intend to shield the criminals from the prosecution in ICC.

[175] Naqvi (n 152) p 561

The second inference can be taken from article 53 of the Rome Statute which empowers the prosecutor not to proceed if he or she is satisfied that the investigation will not serve the interest of justice. Article 53 gives the prosecutor enormous powers and even technically he can choose not to proceed with the case referred by the UNSC if he deems it in the interest of justice.

The third possible inference of amnesty is that from article 16 of the Rome Statute. Article 16 of the Rome Statute empowers the UNSC to defer a case for a period of 12 months on request to ICC. This article is perhaps the most strong in favour of amnesty. The UNSC may use this time to bring the warring parties to a solution in conformity with the UN Charter. An amnesty deal brokered by UNSC will have strong legal and moral grounds.[176]

4.11. POSSIBLE OPTIONS REGARDING AMNESTY

Retaliation or punishment is one form of grievances' redressal and satisfaction for the victims. But at the same time peace and prosperity are the needs of the war torn societies. ICC instead of looking to redress the past atrocities by punishing the offenders should also focus on the prevention of future atrocities by giving space to peace and reconciliation processes.

[176] It has been stated in the Rome Statute that the UNSC can defer a situation from the ICC to investigate or prosecute for a period of twelve months and this can be renewed by a subsequent request in the coming years. There is no explanation in the Rome Statute that when an issue is deferred by UNSC and is settled by the brokerage of UNSC, UN or through any other means, then through which means the case may be closed. Either it will need renewal of the request each year or it may be done by a UNSC resolution which permanently defers the situation from ICC which will not be in compliance with the Rome Statute.

Restorative judicial approach accompanied by limited and principled amnesty, focusing on the normative, rather than the punitive measures and objectives of the international criminal justice may be the more appropriate model and substitute of atrocities.[177] Such amnesties have normally no extraterritorial effects, as they do not adversely affect the treaty obligations or entitlement to prosecute the accused of war crimes under customary international law.[178] The need of amnesty is that there should be certain minimum standards and criteria for it in order to make it compatible with international law. Amnesty may be accommodated in the regime of international law while having the following minimum criteria.

4.11.1. PURPOSES OF THE AMNESTY DEAL

Amnesty may be considered if the purpose of amnesty deal is clear and in conformity to International Law. The valid purpose of an amnesty law may be the establishment of peace and furthering peace and stability. Unlimited prosecutions do not serve the interest of justice and peace. The Constitutional Court of South Africa based on these arguments recognized the broad amnesty granted under the "Promotion of National Unity and Reconciliation Act of 1995."[179]

4.11.2. OTHER ACCOUNTABILITY MEASURES

[177] Naqvi (n 152) p 583
[178] ibid 588
[179] AZAPO Case Para 19

Amnesty can be justified on the ground when there is provided additional mechanism to reach justice. For example other accountability measures and truth commissions are established. Lasting peace can only be established when there are accountability measures and the victims are satisfied that their grievances have been addressed.

Lasting peace and reconciliation requires forgiveness. Forgiveness can only be meaningful when the victims are in position to take revenge and the violators show repentance over their acts. Therefore an amnesty accompanied with such accountability measures through which the position of the victims and the violators come to the same page can be considered compatible in international law.[180]

4.11.3. AMNESTY DEAL: WITH IN LEGAL PARADIGM

The validity of amnesty deal can be questioned on the ground that a defective ruler who has no elected background, is not competent to grant an amnesty deal. A non elected legislature may also be considered incapable to provide a deal of amnesty. For example in Spain the military ruler granted amnesty on purely political basis in Chile and Argentina, cannot be considered as valid under international law.[181]

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[180]Naqvi (n 152) p 619

[181] W. Burke-White, "Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation" Harvard International Law Journal, Vol. 42, No.2, 2001, p 479.

Amnesty granted by a regime to protect state's agents or state's armed forces from the jurisdiction of ICC can not be considered as valid by the international law. For example the amnesty granted by the Ugandan government to the human rights violators can not be justified by the international law because its purpose was to provide shield to the Ugandan forces from the jurisdiction of the ICC.[182] The very basic notion of law is that no one can be judge in his own case. Therefore self proclaimed amnesty has no legal effects.

