SOVEREIGNTY AND INTERNATIONAL CRIMINAL LAW: A CRITICAL ANALYSIS OF JURISDICTIONAL ISSUES

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DECLARATION

I declare that the thesis entitled "**Sovereignty and International Criminal Law: A Critical Analysis of Jurisdictional Issues**" submitted by me for the award of the degree of **Doctor of Philosophy** of Jawaharlal Nehru University is my own work. The thesis has not been submitted for any other degree of this University or any other University.

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CONTENTS

Page No.

ACKNOWLEDGEMENT **i**

LIST OF ABBREVIATIONS **v**

I. INTRODUCTION **1-5**

1. BACKGROUND OF THE STUDY 1
2. DEFINITION, RATIONALE AND SCOPE 3
3. RESEARCH QUESTIONS 3
4. HYPOTHESES 4
5. RESEARCH METHODS 4
6. SCHEME OF THE STUDY 5

II. EVOLUTION OF SOVEREIGNTY AND INTERNATIONAL CRIMINAL LAW **6-46**

1. ORIGIN AND DEVELOPMENT OF SOVEREIGNTY 7
   - 1.1. Evolution of Sovereignty 7
   - 1.2. Devolution of Sovereignty 11
   - 1.3. Revolution of Sovereignty 15
   - 1.4. Philosophical Foundations 25

2. ORIGIN AND DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW 37
   - 2.1. The Trial of Peter van Haginbach 37
   - 2.2. Treatification of International Criminal Law 38
   - 2.3. Institutionalisation of International Criminal Law 40
   - 2.4. Role of United Nations Security Council 42

3. SOVEREIGNTY AND INTERNATIONAL CRIMINAL LAW 43

III. STRUCTURAL PRINCIPLES OF INTERNATIONAL CRIMINAL LAW **47-85**

1. PRINCIPLE OF SOLIDARITY 48
   - 1.1. *Hostis humani generis* 49
   - 1.2. *Aut dedere aut judicare* 52
   - 1.3. Responsibility to protect 59

2. PRINCIPLE OF SOVEREIGNTY 64
2.1. Sovereign autonomy 65
2.2. Sovereign equality 67
2.3. Sovereign immunity 68

3. PRINCIPLE OF UNIVERSALITY 71
3.1. *Jus gentium* 71
3.2. *Jus cogens* 72
3.3. *Obligatio erga omnes* 74

4. PRINCIPLES OF LEGITIMACY 75
4.1. Principle of Legality 76
4.2. *Double Jeopardy* 79
4.3. Principle of Culpability 82

IV. JURISDICTION UNDER INTERNATIONAL CRIMINAL LAW 86-125
1. ENFORCEMENT JURISDICTION OF DOMESTIC COURTS 87
1.1. Standard Jurisdictional Principles 88
1.2. Universality Principle 94
1.3. Protective Principle 97

2. ENFORCEMENT JURISDICTION OF INTERNATIONAL TRIBUNALS 99
2.1. Principle of Complementarity 99
2.2. Principle of Communitarianism 103
2.3. Principle of Surrender 104

3. PRESCRIPTIVE JURISDICTION AND INDIAN STATE PRACTICE 109
3.1. Domesticating International Criminal Law 111
3.2. Parliamentary Incorporation 114
3.3. Judicial Incorporation 119

V. EXPANSION OF THE REALM OF INTERNATIONAL CRIMINAL LAW 126-160
1. CONVENTIONAL PERCEPTIONS 127
1.1. Core International Crimes 127

1.2. International Military Tribunals 133
1.3. Russell Tribunals / Private Tribunals 136

2. INSTITUTIONAL GROWTH AND EXPANSION 137
2.1. International Criminal Tribunals 138
2.2. International Criminal Court 140
2.3. Hybrid Crimes Tribunals 145

3. HORIZONTAL DIVERSIFICATION 147
3.1. Torture and Enforced Disappearance 148
3.2. Terrorism Activities 152
3.3. Transnational Organised Crimes 154

VI. ACCOUNTABILITY UNDER INTERNATIONAL CRIMINAL LAW 161-226
1. CRIMINAL RESPONSIBILITY UNDER ICL 162
1.1. State Responsibility 163
1.2. Individual Responsibility 172
1.3. Responsibility of Organisations 187
1.4. Responsibility of Corporations 188

2. CIVIL LIABILITY UNDER ICL 199
2.1. Modes of Civil Liability 200
2.2. Liability for Political Crimes 201
2.3. Liability for Environmental Crimes 206
2.4. Liability for Corporate Crimes 209

3. PREVENTIVE AND PROTECTIVE RESPONSIBILITIES 213
3.1. Responsibility of Individual States 214
3.2. Responsibility of International Community 218

VII. CONCLUSION 227-232
ANNEXURE 233-252
REFERENCES 253-276

LIST OF ABBREVIATIONS

AL	Arab League
ASEAN	Association of Southeast Asian Nations
AU	African Union
BWCT	Bangladesh War Crimes Tribunal
CAE	*Chambres Africaines Extraordinaires*
CAFTA	Central America Free Trade Agreement
CAH	Crimes Against Humanity
CAR	Central African Republic
CBI	Central Bureau of Investigation
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CELAC	Community of Latin American and Caribbean States
CERDS	Charter of Economic Rights and Duties of States
CIA	Central Intelligence Agency
COMINCO	Consolidated Mining and Smelting Company
CrPC	Criminal Procedure Code
CVC	Central Vigilance Commission
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Court of Human Rights
EO	Executive Outcomes
EoP	Extradite or Prosecute
EU	European Union
FBI	Federal Bureau of Investigation
FIU	Financial Intelligence Unit
FSIA	Foreign Sovereign Immunity Act
GC	Genocide Convention
IB	Intelligence Bureau
ICA	International Council on Archives
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination

ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICSCC	International Convention for the Suppression of Counterfeiting Currency
ICTB	International Crimes Tribunal for Bangladesh
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IHT	Iraqi High Tribunal
IJPK	International Judges and Prosecutors Programme in Kosovo
ILC	International Law Commission
ILO	International Labour Organization
IMTFE	International Military Tribunal for the Far East
IMTN	International Military Tribunal at Nuremberg
IO	International Organization
IPC	Indian Penal Code
IRA	Irish Republican Army
ISIS	Islamic State in Iraq and Syria
ITLOS	International Tribunal for the Law of the Sea
JCE	Joint Criminal Enterprise
JCR	Joint Criminal Responsibility
JKLF	Jammu Kashmir Liberation Front
KGB	*Komitet Gosudarstvennoy Bezopasnosti*
KLWCC	Kuala Lumpur War Crimes Commission
KWCT	Khabarovsk War Crimes Trials
LNM	Latin Nationalists Movement
LTTE	Liberation Tigers of Tamil Eelam
MICT	Mechanism for International Criminal Tribunals
MINURSO	United Nations Mission for the Referendum in Western Sahara
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali

MINUSTAH	United Nations Stabilization Mission in Haiti
MLC	*Mouvement de Liberation du Congo*
MNCs	Multinational Corporations
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
MPLA	*Movimento Popular de Libertaçâo de Angola*
MPRI	Military Professional Resources Inc.
NAFTA	North American Free Trade Agreement
NAM	Non-Aligned Movement
NATO	North Atlantic Treaty Organization
NCB	Narcotics Control Bureau
NEERI	National Environmental Engineering Research Institute
NGOs	Non-Governmental Organizations
NIEO	New International Economic Order
NWCT	Nanjing War Crimes Tribunal
OAS	Organization of American States
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-operation and Development
OP	Operation Condor
OPEC	Organization of the Petroleum Exporting Countries
P5	Permanent Five members of the UNSC
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PMCs	Private Military Companies
PoW	Prisoners of War
PPP	Polluter Pays Principle
PSCs	Private Security Companies
PTC	Pre-Trial Chamber
R2I/RtoI	Responsibility to Intervene
R2P/RtoP	Responsibility to Protect
RS	Rome Statute
SAARC	South Asian Association for Regional Cooperation
SAFTA	South Asian Free Trade Area
SCSL	Special Court for Sierra Leone

SPSC	Special Panels for Serious Crimes in East Timor
STL	Special Tribunal for Lebanon
TCPs	Traditional Colonial Powers
TFV	Trust Fund for Victims
TNCs	Transnational Corporations
TNT	Trinitrotoluene
TOCs	Transnational Organized Crimes
UDHR	Universal Declaration of Human Rights
UJ	Universal Jurisdiction
UNAMID	United Nations Mission in Darfur
UNCLOS	United Nations Convention on Law of the Sea
UNCRC	United Nations Convention on the Rights of the Child
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner of Human Rights
UNITA	*Uniâo Nacional para a Independência Total de Angola*
UNMIK	United Nations Mission in Kosovo
UNO	United Nations Organization
UNODC	United Nations Office of Drug and Crime
UNPMR	United Nations Peacekeeping Mission for Rwanda
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor
UNTS	United Nations Treaty Series
VCCR	Vienna Convention on Consular Relations
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on Law of Treaties
WMO	World Meteorological Organization
WOSD	World Organization of Self-Defence
WSOD	World Summit Outcome Document
WTO	World Trade Organization
WW I	World War I
WW II	World War II

CHAPTER I

INTRODUCTION

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INTRODUCTION

1. BACKGROUND OF THE STUDY

The end of the World War II has seen the growing importance of human rights as an indispensable component of measures to ensure global peace. It has in turn, among other things, augmented the development of international criminal law (ICL). ICL is an aggregation of rules and principles to proscribe heinous crimes against commonly shared human values and to hold the perpetrators criminally accountable. Serious international crimes include but are not limited to genocide, slavery, war crimes and crimes against humanity. A number of international courts and tribunals have been established for the prevention and punishment of such crimes. Thus, the *raison d'être* of ICL is to confer responsibility upon the international community to safeguard humanity by bringing to justice perpetrators of heinous crimes.

Though ICL has evolved as supplementary and not contrary to the domestic jurisdiction of states the implementation process operates to the exclusion of the authority of sovereign states. On the one hand, exercise of criminal jurisdiction by domestic courts—through active personality, passive personality, territoriality or universal jurisdiction—over alien perpetrators of serious crimes contravenes the fundamental components of sovereignty doctrine such as, sovereign autonomy, sovereign equality and sovereign immunity. As a result, international criminal law faces serious obstacles from states during the implementation process.

On the other hand, principles of international criminal law like *hostis humani generis*, responsibility to protect, extradite or prosecute, and solidarity provide jurisdictional justification for adjudication of serious crimes. Nevertheless, sovereignty is still the necessary legal basis to confer authority over courts and tribunals. It is the underlying legal justification for jurisdictions *ratione materiae* (jurisdiction based on subject-matter of a crime), *ratione personae* (jurisdiction based on nationality of accused or victim of a crime), *ratione temporis* (jurisdiction based on temporality of a crime), *ratione loci* (jurisdiction based on territoriality of a crime), or even universal jurisdiction (jurisdiction based on heinous nature of a crime) under ICL. In this regard ICL encounters two major issues: (i) its enforcement encounters difficulties with sovereignty doctrine; and (ii) diversity of jurisdictional principles attract multiple legal authorities over specific crime for jurisdiction. In either case the

sovereignty doctrine needs to be clarified. Thus, it is essential to scrutinise the role of sovereignty under international criminal law.

ICL is ever expanding from conventional crimes like genocide, war crimes, crimes against humanity, crime of aggression to encompass transnationally organised crimes like, terrorism, money laundering, drug and human trafficking, illegal arms trade, cybercrime and environmental crimes. Similarly, authors of serious international crimes are no longer natural persons alone but even legal persons as well, notably corporations and organisations. For instance, incidents like the *Bhopal Gas Leak* and *Chernobyl* on the one hand, and the operations of private military companies (PMCs) in countries like Iraq and Sierra Leone on the other, show that corporations can commit serious international crimes. Evidences are available since WW II specifically, from *Flick trial*, *IG Farben trial*, *Krupp trial* and *Zyklon B issue*. Rape, torture, or other war crimes by members of international organisations (IOs) during peace operations show that individuals can commit serious crimes under the banner of organisations. Similarly, jurisdiction under international criminal law is exercised not alone by international criminal tribunals but also by domestic courts, regional courts, coalition courts, hybrid tribunals, and private Russell tribunals. Even remedy for serious crimes is available in different forms ranging from physical punishment to monetary compensations, declarations, truth commissions, apologies and so on.

In short, neither the nature of crimes is static nor the ability to commit serious crimes is restricted to individuals nor the authority to exercise jurisdiction is confined to domestic courts nor remedy for crimes is physical punishment alone. Thus, ICL has to evolve to deal with the modern crimes from conventional to transnational to cyber world; and sovereign states have to extend their cooperation to deal with this transformation. The traditional understanding of absolute sovereignty holds merely a relative validity in modern times and has to give way to the values of humanism, solidarity and peace. The exercise of sovereign authority may sometimes have to be waived to accomplish the common interest of the international community. Nonetheless, sovereignty cannot be replaced altogether with global governance, which may lead to selective exercise of criminal jurisdiction by powerful states against the weak. To articulate a balanced approach the study seeks to analyse the principles of ICL and its jurisdictional aspects in the backdrop of sovereignty doctrine.

2. DEFINITION, RATIONALE AND SCOPE

The relationship between international criminal law and state sovereignty has never been a smooth affair. On the one hand, sovereignty is considered as an obstacle for enforcing ICL and on the other hand, enforcement of ICL is considered as a spurious justification for intervention into the domestic affairs of sovereign states. Though the concept of state sovereignty continues to play a significant role in international legal order, preserving human values and punishing perpetrators of heinous crimes is a prerequisite for the legitimacy of any legal order. Thus, there is a need for finding a middle ground to harmonise the doctrine of sovereignty with the international criminal law system. In this regard the study seeks to analyse the structural as well as the jurisdictional principles of international criminal law to harmonise it with the concept of sovereignty.

The ever expanding nature of criminal activities at the global level is no more restricted to conventional crimes. It has come to include torture, terrorism, enforced disappearance, and transnationally organised crimes. Similarly natural persons are not the exclusive perpetrators of serious international crimes but legal persons as well. This changing nature of criminal activities requires civil liability as a remedy in addition to criminal responsibility. Further, the new found concept of responsibility to protect imposes three-phase responsibility on states and international community towards individuals, such as: *prevention* of serious crimes, *protection* during conflict, and *prosecution* of perpetrators. Such developments compel to revisit the structural principles and jurisdictional aspects of international criminal law in the context of sovereignty doctrine to secure justice to the victims.

3. RESEARCH QUESTIONS

The study addresses the following research questions:

1. Is the *raison d'être* of sovereignty is to monitor crime and punishment in its evolutionary process?
2. Is there any inherent enmity/contradiction between state sovereignty and criminal law?
3. Do the structural principles and jurisdictional doctrines of ICL is complementary to sovereign autonomy, equality and immunity?
4. Are the existing rules and principles of ICL adequate to address the newer crimes like torture, terrorism or TOC in addition to conventional crimes?

5. Whether imposing civil liability in addition to criminal responsibility is compatible with ICL?
6. Is there a need to codify structural principles and jurisdictional doctrines of ICL to end impunity for serious crimes?

4. HYPOTHESES

The study is based on the following hypotheses:

1. The simultaneous evolution of sovereignty and criminal law admits no inherent enmity between them to disregard the evolutionary product 'international criminal law'.
2. Identification and recognition of structural principles and jurisdictional doctrines of international criminal law help to identify serious crimes, avoid jurisdictional conflicts and end impunity.
3. The changing nature and dimensions of international crimes, its varied perpetrators, and differing remedial needs necessitate the transformation of international criminal law.

5. RESEARCH METHODS

The study is analytical in nature, based on primary and secondary sources of international criminal law, humanitarian law, and human rights law. The primary sources include international conventions, resolutions, declarations, and codes of conduct adopted by various state and non-state actors. Major international conventions and declarations include: The Hague Conventions of 1899 and 1907, Charters of the International Military Tribunals (Nuremberg and Tokyo Charters 1945 and 1946, respectively), Genocide Convention 1948, Geneva Conventions 1949 and its Additional Protocols 1977, ICC Rome Statute 1998, Statute of the ICTY 1993, Statute of the ICTR 1994, Statute of Special Court for Sierra Leone 2002, Draft Convention on State Responsibility 2001, Princeton Principles on Universal Jurisdiction 2002, Universal Declaration of Human Rights 1948 and its Covenants 1966 and the Vienna Convention on Law of Treaties 1969. The *travaux préparatoires* of some of these legal instruments have also been considered along with judicial and quasi-judicial pronouncements of national as well as international courts and tribunals, like ICC, ICTY, ICTR, SCSL and ICJ. Secondary sources include books, journals and internet sources.

6. SCHEME OF THE STUDY

Chapter II traces the simultaneous evolution of sovereignty and international criminal law and argues that state sovereignty and authority over criminal administration are not mutually exclusive; rather, interdependent; and there exists an indissoluble normative bond between them and none outlives the other. The purpose is primarily to disregard the argument that sovereignty is a hurdle to administer ICL and any attempt to enforce ICL necessarily intervenes in state sovereignty.

Chapter III identifies the structural principles of international criminal law which provides the basis, legitimacy and justification for the existence of ICL. The structural principles include: the principles of solidarity (*hostis humani generis*, *aut dedere aut judicare*, and responsibility to protect); the principle of sovereignty (autonomy, equality and immunity); and the principle of universality (*jus gentium*, *jus congens*, and *obligatio erga omnes*) along with legitimacy principles.

Chapter IV analyses the principles that confer jurisdictional authority over courts and tribunals under international criminal law. It includes the standard jurisdictional principles (like the active personality, passive personality and territoriality principles), universal jurisdiction, and jurisdiction through protective principle. The chapter not only analyses the enforcement jurisdiction of courts and tribunals but also the prescriptive jurisdiction of states with special reference to Indian state practice.

Chapter V and VI tracks down the expanding nature of international criminal law on account of increasing number of new forms of crimes like torture, enforced disappearance, terrorism and transnationally organised crimes; novel perpetrators like corporations and organisations in addition to natural persons; divergence of courts and tribunals ranging from domestic to regional, international, hybrid and private tribunals; possibility of civil liability and monetary compensation for victims in addition to criminal responsibility of the perpetrators; and the three-phase responsibility of R2P (i.e. prevent, protect and prosecute) on states and international community.

Chapter VII ends with conclusions of the present study.

CHAPTER II

EVOLUTION OF SOVEREIGNTY AND INTERNATIONAL CRIMINAL LAW

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Sovereignty implies the authority of states to avert external influence and administer internal affairs.[1] Former is the external manifestation of sovereignty and latter is the internal manifestation of sovereignty. In fact, a state does not always enjoy an absolute external sovereignty on account of territorial, political, economic or other reasons. The system of *suzerain-protectorate arrangements* or *vassal-tributary arrangements* establishes the fact that a state may be under subordination of a dominant power but still being a sovereign. Even in contemporary times the external sovereignty of a state is subject to the principles of international law. The Permanent Court of International Justice (PCIJ) recognises such restrictions in the *S.S. Lotus case* that 'all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty' (*S.S. Lotus case* 1927: 19).

However, no such options available for states to compromise on internal sovereignty. An entity will be a state only as long as it administers the internal affairs through a political or legal system enforceable with punishments for violation and non-obedience. Accordingly, crime and punishment are ever since the part of a state system. In fact, sovereignty and administration of criminal justice are inseparable

[1] The word 'sovereignty' is derived from the Latin word 'superannus' meaning supreme. It means the supreme power of the state over all individuals and associations within its own territorial limits. This is internal sovereignty of the state whereby the state is the final authority to make laws, issue commands and take political decisions which are binding upon all individuals and associations within its jurisdiction. It has the power to command obedience to its laws and commands; and to punish the offenders who violate the same. On the other hand, sovereignty involves the idea of freedom from foreign control, i.e., the independence of the state from the control or interference of any other state in the conduct of its international relations. This is called external sovereignty whereby a state has the power to independently determine its own foreign policy and has the right to declare war and make peace. At the same time, external sovereignty implies that each state (big or small) by virtue of its sovereign status is equal to every other state. It can command no other state and it cannot itself be commanded by any other state. Accordingly, sovereignty of the state has two aspects, namely: internal and external sovereignty (Kingsbury 1998: 599).

In jurisprudence, the word sovereignty is understood as full right and power of a governing body to govern itself without any interference from outside sources or bodies. In political theory, sovereignty is nothing but a supreme authority over some polity or supremacy over territoriality. There are different kinds of sovereignty, namely titular, real, *de facto*, *de jure*, legal, political, and popular sovereignty. The doctrine of sovereignty is a basic principle of Westphalian system and gave a normative foundation for the development of international law.

elements of a common phenomenon; none exists in the absence of the other. For instance, in the *Island of Palmas case* the arbitration tribunal held that, when sovereignty over a territory is contested 'what is essential in such a case [to decide] is the continuous and peaceful display of actual power in the contested region' (*Island of Palmas* 1928: 857). Relying on the evidence of administration of criminal justice the tribunal concludes that:

> [A] document, dated November 1st, 1701, concerning *regulations as to criminal justice* (suppression of vendetta and reservation of capital punishment as an exclusive prerogative of the East India Company) in the native State of Tabukan. This documentary evidence…*leads to the conclusion* that the island of Palmas (or Miangas) was in the early part of the 18th century considered by the Dutch East India Company as a *part of their vassal State* of Tabuka (emphasis added; *Island of Palmas* 1928: 863).

The above observations of the tribunal make it clear that the existence or non-existence of sovereignty of a state over a territory depends on the proof that it administers criminal justice over the contested territory. The present chapter analyses the simultaneous evolution and growth of sovereignty and criminal law in three parts: first part traces the historical evolution of sovereignty and states system; and second part traces the origin and development of international criminal law; and part three provides a brief analysis of the interaction between sovereignty and international criminal law.

1. ORIGIN AND DEVELOPMENT OF SOVEREIGNTY

1.1. Evolution of Sovereignty

Ancient system of life-style was uncertain and people did not stay in determinate places.[2] The tribal group of small number of people lived together and they followed the nomadic system of unsettled life-style and they were called as '*Gypsies*'. Gypsies were members of a travelling people traditionally living by itinerant trade and fortune telling. During that time there was no existence of sovereignty and they lived as

[2] The ancient period was between early origin to seventh century AD.

Gypsies with head man to lead their day to day life.[3] No such Gypsies had clear cut boundaries, precise beginnings and endings as a group. They were defined 'both by common objective elements, such as language, history, [culture], religion, customs, institutions, and by the subjective self-identification of people' (Huntington 1996: 43). Among the elements, the culture and religion were identified as central defining characteristics of each group.

Later, the tribal populations started staying in one place where food, cloth, shelter and life-style were not threatened. Most of the civilization began at river-belts on account of the easy availability of water and food around, the basic human need.[4] Gradually, the tribes of *Gypsies* got land and territory ruled or controlled by an eldest and experienced men among them as a chieftain. They cultivated lands; domesticated cattle for agriculture and hunting; emerged as formers to initiate the process of civilization with their changing lifestyle. Among the semi-civilized tribal groups conflict arose out of greed and jealous for fertile land and wealth. The need for protection from external threat and natural disasters consequently, necessitated the chieftain to become a king with settled army. It became base for the origin and development of the concept of sovereignty. The head man derived his authority out of necessity and followed the principles of nature to retain legitimacy for his rule. When his subjects disobeyed or violated the rule of nature the chieftain inflicted punishment to establish order among the society of men. As a result, the exercise of external as well as internal authority had become essential elements of power with the ruler.

Even in medieval period there was no existence of sovereignty, instead each civilization had one or more constituent political units, like dynasties and kingdoms. They were either ruled by religious leaders or by kings (*ibid*.).[5] Medieval monarchs were

[3] Here the word Gypsy indicates freedom or inclination to move from place to place. It is often believed that Gypsies have migrated originally from India, settling in various parts of Asia, Europe, and, most recently, North America. The evident shows that *Gypsies* migrated from India between tenth and eleventh centuries but its origin had great controversy (A Helsinki Watch Report 1991: 3). The term Gypsy derived from the word 'Egyptian'; a name 'used in a vague way for any exotic or Eastern, Islamic people and was applied to Gypsies early on' (Hancock 1989: 614).

[4]The early civilizations had begun in the valleys of the Nile, Tigris-Euphrates, Indus, and in Yellow rivers about 5000 BC (Huntington 1996: 49, 68). As a result, the Hindu, Chinese, Egyptian, Jewish, Greek, and Roman civilizations had evolved.

[5]This is the quality that early modern states possessed, but the popes, emperors, kings, bishops, and most nobles and vassals during the Middle Ages lacked sovereign authority. The medieval period was between seventh century to fifteenth century AD (in which the early medieval was approximately be-

not sovereign, at least not strongly so, on account of their shared power with their feudal aristocracy as well as by custom. During this period sovereignty could be seen as *de jure* rights of nobility and royalty, and *de facto* capability of individuals to make their choice in life. The Roman jurist Ulpian observed that the imperium of the people is transferred to the Emperor. Emperor is the law making force and he is not bound by the law but by natural law. The religious head man derived their authority and legitimacy through divine law. *Law of nature* and *law of god* were well established and appreciated in every civilization and had universal relevance. The thirteenth century philosopher St. Thomas Acquinas said that '[n]atural law formed part of law of God, and, was the participation by rational creatures in the Eternal Law' (Shaw 2007: 21). In 1259 BC the Treaty of Kadesh, the first known peace treaty in human history, was signed between the Egyptian pharaoh Rameses II and the Hittite Empire Hattusilis III to protect internal sovereignty from external threat or intervention in a reciprocal manner.[6] It was the first legal document to recognise the autonomy of two political entities.

However, the system of sovereign states evolved only in modern times.[7] When divine law had prominence the pope had exercised universal jurisdiction in Europe, and even beyond. The Pope Alexander VI made Papal Bull demarcation in 1492 that

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tween seventh to thirteenth century AD, and the late medieval between thirteenth to fifteenth century AD).

[6] It marks a beginning for the evolution of international law because though the concept of sovereignty has evolved (with or without our knowledge) as part and parcel of human existence, but there is no evidence to justify. A proper evidence for its existence could be found only in Treaty of Kadesh. This treaty was signed in 1259 BC between the Egyptian pharaoh Rameses II and the Hittite Empire Hattusilis III. It ended a long war between the Hittite Empire and the Egyptians, who had fought for over two centuries to gain mastery over the lands of the eastern Mediterranean. The treaty was ratified in the 21st year of Ramses II's reign and continued in force until the Hittite Empire collapsed eighty years later. The Egyptian–Hittite peace treaty was also known as the Eternal Treaty or the Silver Treaty. Although it is often referred to as the 'Treaty of Kadesh' but the word Kadesh is not mentioned in the text. It was the first globally known peace treaty and is the only ancient Near Eastern treaty for which both sides' versions have survived (Trevor 2006).

This peace treaty protected internal sovereignty from external threat or intervention in a reciprocal manner. It created unerased history to end the long years of wars and hostility among the states. This peace treaty was made to present day standard to consider a conclusive model to make peace among the states without affecting the internal sovereignty. Even though it was the first peace treaty brought for the purpose to protect states sovereignty among the empires. But there was no proper definition for the term sovereignty and even the term was not expressly used in the treaty.

[7] There was no system of states in ancient time. In ancient times, the people were grouped and occupied certain territory headed by a supreme authority (mostly by kings or spiritual heads) as small political units (such as dynasties and kingdoms). These political units were often considered as the starting point for the evolution of states.

divided the world into Spanish and Portuguese spheres. Later, on account of the declining authority of the Roman Catholic Church as well as the long standing power-struggle between the Pope and the Emperor, the European Christendom disintegrated and '[o]ut of this chaos emerged nation-States' (Anand 1986: 23). The religious war started in 1618 and ended in 1648 between Catholics and Protestants in Europe (Friedmann 1964: 6, fn. 2). To end the thirty years of religious war European powers entered into the Treaty of Westphalia in 1648 and brought peace and harmony in Europe. This paved a way for the establishment of political and legal supremacy of sovereign states (*ibid*.).

As a result, every state in Europe enjoyed internally supreme and externally limited sovereignty. Since then there was no international relations based on religious allegiance; diplomatic relations and wars were essentially conducted between sovereigns (*ibid*.). The temporal powers of the Church were curtailed to an extent that they no longer challenge any state's sovereignty. Hence, Westphalian Treaty is often considered as the starting point for evolution of sovereign state system at the international level and marked a beginning for modern international law (*ibid*.).[8] During that period sovereignty derived its authority from positive law (hereditary law, constitution, and international law) and not from divine law.

The Westphalian concept of sovereignty was subsequently strengthened by the Congress of Vienna 1814 that classified states as civilized and uncivilized; the Congress of Berlin 1885 that brought African continent within the ambit of civilizing mission with the help of international law; and the UN Charter in 1945 completed the establishment of sovereign state system. Mohammad Bedjaoui views that this classic international law consisted of a set of rules with 'a geographical basis (it was a European law), a religious-ethical inspiration (it was a Christian law), an economic motivation (it was a mercantilist law) and political aims (it was an imperialist law)' (Bedjaoui 1979: 50).

Around same period of time in the East (1500 AD onwards), many kingdoms and empires had unlimited sovereignty over their respective territories. The Emperors or the Kings in Asia made their dealings only with other Kings or Emperors and not with

[8]The Treaty of Westphalia 1648 has produced two basic concepts of international law, namely, sovereignty and sovereign equality of states (Anand 1986: 23, 52).

representatives. It was a great disgrace for them. For instance, princely states of India refused to talk with the British merchants to establish the East India Company; and even refused to accept the letter from the queen of England. It was accepted only after a significant period of time. It shows that the fundamentals of sovereignty and international law were already present in the Eastern World even before Europeans. The same is true with the Kingdom of Ethiopia, Syria, Kingdom of Turkey, etc. Thus, the claim of sovereignty and international law as the product of Western Christian civilization cannot be accepted in total. Until this period of time the administration of criminal justice was well within the authority of each individual state.

1.2. Devolution of Sovereignty

After the advent of Spanish, Portuguese, Dutch, English and French in the non-European continents for trade and commerce, the concept of sovereignty had undergone a period of devolution. The Crown of Portugal dealt with the East Indian Rulers directly through its officials, but the Dutch, English and French dealt through the East India Companies with delegated sovereign power, started operating in the seventeenth century (Alexandrowicz 1967: 15).[9] When the mediate sovereigns (i.e., European officers and the companies) with their quasi-sovereign power entered into treaties, the East Indian Rulers were reluctant to conclude the treaties with them (*ibid*.: 149).[10] However, since sixteenth century to the end of the eighteenth century, the East Indian Rulers were treated as equal sovereigns and Europeans entered into equal treaties (*ibid*.: 149-184).[11]

[9] The Portuguese in Asia were primarily servants of the Crown of Portugal and not merchants (Alexandrowicz 1967: 26). The Dutch, English, and French entered into East Indies as a merchant and established commercial organizations – 'for the purpose of giving support and lending security to trading activities that the companies received in their charters quasi-sovereign powers' from the Crown – 'which comprised the active and passive right of legation, the right to conclude treaties, to acquire territory and if necessary to wage war' (*ibid*.: 27). Westlake (1914) calls them as 'mediate Sovereigns' (*ibid*.: 15). Here, the term 'East Indies' covers India as well as 'Further India' including Ceylon, Burma, Siam, Indonesian Islands, Persia, China, Japan, etc.

[10] '[C]ertain Asian Sovereigns such as the Moghul Emperor (prior to the eighteenth century) and the King of Burma (Ava) were reluctant to deal with the Company as not being a full sovereign entity' (*ibid*.: 165).

[11] Alexandrowicz (1967) quotes many equal treaties between European and East Indian rulers from the Grotius and Freitas works. In the beginning itself, Alexandrowicz proves the East Indian sovereign power to make treaties, through ICJ judgment on *Right of Passage over Indian Territory case*.

In later part of time, the states from Asia, Africa, and Latin America were treated unequally by representatives and officers of the East India Company, in the wake of their declining sovereignty of states over their territories. In the seventeenth and eighteenth centuries, the gentle agreements (unequal treaties) were made between the European powers and their colonies. With their increasing power the European countries refused to obey even these unequal treaties, when it is against their interest. For instance, French Governor Joseph Francois Dupleix of Pondicherry took help from the Nawab of Carnatic and promise to give the captured city of Madras. Accordingly France attacked and captured the city of Madras (which was the colony of British in 1746) but refused to give the captured territory (Naravane, M.S. 2014: 152-153). Later in 1748, French force returned the territory to British (that was captured from British forces in 1746) in exchange of Louisbourg in Acadia by the *Treaty of Aix-la-Chapelle* (Keay, J. 1993: 285). Similarly European states captured different territories and ports from one colonial power to another (especially in *Opium Wars*) and made the colonial countries unequal.