However when an amnesty is dealt between the incoming regime and the out going regime in a proper way, it can be considered as valid in international law. During the Apartheid regime, the UN condemned the Apartheid very strongly and declared the international community to prosecute those involved in Apartheid under the Apartheid Convention.[183] But when a new constitution was adopted and an amnesty clause was inserted in it, the UN adopted resolutions welcoming the transition toward democracy and had a silent attitude towards the previous crimes' prosecution.[184]An amnesty brokered by UN may be considered valid under international law if it is with in the norm of international law.

4.11.4. BENEFICIARIES OF THE DEAL

[182]Naqvi (n 152) p 620
[183] A/Res/36/13, 28 October 1981, A/Res/37/47, 3 December 1982.
[184] A/Res/48/159, 20 December 1993.

The validity of the amnesty law can also be challenged on the grounds that who are benefiting from it. It is a well established principle of law that the most responsible for a crime is punished most severely and brought to justice.

The Rome Statute has explicitly explained those who responsible for crimes and those who will be brought to justice. However for an amnesty deal, it is needed to punish the most responsible and grant amnesty to the least responsible. This mechanism has been adopted previously in two different statutes for the Court of Seri Leone and the "Law Establishing Extra Ordinary Court of Cambodia." Both had jurisdiction over the criminals most responsible.[185] At Nuremberg also only senior members of the Nazi war criminals were put on trial at IMT while the low levels were tried in the national military courts by the allies. The UNSC has also endorsed the prosecutorial policy of ICTY and ICTR that "civilian, military and paramilitary leaders should be tried before them in preference to minor actors."[186]

The above are the minimum standards and criteria for recognition of amnesty laws. However as already explained, the purpose of amnesty law should not be to cover or provide shield to those perpetrators of the most heinous crimes.

4.12. TRUTH AND RECONCILIATION COMMISSIONS

[185] Naqvi (n 152)
[186] Allison Martson Danner and Jenny S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' 2005 California Law Review, p 16

The truth and reconciliation commissions are established in the transitional societies to reach toward truth and reconciliation for establishing peace and furthering peace. It is obvious that there is apparently no provision in the Rome Statute from which the justification of truth commissions can be taken. But at the same time, it can also be not presumed that the truth and reconciliation commissions are against international law. The relevance of truth and reconciliation commissions can be sought by balancing the interest of peace and reconciliation pursued by such a body.[187]

A truth commission which is established by a regime should be followed by a free and fair trial and other incentives which satisfy the victims. If the regime failed or unwilling to proceed with the findings of the truth commission or failed to satisfy the interests of the victims, then the ICC may assume jurisdiction and proceed with the trial of the offenders. Truth and reconciliation commissions can only be compatible with the Rome Statute when it is accompanied by a sound trial of the most responsible offenders along with the satisfaction of the victims.[188]

4.13. CONCLUSION

From the above details it may be concluded that amnesty, truth commissions and reconciliations are primarily beyond the domain of the Rome Statute. The Rome Statute

[187] Anja Seibert-Fohr, 'The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions' A. von Bogdandy and R. Wolfrum (eds.). Max Flank Yearbook of United Nations Law, Vol. 7, 2003, 553-590 Koninklijke Brill N.V. Printed in the Netherlands p 574
[188] ibid p572

strictly insists upon the prosecution of those involved in the most heinous crimes. But on the other side, it is also observed that if this approach is adopted in international criminal justice, then the situation can not be reconciled nor brought to peace. It has been already described that the war torn societies primarily need peace. The general principle of international law is that the authors of the most serious violations of human rights must be punished and no derogation is permissible from this principle. The above mentioned criteria for amnesty can be adopted only in exceptional cases and for the purpose of upholding the spirit of international law, not for defeating the purpose of international law.

CHAPTER 5

CONCLUSIONS

5.1. THE FACTS DISCOVERED

Crimes of international concern wherever and whenever committed, must be punished and there can be no exception to this principle. This policy has its roots since 1919 when the Commission on Responsibilities showed interest in the prosecution of those who were involved in gross human rights violations in First World War. This position was incorporated in the Nuremberg Charter that the crimes against peace, war crimes and crimes against humanity must not go unpunished on any ground. The Geneva Conventions also make it obligatory upon all states to respect and ensure respect for the Conventions by punishing those involved in grave breaches, violations of article 3 or other violations of "Geneva Conventions and its Additional Protocols." States are under duty to punish those who have committed gross human rights violations and no derogation is permissible from this position.

Crimes recognized in international law remain crimes and no local law of a state can legalize an act which is criminal under international law. Immunities or other

statutory limitations have no recognition in international law with respect to the crimes of international concern and every one is individually responsible for the criminal act committed by him along with the responsibility of state. States are under duty to prosecute or extradite those who have committed crimes of international concern.