Europeans with their military might started colonizing the non-European countries through a legal mechanism of unequal treaties. When European powers adopted the Congress of Vienna in 1814 to form the 'family of nations' it became another milestone in the evolutionary history of sovereign state system.[12] The condition to join the family was that the state should be 'civilized' and its constituent recognition shall be made by fellow member countries. Only small number of European powers became the members of the 'family of nations' and they determined the circle within which the law of nations shall apply. Consequently, the concept of recognition of states was introduced under international law; and the European powers monopolised the tool to confer legal status on new members.[13]

[12] The Congress of Vienna 1814 came to end up the Napoleonic Wars and to create and maintain the balance of power among the European powers. The principal allied powers were Austria, Great Britain, Russia, Prussia and France—recognised themselves as the only parties qualified to make and keep peace and assumed the responsibility for European security (Anand 1986: 60). It formed the 'family of nations' with all states engaged in the war. The Congress of Vienna was the first of a series of international meetings that came to be known as the Concert of Europe, which was an attempt to forge a peaceful balance of power in Europe. It served as a model for later organizations such as the League of Nations in 1919 and the United Nations in 1945. The Nepoleonic wars started in 1803 and ended in 1815.

[13] Alexandrowicz puts forth a view that, as a result of the formation of family of nations, 'Asian states who for centuries had been considered members of the family of [n]ations found themselves in an *ad*

As a result, there was a dramatic change in interstate relations, where the Europeans declared themselves as civilized nations and considered the non-Europeans as uncivilized. It was declared that only civilized states can be sovereigns to force others to enter into numerous unequal and capitulation treaties in the nineteenth century.[14] Anand writes that after the Congress of Vienna, sovereign states meant only the European states and all others 'were considered not 'subjects' but merely 'objects' of international law, whatever might be their status under classical international law'. Hence, they 'were not admitted into the charmed circle of sovereign States' (Anand 1986: 58).[15] As a result, the non-European countries, like Asian, African and Latin-American countries, became subjects of colonialism and objects of international law.[16]

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hoc created legal vacuum which reduced them from the status of international personality to the status of candidates competing for such personality' (Alexandrowicz 1955: 318). Further, he theorises that 'colonialization during the 18th and 19th centuries *eclipsed* rather than extinguished the international legal personality of the colonized countries' (Anand 1986a: xvii). In short, Anand observes that '[i]n international law the term 'colonization' merely meant temporary legal incapacity of the once sovereign actors' (*ibid.*).

[14] Anand writes that the 'civilization' required not only an effective government over a defined territory but willingness and ability to accept the obligations of European international law, particularly the obligations relating to protection of the life, liberty and property of foreigners' (*ibid*.: 56). Even the powerful Asian nation China was forced by Great Britain to accept the illegal opium trade by a war in 1839 (*ibid*.: 58). In the Treaty of Nanking 1842 that followed the 'Opium War', not only was Hong Kong annexed, but four other Chinese ports were opened to foreign commerce (*ibid*.). Several other Asian countries were similarly humbled and even annexed in the name of free trade (*ibid*.)

[15] It was only in the Treaty of Paris 1856 that a non-Christian oriental country, Turkey, was formally admitted to the family of nations to participate in the public law and concert of Europe (*ibid*.: 56). And Japan was admitted to the group of 'civilized nations' in 1906, only after it defeated China (1894) and Russia in war (1904) (*ibid*.). In the same way, even the powerful countries of Africa such as Egypt, Ethiopia, etc. were not included in the 'family of nations' – they all joined in the charmed circle of sovereign states only in the League of Nations (Anand 1972: 18). In fact, seven Asian-African countries were included among the fourty-two original members of the League, which included Ethiopia, Turkey, Iraq, Afghanistan, Egypt, India, etc. (*ibid*.: 24). Though the League gave the first opportunity to these countries to represent in the 'family of nations', but the centre of gravity throughout its existence continued to remain with Western Europe (*ibid*.).

[16] It resulted 'Orientalism' in non-European world. Said views that the concept of 'Orientalism' has started roughly in the eighteenth century and it connotes 'the high-handed executive attitude of nineteenth and early twentieth century European colonialism'. The term 'Orientalism' has two elements, namely 'Orient' (Easterners and Bible lands), and 'Occident' (Westerners). '[T]he Orient is an integral part of European material civilization and culture' (Said 1978: 2). The French and the British—less so the Germans, Russians, Spanish, Portuguese, Italians, and Swiss—have had a long tradition of 'Orientalism' (*ibid*.: 1). Said says that 'Orientalism derives from a particular closeness experienced between Britain and France and the Orient, which until the early nineteenth century had really meant only India and the Bible lands' (*ibid*.: 3). In short, 'Orientalism' as a Western style for dominating, restructuring, and having authority over the 'Orient'. As a result of 'Orientalism', the Orient was not (and is not) a free subject of thought or action (*ibid*.).

The Berlin Conference 1885 paved the way for further expansion of colonialism in non-European world.[17] The European industries were in need raw materials for their larger markets that led them towards the vast African continent (Anand 1986: 58). Led by Belgians, the French, Germans, Portuguese and the British went to the African continent at the end of the nineteenth century, and colonized them (*ibid*.:58-59). As Anand (1986) observed the Berlin Conference provided a code for territorial aggrandizement in Africa. Within less than two decades, the whole of Africa was partitioned by the European industrial powers to be fully exploited for their economic and political interests' (*ibid*.: 59).

The nineteenth century international law was dominated by positivism that justified the distinction between civilized and uncivilized states and the system of constituent recognition of state.[18] Anghie (2005) argues that '[t]he naturalist international law which had applied in the sixteenth and seventeenth centuries asserted that a universal international law deriving from human reason applied to all peoples, whether European or non-European. By contrast, positivist international law distinguished between civilized and non-civilized states and asserted further that international law applied only to the sovereign states which comprised the civilized 'family of nations'' Anghie 2005: 35). Further, the '[n]nineteenth century international law…excluded non-European states from the realm of sovereignty, upheld the legality of unequal treaties between European powers and non-European powers, and ruled that it was

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The techniques and technologies used for suppression was the concept of 'Civilizing Mission' or what we call 'the White Man's Burden' (Anand 1986: 59; Anghie and Chimni 2003: 80; Anghie 2005: 37-38). 'The civilizing mission operates by characterizing the non-European peoples as the 'other'—the barbaric, the backward, the violent—who must be civilized, redeemed, developed, pacified' (Anghie and Chimni 2003: 80). Race has played a crucially important role in construing and defining the 'other' (*ibid.*). Anand says that '[i]t was said to be the duty of the 'superior races' to civilize the inferior races' (Anand 1986). Consequently Anghie and Chimni puts that '[t]his concept of the 'civilizing mission' justified the continuous intervention by the West in the affairs of the third world societies and provided the moral basis for the economic exploitation of the third world that has been an essential part of colonialism' (Anghie and Chimni 2003). 'French and Germans devoutly believed in their civilizing mission in Africa, even if this had to be achieved by force' (Anand 1986: 59). The French statesman Jules Ferry wrote that 'the superior races have a right as regards inferior races. They have a duty of civilizing the inferior races' (*ibid*.)

[17] In 1885, fifteen European states assembled at Berlin and acted as 'quasi-world-legislators' in the matter of Africa. They laid down 'rules of the game amongst themselves for the grab of Africa' (Anand 1972: 21). Led by Belgians, the French, Germans, Portuguese and the British went to the African continent at the end of the nineteenth century and colonized them (Anand 1986: 58).

[18] Koskenniemi (2004) considers nineteenth century is a period of progressivism, because from which international law and the major ideologies of Liberalism and Marxism arose.

completely legal to acquire sovereignty over non-European societies by conquest' (Anghie and Chimni 2003: 80). Therefore, it is often viewed that the colonialism is central to the formation of international law (*ibid*.: 84). During colonial era the exercise of criminal administration was a mixed authority of colonies and along with their masters.

1.3. Revolution of Sovereignty

Institutionalisation of interstate relation after the First World War has revolutionised the concept of sovereignty and international law. Institutionalisation not only ensured equality and peaceful coexistence among states but also imposed limitations on the claim of absolute sovereignty. The so called absolute and unconditional sovereignty among European powers accompanied with greed and jealous for power and resources caused the First World War. Sovereignty is always a dangerous double edged sward; if it is absolute it will be dangerous absolutely.[19] After the First World War, the Paris Peace Conference in 1919 led to the adoption of the Treaty of Versailles with a mechanism for institutionalisation of interstate relations. The League of Nations was established with the Covenant to prohibit future war and conflicts.[20] As a result, the dimensions of international relations have changed from the notion of sovereign independence to the system of interdependence; and the perceptions on international law is also changed from law of co-ordination to law of co-operation (Friedman 1964). As rightly observed by Anand, Treaty of Versailles 1919 paved a way for the establishment of the League of Nations, which represented the first important step in the direction of building an enduring structure of co-operation among states (Anand 1986: 33; Shaw 2007: 30).[21]

[19] The First World War started in 1914 and ended in 1918. In the war, the 'Allied powers' (the United States of America, the British Empire, France, Italy and Japan) defeated the 'Central powers' led by Austro-Hungarian, German, and Ottoman Empires. Whilliam Keysar II played a key role for the cause and effect of WW I.

[20] Its main object and function was 'to promote international co-operation and to achieve international peace and security' (Preamble of the League Covenant).

[21] As a result of the First World War, the US President Woodrow Wilson prepared 14 points to form an international organization, which led to the formation of the League of Nations and the adoption of the League Covenant. The League of Nations came into existence on 10 January 1920 with 42 founding members and was dissolved on 18 April 1946. Between 1920 and 1939, a total of 63 countries became member states of the League of Nations.

However, with the formation of the League of Nations, no country readily limited their sovereign right towards an international institution, hence unanimity rule was adopted and hence the possibilities of war was restricted but not prohibited.[22] But in the Treaty of Paris (Kellogg-Briand Pact) 1928, 'renunciation of war as an instrument of national policy' was recognized by a group of states.[23] Along with the establishment of the League of Nations, the Treaty of Versailles also had provisions for the prosecution and punishment of serious war crimes through military tribunals. The proposal to establish international criminal tribunals could not be materialised, but the punishment for international crimes were ensured.

Nevertheless, the League of Nations failed to prevent the breakout of the Second World War on account of inherent weakness of the League council. As a result, Japan invaded China in 1931; German frequently engaged in internal and external aggressions; the Soviet Union invaded Finland in 1939; and finally, the Second World War broke out in 1939 and ended in 1945. In the war, the 'Allied powers' led by the United States of America, the United Kingdom, the Union of Soviet Socialist Republic, China and France defeated the 'Axis powers' led by Japan, Germany and Italy. The failure to respect the principle of sovereignty and non-intervention was the major reason for the WW II.

During the Second World War itself, the 'Great powers' (initially the UK and the US) had started making efforts to establish a new 'International Organization'. Their efforts led to the formation of several international conferences, such as London Declaration 1941, Atlantic Charter 1941, United Nations Declaration 1942, Moscow Declaration 1943, Tehran Conference 1943, Dumbarton Oaks Conference 1944, Yalta Conference 1945, and San Francisco Conference 1945. Consequently, the UN Charter was adopted and the United Nations Organization was established on 24 October 1945,[24] where the member states agreed to limit their sovereignty[25] and prohibit

[22] Article 5(1) of the League Covenant deals with the unanimity rule and Article 12(1) deals with the restrictions on war.

[23] Originally the Treaty of Paris (Kellogg-Briand), 1928 was adopted by Germany, the United States, Belgium, France, the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, and the Dominion of New Zealand.

[24] United Nations Organization was established with 51 original members and presently it has 193 member states. The United Nations Organization has six principal organs: General Assembly (acts as a legislative body of the United Nations), Security Council (acts as an executive body of the United Nations), International Court of Justice (acts as a judicial body of the United Nations), Economic and So-

war.[26] Its main object is to restore and maintain international peace and security.[27] It implies that the main reason for the existence of UNO is to prohibit the heinous international crimes against the humanity through ICL and to prevent and regulate the future wars through IHL.

A circumscription of absolute sovereign became a prerogative in the second half of the twentieth century.[28] That is after the Holocaust, a meaningful legal and institutional circumscription of sovereignty came and the sovereign states tried to abridge their rights quite significantly towards international and regional organizations on various issues (ranging from human rights, environment, trade,

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cial Council (as an organ of the United Nations facilitating international co-operation making on standards and problem solving in economic and social issues), Trusteeship Council (as the principal organ of the United Nations and it came for the purpose to protect the trust territories, and now suspended its operations), and Secretariat (as an organ of the United Nations and it's an administrative unit responsible to maintain records and other secretarial duties; especially for international organizations. Secretary General as a chief administrative officer of the United Nations).

[25] As per Article 24(1) of the UN Charter, the members of the UN have limited their sovereignty towards the Security Council, and the Council acts on their behalf; and as per Article 25, the decisions of the Security Council binding upon the members of the UN.

[26] Article 2(4) of the UN Charter prohibits the threat or use of force, but it is subject to certain exception – that is, in case of self-defence (Article 51), collective enforcement action (Chapter VII) and regional agencies may take enforcement action with the authorization of the Security Council (Article 53(1)) – in such cases the states can use force under the United Nations system.

[27] Article 1(1) of the UN Charter talks about the purpose of the UN is '[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace'. Article 2 of the UN Charter mentions various principles of the United Nations (including the principle of sovereignty and non-intervention).

[28] In this regard, especially, the nineteenth century has been described as 'the era of *preparation for* international organization' (between 1815 and 1914), and the twentieth century has been regarded as 'the era of *establishment* of international organization' (especially the year of 1914 and after) (Amerasinghe 2005: 5). In fact, the present structure of international relations can be found in all the above said concepts, such as 'international, transnational, and supranational' organizations, but these institutions are represented by the traditional system of interstate diplomatic relations.

The international organizations are mostly treaty based and sector specific (the UN is the only exception, which has general competence to deal with all matters through its specialized agencies). Prost and Clark (2006) says that '[n]ormally, IOs [International Organizations] are designed to deal with some specific class of issues, limited sometimes by region, sometimes by subject-matter, and sometimes by both'. At present, there are more than 500 International Organizations exist, which may possibly lead to the overlapping of activities (Prost and Clark 2006: 344). Friedmann (1964) rightly puts that '[i]t is the interplay and the tensions between these various levels of international activities that characterize the structures of contemporary international relations and determines the structure of international law'. Amerasighe (2005) says that: 'The institutionalization…of inter-state relations [today] has led to international organizations influencing far more than in the past the shaping of international relations and the development of international law intended for their regulation'.

investment, air and space, etc).[29] The two most prominent curtailments of sovereignty are conventions on human rights and European integration. Here the concept of limited sovereignty means that the states are internally supreme but externally limited by international and regional organizations. Similarly, the international sovereignty respects sovereignty of every state[30] and no way breach the limited sovereignty for any reason unless and until the international humanity is in threat.[31]

While establishing the United Nations, on the one hand the states have circumscribed their sovereignty towards the United Nations and on the other it: (1). brought new sovereign states within the UN system, and (2). gave preponderance position (excessive/unlimited sovereignty) to five big powers through permanent membership and veto power.

New Sovereign States

One of the most important changes since the establishment of the UNO is the emergence of new sovereign states.[32] In the beginning of the twentieth century, there were only few states joined in the family of nations. After the First World War, some of the

[29] The international conferences and organizations include apart from Congress of Vienna (1814), and Congress of Berlin (1885), the Hague Conferences came into force in 1899 and 1907. Followed by that the League of Nations was established in 1919 and the United Nations Organization was established in 1945. Apart from this, there were many organizations has kept under the UN System as 'specialized agencies' (which include, UNESCO, WMO, WHO, UNTAD, and so on). The European Coal and Steel Community (1952), the European Economic Community and Euratom (1957), and further the IMF, WB and GATT (now WTO) are all considered to be a supranational organizations (Friedmann 1964: 35-39).

There are various regional organizations have been established for many issues. They include, the Pan-American System of 1826, the Washington Conference of 1885, Organization of American States, European Community, the Organization on Security and Cooperation in Europe, North Atlantic Treaty of Arab States, Organization of the Islamic Conference, Organization of African Unity, North Atlantic Treaty Organization, Warsaw pact, and there were many regional trade organization was formed Council for Mutual Economic Assistance, NAFTA, SAFTA, ASEAN, CAFTA, OECD, OPEC, etc (Amerasinghe 2005: 3; Prost and Clark 2006: 344; Friedmann 1964: 35-37).

[30] Article 2(1) of the UN Charter provides that the states are sovereign equal.

[31] Article 2(7) of the UN Charter reads that '[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll'.

[32] Article 1 of the Montevideo Convention on Rights and Duties of States 1933 identifies there are four necessary elements of sovereign state, namely permanent population, defined territory, government and capacity to enter into relations with the other states.

colonial countries were kept under the League's mandate system,[33] which was later transferred to the UN trusteeship council.[34] Kay (1996) says '[a]t the beginning of the Second World War there were more than eighty separate colonial territory, including approximately one-third of the population and covering one-third of the land area of the world'[35] when the heated Cold War between the two super powers started on the ideological grounds, the colonial countries were influenced from either side.[36] Knowing the danger of either side, the colonial (especially the Asian and African) countries met at first time in Bandung Conference in 1955, and declared themselves as 'Non-aligned'.[37] Later the movement was further strengthened by the Accra Conference of 1958 and the Addis Ababa Conference of 1960 in order to get independence from the colonial domination (Kay 1996: 150; Aanad 1972: 53, 57).

In 1960, the UN General Assembly passed a resolution – Declaration on Granting of Independence to Colonial Countries and Peoples.[38] Consequently colonialism has

[33] The League mandate system applied only to the former colonies of Germany and Turkey and completely failed to touch more numerous colonial territories of the victorious Allied powers. The League Covenant divided the mandated territories into three categories (namely class A mandates, class B mandates and class C mandates) and imposed different obligations on the mandatory powers according to the category of its mandate (For more discussion, see Kay 1996: 143-145).

[34] Chapters XII and XIII of the UN Charter says that the trusteeship system is the direct successor of the League's mandate system. As per Article 77(1), the trusteeship system covers: '(a) territories now held under mandate; (b) territories which may be detached from enemy states as a result of the Second World War; and (c) territories voluntarily placed under the system by states responsible for their administration'. In only eleven territories were the provisions of Chapters XII and XIII ever applied. There were more than eight times as many non-self-governing territories, containing over ten times as many people, outside the trusteeship system (For more discussion, see *ibid*.: 145-148).

[35] In 1939, there were seven countries – Great Britain, the Netherlands, France, Belgium, Portugal, Italy, and Spain – with a combined population of only 200 million people controlled almost 700 people in their colonial possessions (*ibid*.: 143).

[36] The Cold War between the USA and the USSR started in 1945 and ended in 1989. It was a war of two ideologies, namely democracy and socialism.

[37] 'Non-aligned' in the sense, the colonial countries aligned neither with the 'First World' (i.e., Western European countries) nor with the 'Second World' (i.e., Eastern European countries) and represented separately as 'Third World' countries. North American countries started nationalist struggle and gained independence and they joined in the family of nations even in the nineteenth century itself. Some of the Latin-American and even some of the European countries gained independence only in 1950s and 1960s and they follows the policy of 'Non-aligned' along with the Afro-Asian states (Anand 1972: 4).

[38] GA Res. (1960), 1514 (XV), 14 December 1960 (the resolution recognized that 'all peoples have an inalienable right to complete freedom' and solemnly proclaimed 'the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations'). In the fifteenth session, there were seventeen colonial territories were scheduled to gain their independence and to join the organization – in which only Cyprus was a non-African country.

In fact, the USSR made a request in the UN General Assembly to include an additional item for the – fifteenth session of 1960 – a 'declaration on granting of independence to colonial countries and

ended and there were mushrooming growth of 'new sovereign states' in the international sphere.[39] And some of the cardinal principles of international law was adopted in the Friendly Relations Declaration (1970). [40] The decolonization declaration and the friendly relations declaration are the major mile-stone for the emergence of new states with sovereign equality and to maintain friendly relations among the states. Anand (1972) writes that: '[w]ith the decay and destruction of colonialism, scores of new nations…which had so far no voice and no status and had been considered as no more than 'objects' of international law, have emerged as full-fledged members of the international society'.

Shortly become independent, the new states realized that not only political – they need an economic sovereignty and freedom from the clutches of colonial powers. Hence the newly independent states started nationalization and expropriation of foreign property,[41] which raised anxiety from the Europeans and Americans.[42] To

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peoples'. The Afro-Asian states decided not to go with the USSR and prepared a separate draft based upon the resolution previously approved in the Asian-African conferences at Bandung in 1955, Accra in 1958, and Addis Ababa in 1960. The Afro-Asian draft differed from the Soviet draft in both tone and substance. The Soviet draft was both anti-colonial and anti-western, whereas the Afro-Asian draft was only anti-colonial and strenuously avoided attacks on specific Western countries. While the Soviet text had demanded that all colonial countries 'must be granted forthwith complete independence and freedom', but the Afro-Asian draft spoke of 'immediate steps' to be taken to transfer power, implying that the transfer could proceeded according to an orderly timetable. In contrast to the Soviet draft, no mention is to be found in the Afro-Asian draft of any prohibition upon foreign bases (For more discussion, see Kay 1996: 148-154)

[39] Anand (1972) says that '[b]y 'new' States all we mean is newly independent States. Several of these States are quiet ancient and existed long before the so-called 'older' States of Europe or America were ever founded'. Kay (1996) says that 'twenty seven of the fifty-one founding members of the United Nations had won their independence after some form of colonial rule'.

[40] GA Res. (1970), 2625 (XXV), 24 October 1970 (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Friendly Relations Declaration)). The Friendly Relations Declaration has dealt with seven basic/cardinal principles of international law, namely, prohibition of force, peaceful settlement of international disputes, non-intervention, international co-operation, equal rights and self-determination of peoples, sovereign equality of states, good faith (Mani 1993).

[41] The Mexican expropriation of the United States oil and land properties shortly before the Second World War, the confiscation of the Anglo-Iranian oil properties in Iran (1951), the take-over of the United Fruit Company in Guatemala (1953), the Suez Canal nationalization by Egypt in 1956, the expropriation of Dutch properties by Indonesia (1958), the take-over of Chilean copper industry (1972), and the Libyan oil industry (1971-74). These events marked unprecedented political process, such as the struggle of colonial peoples for political self-determination and the efforts of developing states to pursue economic self-determination and to establish a New International Economic Order (For more detail, see Schrijver 1997: 3-4; Friedmann 1964: 22, fn. 3).

[42] The Great Britain and France took military action against Egypt after the Suez Canal nationalization in 1956. In some of the cases, such as 'the Mexican oil expropriation leading to a settlement between Mexico and the US in the early forties, and the Iranian Oil Agreement of 1954, a partial satisfaction

solve this problem and to develop their economy, the UN General Assembly passed the resolutions: the Permanent Sovereignty over Natural Resources (1962),[43] the New International Economic Order (1974),[44] the Charter of Economic Rights and Duties of States (1974),[45]and so on.[46] The resolution based on the need to examine ways to ascertain the wishes of the peoples of the non-self-governing territories on the basis of

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was eventually reached as a result of prolonged international negotiations' (For more discussion, see Friedmann 1964: 22-23, fn. 3). Further, the European and American states put forth the 'Cordell Hull' formula, which urges that any expropriation of foreign property requires 'prompt, adequate and effective' compensation. Against which, the newly independent states argued for 'just, fair and equitable' compensation, based on the principle of 'appropriate compensation'.

The *Calvo doctrine* – under one version: 'international liability with respect to contracts entered into with alien private contractors by the State party is excluded'; another formulation describes, 'it as a stipulation in a contract in which 'an alien agrees not to call upon his State of nationality in any issues arising out of the contract''. This used to be inserted (or suggested) as a clause in investment contracts but has also been argued as a specific rule of South American regional law. The *Drago doctrine* sought to exempt state loans from general rules of state responsibility. The *Tobar doctrine*, again, has to do with the alleged duty of non-recognition of governments that have arisen to power by non-constitutional means (for reference to all these doctrines, see ILC Report on Fragmentation 2006: 110, fn. 275).

[43] GA Res. (1962), 1803 (XVII), 14 December 1962 (Declaration on the Permanent Sovereignty over Natural Resources (PSNR)). The PSNR evolved as a new principle of international economic law in the post-Second World War period. Schrijver (1997) writes that '[s]ince the early 1950s this principle was advocated by developing countries in an effort to secure, for those peoples still living under colonial rule, the benefits arising from the exploitation of natural resources within their territories and to provide newly independent States with a legal shield against infringement of their economic sovereignty as a result of property rights or contractual rights claimed by other States or foreign companies'. Further, he says the PSNR gets importance, because it 'touches on such controversial topics as expropriation of foreign property and compensation of such acts, standards of treatment of foreign investors (the national standard versus the international minimum standard) and State succession' (Schrijver 1997: 3-4).

[44] GA Res. (1974), 3201 (S-IV), 1 May 1974 (Declaration on the Establishment of a New International Economic Order (NIEO)). The NIEO gives a '[f]ull permanent sovereignty of every State over its natural resources and all economic activities', which include 'the right to nationalization or transfer of ownership to its nationals'. Further it says '[t]he right of all States, territories and peoples under foreign occupation, alien and colonial domination or apartheid to restitution and full compensation for the exploitation and depletion of, and damages to the natural resources and all other resources of those States, territories and peoples'.

[45] GA Res. (1974), 3281 (XXIX) (Charter of Economic Rights and Duties of States (CERDS)). The CERDS stresses that '[e]very State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities'. Further it says that '[e]ach State has the right: (a) to…exercise authority over foreign investment within its national jurisdiction… No State shall be compelled to grant preferential treatment to foreign investment'. However, '[e]ach State has the right: (c) to nationalize, expropriate, or transfer ownership of foreign property, in which case appropriate compensation should be paid', if any controversy arise over the compensation than 'it shall be settled under the domestic law of nationalizing State and by its tribunals', unless otherwise freely and mutually agreed by the concerned parties.

[46] GA Res (2000), 55/146 (Second International Decade for the Eradication of Colonialism). The resolution ascertains the wishes of the peoples of the non-self-governing territories on the basis of GA Resolution 1514 (XV) (1960) and other relevant resolutions in-relation to decolonization.

resolution 1514 (XV) and other relevant resolutions in-relation to decolonization (UNGA 2000: Res. 55/146) and so on. Alexandrowicz's says that 'colonization during the eighteenth and nineteenth centuries *eclipsed* rather than extinguished the international legal personality of the colonized countries' (Anand 1986a: xvii). Anand says that the term 'colonization' in international law merely meant 'temporary legal incapacity of the once sovereign actors' (*ibid*.). Hence it is often stated that though the Treaty of Westphalia marked the beginning of sovereign state system but the completeness was achieved only after the adoption of the UN Charter in 1945 followed by the decolonization process.

Permanent Membership and Veto Power

Further, in view of the dominant position held by the 'Great Powers' (i.e., the USA, USSR, UK, China and France) among member of the United Nations at war with the 'Axis Powers',[47] they decided to take primary responsibility among themselves in the UN. Because of their primary responsibility in the maintenance of international peace and security, they were determined to obtain a preponderant position in the Security Council. Hence, they decided the (1). Permanent status, and (2). Veto power only to the 'Five Great Powers' (Simma and Others 1995: 398-400). Later on it was adopted under Article 23(1)[48] and Article 27(3)[49] of the UN Charter, respectively.

But the medium and smaller powers within the UN group criticized about such special privilege of the Great Powers even at the San Francisco Conference, 1945 itself, and these states argued on the basis of principle of equality of states and of the realization of the ideal of democracy in international relations and also its possibility to block the effective operation of the Council as well as the Organization not only in

[47] The term United Nations refers to those states which found themselves at war with 'Axis Powers' and on 1 January 1942 had confirmed their signatures in the 'Declaration of the United Nations' that was already signed by the USA, the USSR, the UK, and the Republic of China.

[48] Article 23(1) of the UN Charter provides that, the Security Council shall consist of eleven (now fifteen) Members of the United Nations among whom five are permanent members (namely China, France, the USSR, the UK, and the USA) and remaining six (now ten) are the non-permanent members.

[49] Article 27(3) of the UN Charter provides that, decision of the Security Council on all other matters (i.e., substantial matters) shall be made by an affirmative vote of seven (now nine) members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under Article 52(3) (i.e., in case of pacific settlement of disputes), a party to a dispute shall abstain from voting.

the maintenance of international peace and security, but also in other fields. Further, they argued that it cannot be assumed that the named five permanent members in the UN Charter will necessarily remain the five 'Great Powers' and the problems may well arise when any marked shift of power does occur.

After the post-war period (i.e., after 1945), because of the following changes in the United Nations Organization their assumption becomes reality. Due to the Cold War between the USA and the USSR, the special privilege turned as an 'arbitrary means' in the hands of the 'Great Powers' to threat others in a number of circumstances, while admitting the new states to the Organization, appointing the Secretary-General, and while taking the Enforcement Actions. Most of the time, the Great Powers exercised the veto power not for the betterment of the member countries, but for their own personnel or allies benefit. Hence, since the adoption of the special privilege under the UN Charter, much of the efficacy of the Council has been destroyed and the permanent members have not hesitated to use the veto power when they felt their vital interest were at stake.[50]

Similarly, the Security Council showed partiality among the Members of the United Nations while taking actions against threats to the peace, breaches of peace and acts of aggression. For instances, in case of terrorist attacks of 11 September 2001 on New York and Washington DC. On the next day itself, France introduced and the Security Council unanimously passed Resolution 1368 (2001), which condemned the attacks and opened the way for United States-led military action against the Taliban regime in self-defence. On the same day, the General Assembly condemned terrorism and the attacks. Further, on 28 September 2001, the Security Council adopted Resolution 1373 (2001), which obligates all members states, under Chapter VII of the Charter of the United Nations, to take specific actions to combat terrorism and it includes to prevent the financing of terrorism, criminalize the collection of funds for such pur-

[50] The veto power was used 108 times out of 195, within a period of 20 years from the date of its functioning and in which 50 vetoes used for the rejection of Membership Applications and 2 vetoes used for the rejection of the nomination of Secretary General and the remaining 56 vetoes have been used to prevent the Security Council from taking Enforcement Action for the maintenance of international peace and security. As of 2017, there are 261 vetoes have been used in the decisions of the Security Council. It shows the misuse or abuse of such privilege status by the permanent members in the Security Council after they gained the permanent status and veto power in the UN (Jain 1978: 287).

pose, and immediately freeze terrorists financial assets – establishing Counter-Terrorism Committee to oversee its implementation.

If we compare, the United Nations responded to the attacks on 11 September 2001 with its actions when confronted with a far more deadly event from 6 April to mid-July 1994. Rwanda experienced the equivalent of three 11 September 2001 attacks every day for 100 days, all in a country whose population was one-thirty sixth that of the United States. Two week into the genocide, the Security Council withdrew most of its peacekeepers from the country. It took almost a month for the UN officials to call it as genocide and even longer for some Security Council members. Similar, incidents and response of our institution was also happened in Bosnia-Herzegovina (1993), Kosovo (1999), Burundi (2004), Durfur (2005), Sri Lanka (2009), Nigeria, Kenya, Libya, Iraq, Syria, etc. In the same way, countries like India had already lost thousands of lives to terrorism long before 9/11 occurred, and were striving hard to catch international attention without much success (Mani 1975: 507).

Therefore, the major criticism upon the P5 is that whether the UN and P5 evolved to maintain international peace and security? Or is it created as a means to dominate the whole world in the name of humanity threat? How human atrocities gradually increasing even after the establishment of UN? How does the 'peace keeping', 'peace making' and 'peace building' of the UN Security Council all around the globe fails to stop human rights violations even after sixty years of its establishment? Whether the UNSC following the method of pick-and-choose methods to reverse the problems? The developing countries often understand that UN itself acts as a weapon to threat/control the developing world and poses a threat of recolonization through the powerful western states. At the same time one has to agree that it is impossible to imagine without UN – the sovereign nations became more dangerous than what we have at present. Hence the global community neither ignores the UN nor accepts it completely. Left with no other option the states agree and follow the UN principles, that recalls the popular statement that 'something is better than nothing'.

Therefore, to secure the values of humanism, solidarity and peace, and to accomplish the common interest of the international community, the states waived their absolute sovereignty towards the international organization. Nonetheless, the action of the UNSC shows sovereignty cannot be replaced altogether with global governance, which may lead to selective exercise of criminal jurisdiction by powerful

states against the weak. However, during this revolutionary period of sovereignty international criminal law has undergone the process of institutionalisation. The international criminal tribunals administer criminal justice under the authority of pooling of sovereignty of the international community.

1.4. Philosophical Foundations

Philosophical Foundations from West

Origin of the 'concept of sovereignty' could be traced back to the Platonic era of *The Republic* (around 380 BC) where he attempts to establish the state system out of the idea of community and self-sufficiency among identifiable group of people.[51] He describes the process as 'when we have got hold of enough people to satisfy our many varied needs, we have assembled quite a large number of partners and helpers together to live in one place; and we give the resultant settlement the name of a community or state' (Plato 1987: 58).[52] However, the expression 'sovereignty' seems to be used for the first time by Jean Bodin in 1576 to define his *Commonwealth* 'as the rightly ordered government of a number of families, and of those things which are their common concern, by a *sovereign power*' (emphasis added; Bodin 1955: 1).[53] But he expressly recognises other names like 'Aristotle, Polybius, and Dionysius Halicarnassus [sic] alone among the Greeks discussed the attributes of sovereignty' (*ibid*.: 41).