'Crimes of international concern must not go unpunished' was the logic behind the establishment of ICC. The adoption of the Rome Statute of ICC was to give practical shape to the commitment of international community for the establishment of permanent international criminal court to punish those criminals of human rights violations who were hiding behind different pretexts from accountability and punishments. However the purpose for which ICC was established seems very difficult to achieve. ICC exists and continues its work in such a situation in which its role as independent judicial body is verily questioned. ICC is subjected to enormous challenges which include international politics, the dominant rule of UNSC, lack of international cooperation and its adverse effects upon the war torn societies.

International politics is a reality and so far have played very negative role with respect to the prosecution and punishment of gross human rights violations. Historically justice delivered by international tribunals has proved victor's justice. International politics have made it difficult for ICC to bring the culprits on merit to justice.

The UNSC which is the most powerful international body and entrusted with the establishment of peace and security world wide is reluctant to cooperate with ICC. Legally, the ICC Statute is not binding on UNSC; rather the UNSC resolutions and

actions are binding on all states and organizations including the ICC. UNSC has been given the role of "on and off" the proceedings in the ICC which is a barrier to the independence of the ICC. The UNSC can refer or defer a case to the ICC and that referral and deferral may not be based on sound judicial basis but may be based purely on political basis irrespective of the danger to global peace. The UNSC is bound only by the principles of the United Nations and general principles of customary international law and its acts beyond Rome Statute can not be called '*act legibus solutus.*'

The referral and deferral power of the UNSC is considered as an attempt of subduing and restraining the ICC from the exercise of its powers judiciously. So far there has been no situation deferred from the ICC by the UNSC. In number of cases the UNSC in its resolutions have barred the ICC from exercising its jurisdiction over the future expected crimes of the peace keeping mission forces. The two situations referred to the ICC by the UNSC have not brought good results. The UNSC is also reluctant to cooperate in cases which have been referred to ICC by itself.

The powerful nations of the world including China, Russia, India Pakistan etc. and specially the United States of America which play great role in international atmosphere are strong opponents of the ICC. The USA has enacted legislation for the protection of its citizens from the jurisdiction of ICC and also signed Article 98 agreements with different countries of the world which make citizens as well as the contractors of USA immune from the ICC jurisdiction. The powerful nations are trying to use ICC for their sole interests. The ICC is also facing hardships in executing its orders etc and cannot compel any state to enforce its orders nor can any state take any measure

on the pretext of ICC action except under the authorization of UNSC working under its chapter VII. ICC lacks enforcing mechanism and no state functionary is under obligation to carry out its orders just as of national courts.

The ICC is internally also faced with politics and there is no criteria for the selection of country and persons to be indicted. The only criterion which has been so far visible is that the weak and less privileged states are targeted. In these targeted states also it was observed that it almost targeted one party involved in the crimes and sought the cooperation of another party in reaching justice. Furthermore, it has also been observed that the international forces are reluctant to the role of ICC played in bringing to justice those who are at the list of ICC because of their vested interests. In such scenario the ICC exists and struggles for its legitimate role for justice in this world.

ICC is facing great difficulties in its approach towards justice. The approach towards justice of the ICC some times leads to furthering atrocities in the prevailing countries and this is looked with bad eyes from those quarters where the actions of ICC produce further destabilization. The situations in Darfur and Uganda are the best examples of this phenomenon. The Ugandan peace talks in 2006 and 2008 were apparently failed due to the stance of the LRA to withdraw the charges against LRA and its leadership while ICC was not ready to withdraw the charges. This adversely affects the very credibility of the ICC. The African Union upon the indictment of Sudanese president Omar ul Basher declared ICC as the instrument of west for furthering their interests, led to further destabilization in Darfur and the Sudanese president was welcomed by those also who were party to the Rome Statute. In such situation the ICC is

faced with further atrocities as well as criticism from those who are thirsty for peace. A person who is facing continuous threat to his life, liberty and property due to the actions of ICC cannot consider ICC as his well wisher.

The Rome Statute is further not in the position to provide any proper place for peace and reconciliation processes. The commentators of the Rome Statute have only drawn conclusion from certain articles of the Rome Statute. However there is no explicit place in Rome Statute for peace and reconciliation.