[51] Even before political theorists like Socrates, Plato, Aristotle, etc. the kings and empires used their sovereignty to draw a line among the territories of another state(s) and protected their territorial sovereignty. They used verbal agreements for sharing and resolving border disputes and such verbal agreements among kings or empires were final and they keep their promise till the end of their last breath or till the power vested with their hands. Plato's *Republic*, Aristotle's *Politics*, Thomas Hobbes's *Leviathan*, etc. discusses the issue of sovereignty and the sovereign authority implicitly.

[52] Plato in his book *Republic* suggests five basic forms of government. His own ideal constitution can be conceived as either royalty or aristocracy (IV, 445D), where sovereignty lies with the carefully trained guardians. The other four forms represent a progressive degeneration away from this model: timocracy (where the pursuit of honour is paramount), oligarchy, democracy and tyranny. Plato also describes five basic kinds of individual characters or souls, corresponding to the respective forms of government (VIII, 544E-545C).

[53] The modern concept of sovereignty owes more to the jurist Jean Bodin (1530–1596). Bodin conceived it as a supreme, perpetual, and indivisible power, marked by the ability to make law without the consent of any other. Its possession by a single ruler, a group, or the entire body of citizens defined a commonwealth as monarchy, aristocracy, or popular state. In his *Six livres de la république* (1576; Six books of the commonwealth)[53] Bodin favors absolute monarchy.

It was the era during which the idea of sovereignty was conceived and brought into exists, which authorises states to make law for the welfare of the people. Bodin makes it clear that '[t]he first attribute of the sovereign prince therefore is the power to make law binding on all his subjects in general and on each in particular' (*ibid*.: 43). Further, he argues that law is an expression of sovereignty but valid only when it is accompanied by punishment for non-obedience. In the words of Bodin:

> Properly speaking the law is only concerned with prohibitions and the punishment of those who disobey, for a command implies a prohibition of any breach of that command. Law is not permission, for permission suspends prohibitions, and therefore carries with it no penalty or threat of punishment, without which there can be no law, seeing that law signifies nothing else than the command of the sovereign, as we have shown (*ibid*.: 91)

The above opinion indicates that the concept of sovereignty on the one hand, and crime and punishment on the other are inseparable. In the absence of one the other becomes non-existent. He created the first modern version of the social contract (or contractarian) theory, arguing that people must join in a 'commonwealth' and submit to a 'Soveraigne [sic] Power' that able to compel them to act in the common good. This expediency argument attracted many of the early proponents of sovereignty**.** Jean Bodin used the theory of absolute and undivided sovereignty was a major cause for the development of international law and the principle of intervention was regulated by the doctrine of sovereignty. It is the greatest power to command (Bodin 1962: 84). He defined the term sovereignty as 'perpetual and absolute'. Therefore, 'it is not limited either in power, charge, or time certain'. He expressed that prince is acquitted from the power of the God's laws (*ibid*.: 91). Therefore, the principle of 'king can do no wrong' was strictly followed; the rulers and the ruled were treated differently but the equals were treated equally and all others treated differently.

Thomas Hobbes is popularly known for his description of the 'life of man [as] solitary, poor, nasty, brutish and short' (Hobbes 1651: 619). In his *Leviathan* Hobbes projects that man always lives in a state of nature; and the state of nature is a condition of war of 'every man against every man…nothing can be unjust. The notions of right and wrong, justice and injustice have there no place. Where there is no common power, there is no law; where no law, no injustice. Force, and fraud are in war the two cardinal virtues' (*ibid*.: 620). To avoid such difficulties in human life, he

proposes that, there is a need for 'a common power, to keep them in awe, and to direct their actions to the common benefit' (*ibid*.: 634). That power is '[a] *commonwealth* [which] is said to be *instituted*, when a *multitude* of men do agree, and *covenant*, every one, with *every one*' (emphasis original) (*ibid*.: 635). 'From this institution of a commonwealth are derived all the *rights*, and *faculties* of him, or them, on whom the sovereign power is conferred by the consent of the people assembled' (*ibid*.). Thus, Commonwealth is vested with sovereignty and it 'is annexed to the sovereignty, the right of judicature; that is to say, of hearing and deciding all controversies, which may arise concerning law, either civil, or natural; or concerning fact' (*ibid*.: 637). Even in Hobbesian Commonwealth sovereignty and local administration of justice were inseparable.

John Lock, in his book on *Two Treatises of Government* (1689), rejects the idea of *patriarchalism* and argues for more civilized society based on natural rights and contract theory. He proposes the concept of popular sovereignty or sovereignty of the people, which means the authority of state and government is related and sustained by the consent of its people, through their elected representatives, who are the source of all political power.[54] In short, the concept of popular sovereignty indicates that '[i]n free governments, the rulers are the servants and the people their superiors and sovereigns' (Benjamin Franklin 1790).

Similarly, Jean-Jacques Rousseau, in his treatise *Of the Social Contract* (1763) argues that the Sovereign is 'a collective being of wonder' resulting from 'the general will' of the people (Book II, Chapter I). Thus the legal maxim, 'there is no law without a sovereign'. Rousseau definition of popular sovereignty provides that the people are the legitimate sovereign and he considered sovereignty to be inalienable. The second book of Rousseau's *Du Contrat Social, ou Principes du droit politique* (1762) deals with sovereignty and its rights. Sovereignty or the general will, is inalienable and is indivisible. Since it is essentially general, infallible and always right, determined and limited in its power by the common interest and it acts through laws. Law is the decision of the general will in regard to some object of common interest, but though the general will is always right and desires only good, its

[54] The concept of popular sovereignty is closely associated with social contract philosophers such as Thomas Hobbes, John Locke and Jean-Jacques Rousseau.

judgment is not always enlightened, and consequently does not always see wherein the common good lies; hence the necessity of the legislator. But the legislator has, of himself, no authority; he is only a guide who drafts and proposes laws, but the people alone (that is, the sovereign or general will) has authority to make and impose them.

John Austin, in his book *Province of Jurisprudence Determined* (1832) views that '[i]f a determinate human superior not in the habit of obedience to a like superior receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society and that society (including the superior) is a society political and independent'. Here, the sovereign is the supreme law maker. Laws are the commands of the sovereign which are binding upon all within the territorial jurisdiction of the state. Breach or violation of these commands leads to punishment from the sovereign.

Later in the eighteenth century, Vattel and Hegel, who analyzed and proposed the doctrine of the will of the state (Shaw 2007: 28-29; Friedmann 1964: 76-77; Koskenniemi 2004: 231-235). They said that '[a]ll real international law is derived from the will of the nations whose presumed consent express itself in treaties and customs' (Friedmann 1964: 76). Hegal made a fundamental critique of religion and gave much importance to state and said that the individual was subordinate to the state, because the later enshrined the 'wills' of all citizens and had evolved into a higher will, and on the external scene the state was sovereign and supreme (Shaw 2007: 28-29). [55] Vattel introduced the doctrine of the equality of states into international law irrespective of their strength or weakness (Anand 1986: 53; Shaw 2007: 25-26).

The concept of sovereignty has been analyzed in various ways by Machiavelli, Jean Bodin, Thomas Hobbes, John Locke, Jean-Jacques Rousseau, John Austin, David Hume, Stephen A. Douglas, Montesquieu, Immanuel Kant, etc., they postulated the legal as well as the political omnipotence of the modern sovereign, as against the political, legal, and social power of groups, such as churches, guilds,

[55] Hegel, who was often considered as the father of an ideology, that was ultimately lead to Fascism, Nazism, Capitalism, Liberalism, and Communism. Friedmann said that 'the unmitigated nationalism of Hegelian philosophy contrasted with the internationalist and humanitarian conception of Kant. It found its logical culmination in modern fascism, national socialism and, combined with certain aspects of Marxism, in modern state Communism' (Friedman 1964: 42, fn. 3).

merchants' associations as well as the 'over-mighty subjects' within the King's realm (Anand 1986: 22-51; Shaw 2007: 18-22).[56]

The secular law can be found especially in the works of Vitoria, Gentli, Grotius, Suarez, Pufendorf, Wolf, etc. are all based principles of international law on the law of nature, though some of them derived natural law from the law of God, and others from the law of reason (Friedmann 1964: 75; Shaw 2007: 22-26). Vitoria created a new system of international law to hold Spanish title, which essentially displaces divine law and its administrator (the Pope), and replaces it with natural law administrated by a secular sovereign (Anghie 2005: 17-18).[57] Grotius said that natural law would be valid even if there were no God (Shaw 2007: 23). He deeply influenced by the rationalist term of natural law, used principles of universal reason to establish basic principles of international law (Friedmann 1964: 75).[58] The origin and development of international law could be viewed from natural law to divine law, secular law and positive law. However, in all such philosophical encounters there is no law without sovereignty and no sovereignty without the authority for criminal justice.

[56] Though Machiavelli did not expound the theory of sovereignty, but he dealt with the theory of state (Shaw 2007: 20).

[57] Vitoria focuses on the social and cultural practices of the two parties, the Spanish and the Indians (Anghie 2005: 15). For him, 'sovereignty doctrine emerges through…the problem of cultural difference' (*ibid*.: 16). '[T]he rule of the sovereign was legitimate only if sanctioned by religious authority' (*ibid*.: 17). He argues that 'what natural reason has established among all nations is called *jus gentium*' (*ibid*.: 20). 'The universal system of divine law administered by Pope is replaced by the universal natural law system of *jus gentium* whose rules may be ascertained by the use of reason' (*ibid*.). Here, the '*jus gentium*, naturalizes and legitimates a system of commerce and Spanish penetration' (*ibid*.: 21). For him, opposing the work of the missionaries in the territories was a just reason for war (*ibid*.). Hence, Vitoria's concept of sovereignty is developed primarily in terms of the sovereign right to wage war (*ibid*.: 23). He bases his conclusion that the 'Indians are not sovereign on the simple assertion that they are pagans' – 'Indians lack rights under divine law because they are heathens' (*ibid*.: 29). Anghie (2005) presumes that 'an idealized form of particular Spanish practices become universally binding, Indians are excluded from the realm of sovereignty, and Indian resistance to Spanish incursions becomes aggression which justifies the waging of a limitless war by a sovereign Spain against non-sovereign Indians' (*ibid*.: 30). Therefore, we can say, Vitoria 'reintroduces Christian norms within this secular system; proselytizing is authorised now, not by divine law, but the law of nations' (*ibid*.: 23)

[58] Hugo Grotius was considered as founding father of modern international law. He introduced the concept 'freedom of the sea' in his work *Mare Liberum*, which means 'sea is open for all and belong to none'. And he opposed the closed sea concept which was introduced by the Portuguese (which was later dealt by John Seldon). The most fundamental of his principle is '*pacta sunt servanda*', the respect for promises given and treaties signed (Friedmann 1964: 75).

Philosophical Foundations from East

At some point of time, each civilization (including Hindu, Chinese, Egyptian, Jewish, Greek, and Roman civilizations) had realized the existence of law of nature and law of god. Later, the civilizations had formed their own system of laws and institutions to protect their cultural, religious, moral, and natural values (Huntington 1996).[59] For instance, Islamic civilization had Koranic laws; the Greek civilization had formulated the idea of Natural law in third century BC; the Roman civilization had followed *jus civile*, then *jus gentium*, and finally *jus naturale*; the Hindu, Chinese, and Jewish civilization had also their own system of laws (Alexandrowicz 1967: 28-29; Anand 1972: 12; Shaw 2007: 13-18; Chimni 2010: 28-35). The contribution of Indus civilization for the development of international law could briefly be analysed as under:

(a). Hindu Epics and Concept of Sovereignty: The rules of war, the doctrine of sovereignty, the concept of intervention and the principle of non-intervention could be found in the ancient *Idhihas* and *Puranas*. The Ramayana consists of many international regulations and norms which were later reflected in international law. For instance, in *Ramayana* the treatment of diplomat and the consequences of disrespect to the diplomats clearly discussed; Hanuman was a devotee of lord Rama who was appointed as a diplomat to visit Lankapuri (the present day Sri Lanka) for sovereign relations with lord Ravana to meet Rama's wife Sita. In his visit, the king's council of Lankapuri insulted Hanuman and fired his tail; due to that Lankapuri was burnt by Hanuman with the help of his tail. This incident shows that the Hanuman had violated the sovereignty of Lankapuri on the one hand; and the Lankapuri king's council violation of diplomatic relations on the other. Similarly, Ravana breached the sovereignty of Ayodhya by kidnapping Rama's wife Sita to Lankapuri.[60]

Even 'unjust war' was also discussed in Ramayana, where Rama was hiding and killing Vaali that was treated absolutely illegal. In *Yuddha Kanda* (final war) of

[59] Huntington (1996) writes that the civilizations had their own system of 'values, norms, institutions, modes of thinking to which successive generations in a given society have attached primary importance'.

[60] The history hide the truth alleging that king Ravana kidnapped king Rama's wife Sita because of love and affair on Sita. But in reality, he took Sita merely to insult Rama and nothing else. And the history of Ramayana had written in a fabricated manner showing king Rama as Lord and king Ravana as Ashura. Because it had written by the followers of king Rama and it reflects how the concept of victor's justice was – even since the time immemorial.

Ramayana, though the situation favored Rama for winning but he stopped the war because of king Ravana's unarmed position, where he followed the laws of war. Rama sent Ravana to bring arms to fight equally with similar weapons. These rules could be found in the present day 'just war theory' in the international humanitarian law. The concept of sovereignty and the rules of warfare was respected and followed in Ramayana and Mahabharata in many places. Even though it is considered as '*epic*' but the principles of sovereignty and international law were already written in those ancient literatures.[61] There are many Tamil literatures as well as Sanskrit scriptures (like the four vedas – *Rigveda*,[62] *Yajurveda*,[63] *Samaveda*[64] and *Atharvaveda*[65] and other scriptures) gifted lots to the world which implicitly reflected in several international law principles.

(b). Indian Philosophers and Concept of Sovereignty: Hindu civilization had Manu's *code* Manava *Dharmasastra* (200-400 BC), and Kautilya's *Arthasastra* (350-283 BC), Thiruvalluvar's *Thirukkural* (100-300 BC). Tirukkural has 133 chapters and 1330 couplets, in which chapter 39 (couplet 381-390) talks about the greatness of a king or qualities of a ruler; chapter 55 (couplet 541-550) speaks about the right sceptre or justice; chapter 56 (couplet 551-560) talks about the cruel sceptre or injustice; and chapter 74 (couplet 731-740) talks about country or the land. These chapters and

[61] Whether the Ramayana is a true story or imaginary one, whatever it may be but one has to agree that there someone from south had view about diplomacy, rules of war, etc.

[62] The *Rigveda* means 'praise, shine and knowledge' (here rig means 'shine' and veda means 'knowledge') and it is a collection of Vedic Sanskrit hymns. The text is a collection of 1028 hymns and 10600 verses, organized into ten books (ten Mandalas) (Witzel, Michael 1997: 259-264). It is one of the four canonical sacred texts (Sruti) of Hinduism, which is popularly known as 'the Vedas'.

[63] The Yajurveda means 'knowledge of prose mantras' (here the word yajus means 'prose of mantra' and veda means 'knowledge') and it is a compilation of ritual offering formulas that were said by a priest while an individual performed ritual actions (such as those performed before the yajna fire). The exact century of Yajurveda's composition is unknown and estimated by scholars to be around 1200 to 1000 BC, contemporaneous with Samaveda and Atharvaveda (Witzel, Michael 2003: 68-77). It is one of the four Vedas and one of the scriptures of Hinduism.

[64] The *Samaveda* means 'veda of melodies and chants' (here the word sāman means 'song' and veda means 'knowledge') and it is a liturgical text whose 1875 verses are primary derived from the Rigveda. Three recensions of the Samaveda have survived, and variant manuscripts of the Veda have been found in various parts of India (Staal, Frits 2009: 107-112). It is an ancient Vedic Sanskrit text, and part of the scriptures of Hinduism.

[65] The *Atharvaveda* means 'knowledge storehouse of atharvāṇas/procedures for everyday life' (here the word atharvāṇas means 'procedures for everyday life' and veda means 'knowledge') and it is a collection of 730 hymns with about 6000 mantras, divided into 20 books (Patton, Laurie 1994: 57-58). The text is the fourth Veda, but has been a late addition to the Vedic scriptures of Hinduism.

couplets treat king as a real sovereign. For instance, in couplet 384 expresses sovereign state is a state should respect ethical values, vanish unethical values in the state and stand in a brave manner without affecting the reputation over the state.[66] In couplet 549 expresses in guarding his subjects against injury from others and preserving himself from them; to punish the offenders is not a fault on a king but its a duty.[67] Further, *Patiṟṟup Pattu*, *Pattup Pāṭṭu*, *Paṉṉiru Tirumuṟaikaḷ*, etc. discusses love and bravery along with the concept of good governance or welfare state, the sovereignty of states, etc.

(c). Indian Kings and Concept of Sovereignty: The Indian Kings respected the sovereignty of others. The kingdom of Chola, Chera and Pandiyas had definite territory, population, sovereignty and government and they never occupied illegally without any legal war or without their knowledge; every king maintained and respected their territorial sovereignty. During the ancient period, general rules were created to conduct war and no state should breach those humanity rules. No war should be conducted after sunset and before sunrise, at any cause civilian population should not be targeted. At present these principles could be found in international humanitarian law.

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[66] 'அறனிழுக்கா தல்லவை நீக்கி மறனிழுக்கா
மானம் உடைய தரசு' (திருக்குறள், குறள்: 384).

'Kingship, in virtue failing not, all vice restrains,
In courage failing not, it honour's grace maintains'. (Tirukkural, Couplet: 384).

குறள் விளக்கம்: அரசென்பது (அரசு என்பது) தனது அறத்திலிருந்து விலகாமலும், அறமற்ற கொடுமைகள் தன் நாட்டில் நடைபெறாமலும் விலக்கி, வீரத்தில் தவறாமல் நின்று மானத்தைப் பெரிதாக மதிப்பதே. Couplet Explanation: Sovereign state is a state should respect ethical values, vanish unethical values in the state and stand in a brave manner without affecting the reputation over the state.

[67] 'குடிபுறங் காத்தோம்பிக் குற்றம் கடிதல்
வடுவன்று வேந்தன் தொழில்' (திருக்குறள், குறள்: 549).

'Abroad to guard, at home to punish, brings
No just reproach; this work assigned to kings' (Tirukkural, Couplet: 549).

குறள் விளக்கம்: மக்களைப் பிறர் வருத்தாமல் காத்து, தன்னையும் வருந்தாமல் காத்து, குற்றவாளிகளின் குற்றங்களைத் தக்க தண்டனையால் ஒடுக்குதல் (ஒழித்தல்), அரசனுடைய தொழில் பழி அன்று. அதாவது, அயலவரிடமிருந்து மக்களையும் தன்னையும் காத்து, குடிமக்களின் குறைகளைக் களைந்து நேரிய ஆட்சி செய்தல், ஆட்சியாளருக்குக் குறை ஆகாது; அது அவர் தொழில். Couplet Explanation: In guarding his subjects against injury from others and preserving himself from them; to punish the offenders is not a fault on a king but its a duty.

For example, just and unjust war was commonly practiced by the kingdoms of Cholas, Cheras and Pandiyas.[68] Later, the Pallava kingdom and the Vijayanagara dynasty were also followed the same. During the reign of Rajaraja Chola I and his successors Rajendra Chola I, Virarajendra Chola and Kulothunga Chola I, the Chola armies invaded Sri Lanka, the Maldives and parts of Southeast Asia (including Malaysia, Burma, Indonesia and Southern Thailand of the Srivijaya Empire) in the 11th century (Murfett, et al. 2011: 16). Similarly, the Pandiya king like Pandian Nedunchezhian, Nedum Cheralathan (popularly known as Imayavaramban) and others were great kings in pandiya dynasty. Pandiyan Imayavaramban conquered till the territory of Himalayan region and the flag of pandiya (i.e. Twin-Fish) flagged at the peak of Himalaya. There is no single evidence to prove about an illegal war of Indian kings against the other neighboring kingdoms.

Similarly, they had separate criminal justice system and equally applied to all (both for king and people) and even the rights of animals were protected equally equal to that of general public and rules not to destroy the cultural monuments was framed. For example, the *Mahavamsa* states that King Ellalan ruled 'with even justice toward friend and foe, on occasions of disputes at law' and elaborates how he executed his own son Veedhividangan to provide justice to a cow.[69] He was popularly called as 'Just King' or 'Manu Needhi Solan' (who followed Manu law during his reign) and his name often used as a metaphor for fairness and justice (it could be noted in ancient literatures: Periya Puranam, Poems 103-135; Silappatikaram, Story-line 50-63; and Mahavamsa, Chapter XXI). Though Cholas followed the religion of shaivam, while conquering Sri Lanka they never vanished (or destroyed) Buddha statues and they respected all religions equally. In a similar vein in 1972 the UNESCO adopted the Convention Concerning the Protection of the World's Cultural and Natural Heritage.[70]

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[68] Among those three kingdoms, Cholas dynasty was as large as of the territories of Alexander the great.

[69] During his rule, he hung a giant bell in front of his courtroom for anyone needing justice to ring and to strike the bell there was a rope. One day a cow stroked the bell with tears in its eyes. On enquiry the king found that his son has killed the calf of that cow unknowingly under the wheels of his chariot. In order to provide justice to the cow, the king ordered to kill his son under the wheels of the chariot as a punishment to himself (i.e. make himself suffer as much as the cow) (The Hindu: 25th June 2010 – Editorial Features: *From the Annals of History*).

[70] That gives protection to cultural, historical and religious monuments all around the world and thereby respects the ancient rulers, people and their respectful monuments.

Philosophical Foundations from Courts and Tribunals

The concept of sovereignty was discussed for the first time by the PCIJ in

***S.S. Wimbledon case*:** The situation in this case regards the Treaty of Versailles (1919) and German sovereignty. The British ship S.S. Wimbledon (owned by a French company) attempted to carry munitions and supplies to Poland as they fought a war with Russia. Germany refused the boat access through the Kiel Canal. The canal is in German territory. Germany was a neutral party in the war and it did not wish to support either side. The application was made to the PCIJ to gain damages for lost time and money in the transport of the goods.

The applicants submitted the request before the PCIJ on the grounds of wrongfulness by German authorities when they refused access to the ship. The Neutrality Orders issued by Germany were inconsistent with Article 380 of the Treaty of Versailles, which provides that '[t]he Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and war of all nations at peace with Germany on terms of entire equality'. This Article has an uncompromising tone. However, German argued that it has sovereignty over its own lands. The Article should not compromise her sovereignty or her sovereign right to neutrality. Boats could be refused access on many grounds, neutrality should be one. Nevertheless, the court ruled in favour of the applicants and held that treaty making is an attribute of sovereignty, Germany, although sovereign are without doubt bound to the treaties they sign.

***S.S. Lotus case*:** Subsequently, the concept of sovereignty has been discussed in *S.S. Lotus case*. Collision occurred on the high seas between a French vessel and a Turkish vessel. Victims were Turkish nationals and the alleged offender was French. Could Turkey exercise its jurisdiction over this French national under international law? A collision occurred on the high seas between a French vessel – Lotus – and a Turkish vessel – Boz-Kourt. The Lotus made the Boz-Kourt to sink and killed eight Turkish nationals on board. In Turkey, the officer on watch of the Lotus (Demons), and the captain of the Turkish ship were charged with manslaughter. Demons, a French national, was sentenced to 80 days of imprisonment and a fine. The French government protested demanding the release of Demons or the transfer of his case to the French courts. Turkey and France agreed to refer this dispute on jurisdiction to the PCIJ. Did Turkey violate international law when Turkish courts exercised jurisdiction over a crime committed by a French national, outside Turkey? If yes, should Turkey

pay compensation to France? The court decided that Turkey, by instituting criminal proceedings against Demons, did not violate international law. Does Turkey need to support its assertion of jurisdiction using an existing rule of international law or is the mere absence of a prohibition preventing the exercise of jurisdiction enough?

The first principle of the *Lotus case*: A state cannot exercise its jurisdiction 'outside its territory' unless an international treaty or customary law permits it to do so. This we call the first principle of the *Lotus case*. The court held that:

> Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention (para 45).

The second principle of the *Lotus case*: 'within its territory', a state may exercise its jurisdiction, in any matter, even if there is no specific rule of international law permitting it to do so. In these instances, states have a wide measure of discretion, which is only limited by the prohibitive rules of international law. The court held that:

> It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable. This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States …In these

> circumstances all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty (paras 46 and 47).

This applied to civil and criminal cases. If the existence of a specific rule was a prerequisite to exercise jurisdiction, the court argued, then 'it would…in many cases result in paralysing the action of the courts, owing to the impossibility of citing a universally accepted rule on which to support the exercise of their [states'] jurisdiction' (para 48). The court based this finding on the sovereign will of states and held that:

> International law governs relations between independent States. The rules of law binding upon States therefor emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed

France alleged that the flag state of a vessel has exclusive jurisdiction over offences committed on board the ship in high seas. The court disagreed. It held that France, as the flag state, did not enjoy exclusive territorial jurisdiction in the high seas in respect of a collision with a vessel carrying the flag of another state (PCIJ Report 1927, paras 71-84). The court held that Turkey and France both have jurisdiction in respect of the whole incident: in other words, there was concurrent jurisdiction.

The ICJ dealt the concept of sovereignty in the *Corfu Channel case* (*United Kingdom of Great Britain and Northern Ireland-Albania*) arose from incidents that occurred on 22 October 1946, in the Corfu trait: two British destroyers struck mines in Albanian waters and suffered damage, including serious loss of life. The United Kingdom first seized the Security Council of the United Nations which, by a resolution of 9 April 1947, recommended the two Governments to submit the dispute to the court. The United Kingdom accordingly submitted an Application which, after an objection to its admissibility had been raised by Albania, was the subject of a judgment, dated March 25, 1948, in which the court declared that it possessed jurisdiction. Is Albania responsible for the explosions? In its judgment the court declared on the first question, by 11 votes against 5, that Albania was responsible. On the other hand, the court held that by sweeping the mines in Albanian territorial waters, the UK had violated its sovereignty hence liable for compensation.

Subsequently the ICJ once again dealt with the concept of sovereignty in *Barcelona Traction case* (*Belgium v. Spain*) Barcelona Traction was a corporation that controlled light and power utilities in Spain and was incorporated in Toronto, (Canada). In 1948, there was an adjudication in bankruptcy in Spain of Barcelona Traction. Its object was to seek reparation for damage alleged by Belgium to have been sustained by Belgian nationals, shareholders in the company. The Belgian Government, contended that after the First World War Barcelona Traction share capital came to be very largely held by alleged Belgian nationals, but the Spanish Government, maintained that the Belgian nationality of the shareholders was not proven. Whether Belgium can bring the case to the ICJ? Belgium's claim is rejected. Belgian government lacked the standing to exercise diplomatic protection of Belgian shareholders in a Canadian company with respect to measures taken against that company in Spain. The court ruled on the side of the Spanish, holding that only the nationality of the corporation (the Canadians) can sue. The case is important as it demonstrates how the concept of diplomatic protection under international law can apply equally to corporations as to individuals. This case dealt the sovereignty of Spain and Canada who has sovereignty right to sue before the ICJ on behalf of the company.

2. ORIGIN AND DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW

2.1. The Trial of Peter van Haginbach

The early seeds for the development of the idea of human values, common interest, global justice, and supranational prosecution dates back even before the formal establishment of sovereignty and state system under the Treaty of Westphalia in 1648. The trial against Peter van Haginbach in 1474, for his heinous crimes committed in the German city of Breisach, was the first major attempt by states to come together against a common enemy of humanity. In this case the French Duke of Burgundy ordered Peter von Hagenbach, a Dutch condottiere, to exact massive taxes from the German city of Breisach that had witnessed strong rebellion from local people. Duke ordered Peter to sack, pillage, rape, and burn the city and Peter obeyed the orders accordingly. This was considered as the terrible and horrifying crime ever committed in human history of that time and had augmented an unusual consensus among states to term the situation as a ‘crime against the laws of God and Man’. Consequently, the representatives of twenty-six member states of Holy Roman Empire came together as

judges to prosecute Peter. Despite his defence of obeying the command of the superior, the court sentenced Peter to be drawn and quartered (Bassiouni 2010).

The same principle of solidarity among states have led to the subsequent development of principles like *hostis humani generis, aut dedere aut judicare, responsibility to protect, jus cogens* and *obligatio erga omnes* under international criminal law. Since then the sovereign authority of states and international criminal law evolved simultaneously.

2.2. Treatification of International Criminal Law

The International Criminal Law is a body of principles— which include *hostis humani generis, ne bis in idem, nullum crimen sine lege, aut dedere aut judicare,* and responsibility to protect—emerged primarily out of state practice as customary norms. Gradually, such principles have become part of treaties and conventions to avoid ambiguity and to ensure uniformity among states. Treaty of Westphalia 1648 was the first major international treaty to deal with the prosecution and punishment of crimes committed during war. The Treaty did not have any provision to confer jurisdiction on courts and tribunals; rather, had provisions to prevent states from exercising criminal jurisdiction. Article XLIII of the Treaty provided that:

> all and each of the Officers, as well Military Men as Counsellors and Gownmen, and Ecclesiasticks of what degree they may be, who have serv'd the one or other Party among the Allies, or among their Adherents, let it be in the Gown, or with the Sword, from the highest to the lowest, without any distinction or exception, with their Wives, Children, Heirs, Successors, Servants…no prejudice shall be done to their Effects and Persons, that no Action or accusation shall be enter'd against them; and that further, no Punishment be inflicted on them, or they to bear any damage under what pretence soever: And all this shall have its full effect in respect to those who are not Subjects or Vassals of his Imperial Majesty, or of the House of Austria.

Whether prohibitive or permissive it was the first known treaty to have provision with regard to prosecution and punishment of crimes. Next stage of evolution is the Treaty of Paris, 1814 adopted in the Congress of Vienna 1814. Act No. XV to the Treaty of Paris deals with the declaration of the powers, on the abolition of the slave trade. This was the basis for the future declarations of slavery and slave trade as crimes against

humanity. The Declaration declares that:

> Having taken into consideration that the commerce, known by the name of 'the Slave Trade', has been considered, by just and enlightened men of all ages, as repugnant to the principles of humanity and universal morality…[Thus] all civilized countries, calls aloud for its prompt suppression; [and wish to put] an end to a scourge, which has so long desolated Africa, degraded Europe, and afflicted humanity;

During the American Civil War in 1863 the German-American legal scholar Franz Lieber drafted the Lieber Code and signed by the US President Abraham Lincoln as an instruction to the soldiers on field not to commit serious crimes. The code recognises most of the humanitarian principles to be followed in times of war including the prisoner of war status to the captured enemies. This was the first written document codifying the customary law of war and it was the antecedent for the Hague Conventions of 1899 and 1907. The Hague Conventions were serious of treaties and declarations giving formal written expression to the laws and customs of war and war crimes through secular international law. These recognised principles of international humanitarian law, violation of which is a war crime, becomes a basis for the evolution of international criminal law. Similar humanitarian law principles are elaborately codified under the four Geneva Conventions 1949, regulating the means and methods of warfare (*jus in bello*). All such conventions were general treaties to deal with all sort of international crimes irrespective of their serious nature.

However, the later development is to adopt separate international conventions for specific crimes, namely 'crime-specific treaties'. For example, Genocide Convention 1948 is applicable only to the crime of genocide, Torture Convention 1984 is applicable to the crime of torture, and Convention on Enforced Disappearance 2007 deals with the crime of enforced disappearance alone. The crimes covered by these conventions were serious in nature and international in character. After the treatification process international criminal law has undergone an exponential growth and diversification. Among other sources treaties play a significant role in the development of any branches of international law.[71]

[71] Article 38(1) of the Statute of the International Court of Justice recognises sources of international law: the international conventions, customs and the general principles of law recognized by civilized states are primary sources; and judicial decisions and highly qualified writings are secondary sources of

2.3. Institutionalisation of International Criminal Law

The process of institutionalising international criminal law began soon after the end of the First World War. During the Paris Peace Conference in 1918, there was a proposal to establish international criminal tribunal to prosecute and punish the perpetrators of serious crimes during war. However, this was opposed by German and hence, a compromise was adopted in the Treaty of Versailles, 1919. Article 229 of the Treaty provides that '[p]ersons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power. *Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned*'. Hence, there existed inter-state criminal tribunal after the end of First World War.