It is further notable that the prosecutor of ICC on different occasions has disowned the responsibility of peace. The prosecutor is true in his remarks and it is clear from the Rome Statute that the mandate of the prosecutor and ICC is that which he has explained, but this position leads to further atrocities and destabilization. It is unreasonable that a person who is the killer of one hundred people comes home and sleeps with out any fear and leads a fearless life, but at the same time it is more unreasonable that the killing and atrocities should continue for unlimited time. ICC lacks any mechanism to handle ongoing and continuous conflicts and its rule can not be given attention during continuing conflict.

5.2. TOWARDS AN OPTIMISTIC APPROACH

International law is for the purpose of the well being of humanity. If its rigidity leads to further atrocities, then the best option can be to reconsider the relevant provisions of

international law and statutes. It is a consolidated fact that ICC is the most precious gift of twenty first century. No one can deny its need, importance and its utility.

International law has reached a clear conclusion with respect to the prosecution and punishment of human rights violations. The practice of prosecution of international criminals has not reached the level which is demanded by international law. Therefore ICC faces great difficulties in solidifying its position with respect to the prosecution of human rights violations. That's why its present position is not representing the wishes and views of those who worked hard for its creation. There are lot of people, states and NGOs who perceived this body as a sacred judicial body and a hope for those who are suffering the atrocities of "genocide, war crimes, crimes against humanity, aggression" and other related crimes. ICC was almost supported by the weak and the oppressed nations in the hope that they would see justice delivered by a supranational judicial body. However most of them are now against the ICC because of its low performance. Although their hopes and wishes have so far not been translated in to practical shape, but this cannot be declared a total failure of their vision.

ICC is a newly established body. Therefore the world has not adapted itself to the role and regulations of this international body. ICC will face hardships in achieving its proper place till the time the most powerful nations of the world including UNSC repose trust in it and accept its legitimate role in world. Without the whole hearted support of the international community and the most powerful nations of the world, it is not possible for ICC to work properly.

However it is also unwise to wait till the approval of those powerful nations. ICC has so far only one conviction in the last ten years. The question is that how will the ICC succeed in achieving its legitimate position in the face of such opposition and what are the needs of the day to make ICC a legitimate judicial body so that it may play its role for bringing to justice gross human rights violators and most heinous criminals along with furthering international peace with out any biased approach.? For this purpose, the following suggestions are forwarded.

5.3. SUGGESTIONS

The first and the most important problem for ICC is the lack of a sound enforcement mechanism. The development of a sound enforcement mechanism is the first and primary need of ICC. ICC should be armed with such powers which are exercised by the national courts. Apart from any other solution to this problem, cooperation of the UNSC can be sought and a statutory relation may be established between the two for the enforcement mechanism.

The dominant role of the UNSC is also a hindrance in the independence of ICC. ICC is now virtually subservient to the UNSC which adversely affects its credibility and judicial performance. Therefore the relationship between the two institutions should be based on genuine coordination and mutual cooperation in which both the institutions work for their respective purposes while reinforcing each other. The UNSC referral

should also be based not on political grounds, but on sound judicial grounds. For this purpose a separate mechanism or procedure should be adopted. Such mechanism may be the establishment of a judicial committee in the UNSC or in UN, empowered to analyze the judicial basis of an issue and to frame recommendations for further action or inaction.

The selective approach of ICC is also detrimental to its credibility. Therefore ICC should adopt a universal approach for upholding the role of law and the delivery of justice. A sound criteria and merit should be followed, and only those situations should be investigated which actually need prosecution and where no other option is available and where actually crimes of international concern has occurred or continued. The purpose is to uphold human rights, stop atrocities and satisfy the victims. If this can be achieved by other less stressful measures, then those measures should be adopted.

The role of ICC in the ongoing atrocities has also not brought good results; rather it adversely affected the war torn societies. One of the reasons of these adverse effects is the clash between international prosecution and regional solutions. International prosecution can not take the place of regional solutions. Therefore International prosecution should not be a bar to local solutions including domestic reconciliations. Therefore such a policy should be adopted which gives chance to peace and reconciliation. Regional, local and cultural solutions should be duly acknowledged. Due care should be taken of the victim's interests. A balance should be established in the prosecution of the previous atrocities and avoidance of the future atrocities. The role of ICC should not only be a trial court, it should also play its role in facilitating the ways

towards the settlement of disputes and development of human rights in coordination with other institutions. Justice and peace should go side by side. Human rights must be upheld not only by prosecution, but through other mechanisms also.

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