However, it was only after the Second World War for the first time the Allied Victorious Powers came together and established two international military tribunals, namely Nuremberg tribunal and Tokyo tribunal, for the prosecution and punishment of war criminals.[72] Though some scholars claim that Peter von Hagenbach trial of 1474 was the first international criminal tribunal, formal institutionalisation of international criminal law by adopting a charter began only after the establishment of Nuremberg and Tokyo tribunal in 1945. Despite criticism on the jurisdiction of the tribunal as one sided and partial to implement the victors' justice, it is an important step forward in the process of institutionalisation of international criminal law. Nonetheless, no such tribunals were established on the Vietnam civil war in 1966 to prosecute the crimes committed by the American forces. On that account, the Russell tribunal, a private judicial body, was established to try the alleged offences and record its findings. The tribunal had no enforcement authority but its purpose was to 'prevent the crime of silence'.

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international law. Nevertheless, there are other sources for international law (like unilateral acts of states and the acts of international organisations) are identified neither as primary nor as secondary sources, despite their increased importance in contemporary times. It has been criticized that the sources of international law mentioned under Article 38(1) is not an exhaustive list and it needs to be amended.

[72] The Nazi criminals were tried under the London Charter of the International Military Tribunal at Nuremberg (IMT, Nuremberg 1945) and Japanese war criminals were tried under the International Military Tribunal for the Far East Charter, Tokyo (IMTFE, Tokyo 1946).

At the end of cold war the world has witnessed two worst conflicts in human history, one was the ethnic conflict in the former Yugoslavia that lead to the establishment of International Criminal Tribunal for Former Yugoslavia (ICTY) in 1993; and the other was the civil war in Rwanda and resultant genocide that lead to the establishment of International Criminal Tribunal for Rwanda (ICTR) in 1994. These two tribunals are fundamentally different from the international military tribunals established in Nuremberg and Tokyo after the Second Word War. Those military tribunals were merely the coalition-courts of the Allied powers, whereas these crimes tribunals are truly international in character established under the authority of the UN Security Council.

At the end of the millennium a permanent International Criminal Court (ICC) has been established in 2002 under the Rome Statute of the ICC 1998. This is at the top of the institutionalisation process of international criminal law, because the previous courts were only event-specific tribunals but the ICC is conferred with the general power to exercise jurisdiction over any future occurrence of crimes.[73] However, during the same period of time, the international criminal law also witnessed the establishment of hybrid tribunals, which is neither domestic nor international rather a mixture of both. The hybrid tribunals include: Khmer Rouge Tribunal or the Extraordinary Chambers in the Courts of Cambodia (ECCC) in 1997; Special Court for Sierra Leone (SCSL) in 2002; Special Tribunal for Lebanon (STL) in 2009; Iraqi High Tribunal (IHT) in 2003; International Judges and Prosecutors Program in Kosovo (IJPP) in 2000, etc. The background and purpose of some of these hybrid tribunals are elaborately discussed in Chapter V of this study.[74]

These tribunals try the criminals based on the principle of *hostis humani generis* and punished the perpetrators not for internal crimes but for international crimes. The international courts and tribunals claims jurisdiction whenever the states failed to secure the jurisdiction (based on active personality, passive personality, territoriality, universality, subject matter jurisdiction, protective jurisdiction, complementary

[73] The ICC has no universal jurisdiction. Some scholars argue that the ICC itself is established based on the principle of universal jurisdiction (Philippe, 2006).

[74] During cold war period, the ICL principles were breached by the powerful nations and human atrocities gradually increased. Hence the international community realized the importance of ICL and the need for proper codification. As a result, after the collapse of cold war, several international criminal tribunals were established along with ICC to protect the neglected victims from heinous crimes.

jurisdiction, community jurisdiction, jurisdiction by surrender, etc.) and punish the perpetrators of heinous crimes. Thereby the international courts and tribunals contribute for the development of international criminal law. Especially, after the adoption of Rome Statue and the establishment of ICC, the ICL become a full-fledged legal regime.

Apart from this, the international human rights conventions have established a number of Committees for their implementation, which include: United Nations Committee on Human Rights, United Nations High Commissioner for Refugees, Committee against Torture, Committee on Rights of the Child, Committee against Racial Discrimination, Committee on Discrimination against Women, etc. The regional courts and tribunals include the European Court of Justice, American Court of Justice, European Court of Human Rights, Inter-American Court of Human Rights, African Court of Human and Peoples' Rights, etc.

2.4. Role of United Nations Security Council

The UN Security Council (UNSC) acts as an executive body to control the human rights violations and to maintain international peace and security. [75] The UNSC plays a major role in protecting human values by adopting several resolutions. In the process it has embraced the concept of universal jurisdiction to protect fundamental human rights and to maintain international peace and security. For instance, UNSC resolutions of 1674[76] of 2006 and 1894[77] of 2009 affirm the responsibility of states to

[75] The UN Security Council carries out the obligations to maintain international peace security under the UN Charter. Article 24(1) of the UN Charter provides that 'in order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf'. And Article 25 provides that 'the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

[76] This resolution reaffirmed from the UNSC resolutions of 1265 (1999) and 1296 (2000) and concerned about the protection of civilians in armed conflict. The resolution is also strengthened by the UNSC Res. 1631 (2005). The resolution 1674 and 1631 focused mainly the co-operation between the United Nations and regional organizations; further the Security Council (for the first time) had recognized a set of criteria to form a basis for humanitarian intervention in situations of armed conflict.

[77] This resolution was unanimously adopted by the UN Security Council on 11th November 2009. It includes the principles of the political independence, sovereign equality, territorial integrity, and respect for the sovereignty of all states. The resolution also extended to the protection of civilians in armed conflict. It acknowledges the enduring need of the Security Council and urges the member states to strengthen the protection of civilians in armed conflict.

comply with their relevant obligations to end impunity and thoroughly investigate and prosecute persons responsible for war crimes, genocide, crime against humanity or any other serious violations of the international humanitarian law, in order to prevent violations and to avoid their recurrence. These resolutions also recommend that the accountability for such serious crimes is to be ensured by taking measures at the national level.

The UN Security Council passed various resolutions and declarations to prevent the crime of terrorism, drug trafficking, women trafficking, money laundering, etc. Similarly, it establishes various international criminal tribunals (including the ICTY 1993, and ICTR 1994) and punishes the perpetrators of serious international crimes and maintains peace and security among the member states. Further the UN Security Council issues international arrest warrant against the perpetrators of heinous crimes (the international arrest warrant was issued against Adolf Eichmann, Augusto Pinochet, Thomas Lubanga, Germain Katanga, Jean-Pierre Bemba Gombo, Yerodia Ndombasi, Charles Taylor, Ariel Sharon, Omer Al-Basher, Muammar Gaddafi, and so on). Apart from taking punitive actions, the UN General Assembly adopts various international human rights and humanitarian conventions and protocols. Thereby the United Nations participates more in the development of International Criminal Law.

3. SOVEREIGNTY AND INTERNATIONAL CRIMINAL LAW

Though the concept of sovereignty continues to play a significant role in international legal order, preserving human values and punishing perpetrators of heinous crimes is a prerequisite for the legitimacy of any legal order. To achieve this end, the states have limited their sovereignty towards international organizations; and on the other hand, the physical and legal persons (including individuals, international organizations, corporations, non-governmental organizations, and civil society groups) treated as a subject of international law with certain rights and obligations. Thereby the ICL turned as a milestone in bringing rights and duties to other subjects of international law as equal to that of states.

Initially, only the states were treated as sovereign having certain rights and duties, hence they were alone treated as subjects of international law. Traditionally, the states would espouse the claims of their citizens in international courts and tribunals. The Heglian doctrine postulates that the state as the total integration of the individual

and the necessary repository of both his freedom and his responsibility' (Friedmann 1964: 247). However, due to the development of international criminal law the concept of individual sovereignty evolved.

The individual sovereignty is a sovereign right over oneself. Here, the individual sovereignty means not the sovereignty of state but the sovereignty of persons who may be ordinary civilian or may be the official but everyone has sovereignty and sovereign right in the state and law. The physical persons (i.e., individuals) are become a subject of international law, when the Nuremberg and Tokyo tribunals established for the prosecution of war criminals and those guilty of crimes against humanity and peace.[78] Later, the ICTY (1993), the ICTR (1994), Special Panels for East Timor (2000), Special Court for Sierra Leone (2002) were also established to punish the war criminals. Friedmann (1964) argues that if the individual can be directly prosecuted for infringements of international law, then the individual ought also to be able directly to benefit the rights conferred by international law (*ibid*.: 245-249).[79] In this regard, he argues that, the philosophy of international law is beginning to move away from Heglian doctrine (*ibid*.: 247). Burke-White (2004) says that today the individuals 'have unprecedented access to the international legal system, often without the tradi-

[78] The responsibility of individual actors was stressed by the International Military Tribunal at Nuremberg in opposition to defense claims 'that international law is concerned [merely] with the actions of sovereign states, and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible… That international law imposes duties and liability upon individuals as well as states'. The tribunal also recognized that 'crimes against international law are committed by men, not by abstract entities….[hence] individuals have international duties which transcend the national obligations of obedience imposed by the individual state….' Apart from this, the tribunal also imposed individual responsibility against the customary international law principle of state authority or sovereign immunity, it rightly declared that: 'the principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position… He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law' (quoted in Paust 2004: 1234-1235).

[79] 'Although there has been no organic connection between the movement for an international recognition of human rights, mainly through the United Nations Declaration of Human Rights and the subsequent draft Covenants of the United Nations, and the imposition of individual criminal responsibility on prominent individuals of the German and Japanese nationalities, in the Nuremberg and Tokyo trials of war criminals, there should be a general correlation between rights and duties. To the extent that the individual is held entitled to assert certain claims to human dignity and the protection of vital human interest on an international level, he can also be fairly held to assume a corresponding degree of responsibility for actions that directly interfere with such values' (Friedmann 1964: 234).

tional requirement of diplomatic protection whereby states would espouse the claims of their citizens in international courts'.[80]

From 1600 onwards the East India company had enjoyed delegated sovereignty of British queen. Friedman's notes that private companies clearly do not have the same status vis-a-vis intergovernmental organizations, but that to the extent that their activities are subject to public international law and they acquire a limited sovereign status in the international legal order (Friedmann 1964: 375).[81] Usually the corporations had access to the international system through their states, because their claims can be espoused only by states not by themselves. But today the corporations 'play an even more direct role in advising governments in WTO dispute settlement and can sometimes brings claims directly under NAFTA Chapter XI' (Berke-White 2004: 969).[82] Often PMC's personnel or commanders are being punished before the international courts and tribunals.

In post-modern times there were numerous NGOs have been established on wide range of issue, in which some of them are general and many of them are issue specific nature. They concern the issues ranging from human rights, environment, economic, humanitarian and so on, which have often direct and indirect access in the international courts and tribunals. For instance, NGOs make indirect communications to the International Criminal Court and mostly recently, they submitted the environmental brief and accepted by the WTO Appellate Body in the *Shrimp-turtle* case. Hence, of-

[80] For example, the United Nations Declaration on Human Rights (1948), and the two Covenants on Human rights (1966); Citizens of European Union member states can bring claim against his own state before the European Court of Human Rights; citizens of the America can petition the Inter-American Human Rights Committee; similarly citizen of the African Union can sue directly before the African Court of Human and Peoples' Rights; likewise the US Alien Tort Claims Act opens the US legal system for individuals to bring international claims for money damages rooted in international law (Burke-White 2004: 969). Further, Slaughter (1995) has argued that in contemporary times – 'it is possible to imagine individuals as monitors of government compliance with agreed rules, whether arrived at through a domestic or an international legislative process'.

[81] It does mean that they participate in the international legal process and that they acquire a limited status in public international law, to the extent that their activities are controlled by public rather than private international law (Friedmann 1964: 375).

[82] After WW II, the private corporations have become increasingly active participants in international transactions, mainly as investors concluding agreements on the exploitation of natural resources, or on industrial activities, with the governments of underdeveloped states (i.e., with sovereigns) and through their participation in certain international multilateral transactions, with governmental organizations or international public institutions (such as the World Bank) (Friedmann 1964: 67).

ten the NGOs are considered as subjects of international law with certain rights and duties.

Finally, the Westphalian sovereignty seems to be replaced by the global sovereignty after the establishment of United Nations. Because it is an international organization restrict and taken over certain rights from the sovereign states (irrespective of newly independent states and early colonial powers). Therefore, some of political thinkers say the notion of sovereignty under UN reached beyond Westphalian perspectives of sovereignty (Lyons and Mastanduno 1995: 1-5). Here the UN itself hold an independent international sovereignty to unite the nations for the protection of humankind as a whole. In reality, the UN did not take away the sovereign right of the states but they themselves gave certain rights to form the international organization for the purpose to protect humanity from external threat and to maintain international peace and security. The ICJ held in the *Reparation* case that the UNO as a legal entity, which can sue and be sued.[83] Since then the international organizations have gained the status as subject of international law.

The relationship between international criminal law and state sovereignty has never been a smooth affair. On the one hand, sovereignty is considered as an obstacle for enforcing ICL and on the other hand, enforcement of ICL is considered as a spurious justification for intervention into the domestic affairs of sovereign states. For instance, when a state exercises its sovereignty to claim criminal jurisdiction over serious crimes it contravenes the sovereign autonomy, equality and immunity of another state. Some of these issues are elaborately discussed in the next chapter.

[83] *Reparation for Damages suffered in the Services of the United Nations* (1949), ICJ Reports.

CHAPTER III

STRUCTURAL PRINCIPLES OF INTERNATIONAL CRIMINAL LAW

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The exercise of criminal jurisdiction over individuals is one area on which states are unlikely to compromise their authority with one another. Criminal law has primarily emerged out of concepts like *oikonomos* of Greek and *paterfamilias* of Rome—that give exclusive authority to sovereign states to administer criminal justice within their territorial boundaries. It is one major reason for the less popularity of international criminal tribunals as well as the continued reluctance of states to ratify the Rome Statute of the ICC. Despite that the *raison d'être* of international criminal law cannot be questioned or dispensed with provided the nature of heinous crimes that it deals with. However, a major problem in recent years is that whether the ambit of international criminal law should only be restricted to the traditional crimes, like genocide, war crimes and crimes against humanity or should it also be extended to the new-found crimes like terrorism, money laundering, cybercrimes, or corporate crimes of bribery, corruption and overthrowing of governments.

Those who oppose the widening ambit of international criminal law may justify their arguments on two grounds, namely (i) the expansion would dilute the effectiveness of international criminal law in preventing and punishing serious offences like genocide or war crime; and (ii) this would pave the way for international institutions to intervene in the domestic jurisdiction of states in the name of administering criminal justice. To the contrary, those who favour the expansion would defend their proposition on two grounds, namely (i) law cannot be static and it should evolve along with society to meet any unusual exigencies; and (ii) the new-found crimes cannot effectively be throttled by piecemeal domestic jurisdiction each states provided the comparative strength of perpetrators of such crimes. However, the right question to ask is not about whether the ambit of ICL should or should not be expanded; rather, it is about whether it can or cannot be expanded. To answer the question one should understand the limits of international criminal law by identifying its structural principles.

Structural principles are those that strengthen the subject by providing the basis, legitimacy and justification for its existence. The international criminal law has its origin and justification from three major principles, namely, (i) principle of solidarity; (ii) principle of sovereignty; and (iii) principle of universality. They have no direct

legal application in international relations, rather, they provide normative basis for various secondary principles on which the rules of international criminal law have been constructed. Some of those secondary principles along with their primaries have been briefly addressed below.

1. PRINCIPLE OF SOLIDARITY

Principle of solidarity is an embodiment of the ideals of cooperation and mutual support and it is the source of sustenance for any civilizational growth. The humanity has reached the present point of evolution only because of solidarity among men; in its absence the humanity would have been sacrificed to the Hobbesian logic of life which is 'solitary, poor, nasty, brutish, and short' (Hobbes 1651: 619). However, at the normative level the principle neither confers legal rights on the needy nor impose legal obligation upon the affluent; rather, endorses a moral duty towards the legitimate expectations of those who are in need. In the context of the law of nations Emer de Vattel, thus, observed '[t]he first general law…is that each Nation should contribute as far as it can to the happiness and advancement of other Nations' (Vattel 1916: 6). Further, he elaborates the principle that:

> when occasion arises, every Nation should give its aid to further the advancement of other Nations and save them from disaster and ruin, so far as it can do so without running too great a risk…if a Nation is suffering from famine, all those who have provisions to spare should assist its need, without, however, exposing themselves to scarcity…To give assistance in such dire straits is so instinctive an act of humanity that hardly any civilized Nation is to be found which would refuse absolutely to do so…Whatever be the calamity affecting a Nation, the same help is due to it (*ibid*.: 114-15).

Vattel prescribes a common responsibility for states to support others who are in need of assistance. In fact, existence of the principle of solidarity predates the evolution of law of nations and Westphalian sovereignty, or even before the notion of city-states. Yet, it is not a popularly agreeable normative framework among states. The reason could be that '[s]overeignty superseded solidarity to such an extent that, in the waning decades of the nineteenth century, solidarity was used as a justification for colonial domination' (Macdonald 1996: 261). Therefore, the principle had never been a binding legal norm but remained merely as one of the foundational components of justice in public international law. For instance, preamble of the United Nations Charter re-

quires the member states 'to practice tolerance and live together in peace with one another'; and Article 1 declares that the purpose of the UN is (i) to take effective collective measures, (ii) to develop friendly relations among nations, (iii) to achieve international cooperation, and (iv) to be a centre for harmonising the actions of nations in the attainment of common ends. Such are nothing more than the substantial manifestations of the principle of solidarity.[1]

In the context of international criminal law the principle of solidarity implies cooperation among states against a common enemy. Following are the subsidiary principles of solidarity in the context of international criminal law, namely: (i) *hostis humani generis*, (ii) *aut dedere aut judicare*, and (iii) responsibility to protect.

1.1. *Hostis Humani Generis*

The Latin maxim *hostis humani generis* means 'enemies of human race'. It was the first major legal formulation of the principle of solidarity to protect human values that paved the way for evolution of criminal law from domestic to international. The Peter von Hagenbach trial of 1474 had been a starting point for many to relate back the evolution of something called international criminal law. In this case, the French Duke of Burgundy ordered Peter von Hagenbach, a Dutch condottiere, to exact massive taxes from the German city of Breisach that had witnessed strong rebellion from local people. Duke ordered Peter to sack, pillage, rape, and burn the city and Peter obeyed the orders accordingly. This was considered as the terrible and horrifying crime ever committed in human history of that time and had augmented an unusual consensus among states to term the situation as a 'crime against the laws of God and Man'. Consequently, the representatives of twenty-six member states of Holy Roman Empire came together as judges to prosecute Peter. Despite his defence of obeying the command of the superior, the court sentenced Peter to be drawn and

[1] The General Assembly Resolution on the Promotion of a Democratic and Equitable International Order enunciates that such an order requires the realisation of Section 4(f) 'solidarity, *as a fundamental value*, by virtue of which global challenges must be managed in a way that distributes costs and burdens fairly, in accordance with basic principles of equity and social justice, and ensures that those who suffer or benefit the least receive help from those who benefit the most'; and the realization of Section 4(o) 'shared responsibility of the nations of the world for managing worldwide economic and social development as well as threats to international peace and security that should be exercised multilaterally' (GA Res. A/RES/59/193 of 18 March 2005).

quartered (Bassiouni 2010). The trial was a major stepping stone in the history of international law (Scharf and Schabas 2002).

This was the first known instance where solidarity among states gave rise to the emergence of international criminal law, by establishing international criminal court, to punish a crime of international character, in order to preserve the commonly shared human values, despite the act claimed to be carried under a legal authority. The trial gave the idea of bringing the perpetrators of heinous crimes to justice irrespective of their official position or authority to carry out such acts; and thereby the principle of solidarity took predominance *vis-à-vis* state sovereignty. Hugo Grotius in his *De Jure Belli* acknowledges such opinion that 'if the authorities issue any order that is contrary to the law of nature or to the commandments of God, the order should not be carried out' (Grotius 1600).

However, the actual terminology of *hostis humani generis* came in to exist only by 17th century when European powers declared piracy as a crime against humanity as a whole and those who engage in piracy as enemies of mankind. But the phraseology could also be traced back to the Roman era when Marcus Tullius Cicero wrote about pirates in his treatise *De Officiis* that '*nam pirata non est ex perduellium numero definitus, sed communis hostis omnium; cum hoc nec fides debet nec ius iurandum esse commune*' which means for a pirate is not included in the list of lawful enemies, but is the common enemy of all; among pirates and other men there ought to be neither mutual faith nor binding oath (Cicero 1913: Book III, 107). Pirates are still considered as the enemies of mankind and the United Nations Convention on the Law of the Sea (UNCLOS) 1982 confers authority on every state to seize and punish the perpetrators of piracy irrespective of any jurisdictional nexus.[2]

Over a period of time the concept was expanded to include other serious crimes, like slavery and slave-trade during 1800s. In early times slavery and slave trade were considered legal and it was a major commerce for nations throughout the world.

[2] Article 100 of the UNCLOS 1982 provides that '[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State'. Further, Article 105 of the Convention declares that '[o]n the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith'.

Though slave trade system emerged in Africa, Asia and Ottoman Empire, by the end of 17th and the beginning of 18th centuries Europeans monopolised and developed trans-Atlantic slave trafficking especially from the African continent. Slaves were treated like cattle and it is said that the cities of England were built on the bones of African Slaves (Klingberg 1968: 13). But later the concept of slavery and slave-trade came to be treated as serious international crimes, a *hostis humani generis* that comes under the purview of international criminal law.[3]

During 20th century three core crimes came to be treated as *hostis humani generis* along with piracy and slave-trade which include war crimes, genocide and crimes against humanity. These crimes were strengthened by the international conventions (such as four Geneva Conventions and its three Additional Protocols, and Genocide Convention). In 1998 the Rome Statute of the ICC added aggression as a serious international crime along with the above said crimes. In 2000 the Princeton Principle on Universal Jurisdiction further widened the scope of serious international crimes by adding torture and crimes against peace in the list. After the 9/11 attacks in 2001 some countries seek to include terrorism as a serious international crime, but how far it is feasible is yet to be analysed.

However, to punish the perpetrators of serious crimes during inter and intra-war period countries came together and established various criminal tribunals since 1990s. For instance, International Criminal Tribunal for Former Yugoslavia, International Criminal Tribunal for Rwanda, Special Court for Sierra Leone, the Khmer Rouge Tribunal for Cambodia (officially known as the Extraordinary Chambers in the Courts of Cambodia), Bangladesh War Crimes Tribunal, and so on have been established to punish the perpetrators of heinous crimes. In addition, the international community have also adopted the Rome Statute in 1998 and established a permanent International Criminal Court (ICC) in 2002 conferring jurisdiction over serious crimes irrespective of the place of occurrence.

The concept of enemies of mankind has infiltrated the legal philosophy to such an extent that where domestic courts claim to exercise extra-territorial jurisdiction over crimes committed in other countries as well. For instance, Eichmann trial was

[3] Article 99 of the UNCLOS 1982 provides that '[e]very State shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free'.

conducted by Israel, Pinochet was prosecuted by Spain and Britain, and several criminals were prosecuted and punished by Belgium. Similarly, in *Filártiga v. Peña-Irala* (630 F.2d 876/1980), the United States 2nd Circuit Court held that it will exercise jurisdiction over agents of the Government of Paraguay in their individual capacity when they would be found to have committed the crime of torture against Paraguayan citizens, through its extra-territorial authority conferred under the Offenses Clause of the US Constitution, the Alien Tort Claims Act, and customary international law.[4] While deciding the case the court was of opinion that 'indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind'. Further, the concept is reinforced by the ruling of the ICTY in the conviction of a torturer in *Prosecutor v. Furundžija* (IT-95-17/1-A/2000) marking its acceptance as a peremptory norm, part of the customary international law, held as *jus cogens*, applying *erga omnes*, upon every state and human individual without exception or reservation whatsoever (Janis and Noyes 2006: 148).

1.2. *Aut Dedere Aut Judicare*

The Latin maxim *aut dedere aut judicare*[5] means 'either extradite or prosecute'.[6] It is a legal obligation upon states under public international law to prosecute the alleged

[4] Article 1(8)(10) of the US Constitution provides that the Congress is granted the power *to define and punish Piracies and Felonies on the high Seas, and Offenses against the Law of Nations*. This clause expressly provides that the Congress may codify customary international law into federal law; and implicitly recognizes this law as the Law of Nations, as a source of law outside of the Constitution is like the common law.

[5] The principle of extradite or prosecute is derived from Latin word *aut dedere aut judicare*. Whoever commits a crime against human community (or human values) can be prosecuted. Accordingly, the state having the custody of a suspect has to either extradite the person to another state having jurisdiction over the case or to initiate its own judicial proceedings. The object of the principle is to avoid crimes being left unpunished. Offences classified under the principle are: hijacking of civilian aircraft, taking of civilian hostages, acts of terrorism, torture, crimes against internationally protected persons, and financing of terrorism and other international crimes.

[6] The ICJ has discussed the concept of extradite or prosecute elaborately in the *Asylum case (Columbia v. Peru)* 1950). In this case, Peru issued an arrest warrant against Victor Raul Haya de la Torre "in respect of the crime of military rebellion" which took place on 3rd October 1949 in Peru. Three months after the rebellion, Torre fled to the Colombian Embassy in Lima, Peru. The Colombian Ambassador confirmed that Torre was granted diplomatic asylum in accordance with Article 2(2) of the Havana Convention on Asylum 1928 and requested safe passage for Torre to leave Peru. Subsequently, the Ambassador also stated Colombia had qualified Torre as a political refugee in accordance with Article 2 of the Montevideo Convention on Political Asylum 1933 (note the term refugee is not the same as the Refugee Convention of 1951). Peru refused to accept the unilateral qualification and refused to grant safe passage.

offenders of serious international crimes where no other state requested for extradition, regardless of any territorial or jurisdictional nexus. It is another manifestation of the principle of solidarity and a continuation of the principle of *hostis humani generis*. The principle is to ensure that when perpetrators of serious crimes are considered as the enemies of mankind, their criminal conduct should never go unpunished. It requires a state to prosecute an offender in its custody or extradite him to another country having links with the offender or the alleged crime (Hebel 1999: 105).[7] The *aut dedere* principle is part of *obligatio erga omnes* which means the state has an obligation to prosecute the perpetrator in which other states have a right to ensure such prosecution; or if the state fails it has an obligation to extradite the perpetrator to other states who are willing and able. It is not an obligation just between parties to a treaty but towards the international community at large (Abass 2006: 354-355).

If the accused and affected victims belong to a same nation no conflict would arises with regard to jurisdictional claims. However, if an accused from one country commits a crime against the citizens of other, then who would get jurisdiction to prosecute the offence and on what basis? The jurisdictional basis of active

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The court concluded that Columbia, as the state granting asylum, is not competent to qualify the offence by a unilateral and definitive decision, binding on Peru (ICJ Report 1950: 12-15). In this respect, the Columbian government have not proved any existence of custom, even if there was such a custom – it could not been forced against Peru, because they were not party to the Montevideo Convention which included the matters of political asylum. Further, it held that there was no legal obligation on Peru to grant safe passage either because of the Havana Convention or customary law. In the case of the Havana Convention, a plain reading of Article 2 results in an obligation on the territorial state (Peru) to grant safe passage only after it requests the asylum granting state (Columbia) to send the person granted asylum outside its national territory (Peru). In this case the Peruvian government had not asked that Torre leave Peru. On the contrary, it contested the legality of asylum granted to him and refused to grant safe conduct. Asylum may be granted on 'humanitarian grounds to protect political prisoners against the violent and disorderly action of irresponsible sections of the population' (for example during a mob attack where the territorial state is unable to protect the offender) (*ibid.*: 16-19). Torre was not in such a situation at the time when he sought refuge in the Colombian Embassy at Lima. The court concluded that the grant of asylum and reasons for its prolongation were not in conformity with Article 2(2) of the Havana Convention (*ibid.*: 20-25).

[7] In 1936 the connection was found between extradition and universal jurisdiction, both contained in the origional manifestation of the *aut dedere* (i.e. extradition of criminals) principle (Feller 1973: 32-33). But in 1983, Oehler asserted that the word universality entitled the *judex loci deprehensionis* to exercise an unfettered jurisdiction over offences which, 'pose an equal threat to all nations' (quoted in Reydams 2003: 38). Meron opinioned that the status of *aut dedere aut judicare* or extradite or prosecute principle has been reinforced by its recognition under customary international law (Meron 1986: 23).

personality,[8] passive personality[9] and territoriality[10] would equally confer jurisdiction on both states. When a state is unable or unwilling to prosecute the perpetrator, it may extradite to the other who is able and willing to prosecute through genuine proceedings. In the absence of either, a third-state may claim jurisdiction under universality principle without any jurisdictional bond, but in neither case the criminal should go unpunished.

However, the principle of *aut dedere aut judicare* shall not be confused with the jurisdictional principle of 'universality' or 'universal jurisdiction'. Though the primary object of both is to combat impunity for certain types of crimes established in international legal instruments but a clear distinction shall be made between them. Mafiraoane Motanyane, the UN General Assembly delegate for Lesotho, has also made similar remarks and welcomed the efforts of the International Law Commission in this regard and expressed hope that it would continue to pave the way for a common understanding of universal jurisdiction. India is also of view that several treaties obliged states to either try a criminal or hand over the person for trial to a party that is willing to do so. This obligation to either extradite or prosecute should not be confused with universal jurisdiction. To the contrary, Argentina has expressed a difference of opinion that extradite or prosecute principle could be found in most multilateral treaties dealing with transnational crime, which in turn implicitly allow for universal jurisdiction along with the application of *aut dedere aut judicare*.

Theorists like Sims argue that the *aut dedere aut judicare* provisions in the 1949 Geneva Conventions were the basis for the '*pure*' universal jurisdiction incorporated

[8] Nationality or active personality jurisdiction is asserted by a state whose national is a suspect. It includes jurisdiction asserted by a state based on the domicile or residence of a suspect. Nationality is understood to be 'universally conceded'. It is noted that under the classical jurisdictional regime, nationality jurisdiction has been commonly circumscribed by many condition and safeguards by the domestic law of many states (Inazumi 2005: 24).

[9] Passive personality jurisdiction is asserted by a state whose national is the victim of a crime. Under the classical jurisdictional regime, passive personality jurisdiction has been observed to be 'asserted in some form by a considerable number of states and contested by others' and is 'admittedly auxiliary in character' (Inazumi 2005: 24). *Encyclopaedia Britannica* provides that 'the passive personality principle allows states, in limited cases, to claim jurisdiction to try a foreign national for offenses committed abroad that affect its own citizens'. This principle has been used by the United States to prosecute terrorists and even to arrest the *de facto* leader of Panama, Manuel Signories, who was subsequently convicted by an American court of cocaine trafficking, racketeering, and money laundering (in 1989–90).

[10] Where the subject-matter occurred gets jurisdiction which is called as territorial jurisdiction. The crime happened within the jurisdiction of the sovereign independent nation gets jurisdiction to prosecute the perpetrators based on the principle of territorial jurisdiction.

in the Belgian Act, 1999. Many post-Second World War conventions explicitly incorporate the *aut dedere aut judicare* principle, whereby states have sovereign authority to accept or reject the extradition request of third states that cannot be questioned. But in case of refusal for extradition the state shall have the obligation to prosecute. The Four Geneva Conventions along with others incorporate the principle of *aut dedere aut judicare* and thereby impliedly authorizes the universal jurisdiction (Abass 2006: 350-351; Scharf 2001: 99-103). Some scholars are also of opinion that the jurisdiction of the ICC is also derived from the concept of *aut dedere aut judicare*, provided complementarity principle of the Rome Statute.

Extradition and Double Criminality: Sometimes extradition of criminals may not be possible when the crime is an offence only in the requesting state but not in the extraditing state. Generally, extradition is allowed only for offences alleged as crimes in both jurisdictions. This is popularly known as the principle of double criminality, which means a crime shall be punishable in both countries i.e. the country where the suspect is held and the country requesting for extradition. Principle 10 of the Princeton Principle on Universal Jurisdiction provides the following grounds for refusal of extradition:

1. A state or its judicial organs shall refuse to entertain a request for extradition based on universal jurisdiction if the person sought is likely to face a death penalty sentence or to be subjected to torture or any other cruel, degrading, or inhuman punishment or treatment, or if it is likely that the person sought will be subjected to sham proceedings in which international due process norms will be violated and no satisfactory assurances to the contrary are provided.
2. A state which refuses to extradite on the basis of this principle shall, when permitted by international law, prosecute the individual accused of a serious crime under international law as specified in Principle 2(1) or extradite such person to another state where this can be done without exposing him or her to the risks referred to in paragraph 1.

International Convention for the Suppression of Counterfeiting Currency (ICSCC), 1929 is the first international convention to incorporate the *aut dedere* principle;[11]

[11] Article 9 of the ICSCC provides that '[f]oreigners who have committed abroad any offence referred to in article 3, and who are in the territory of a country whose internal legislation recognizes as a

followed by the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs (the Drugs Convention), 1936; [12] Convention for the Prevention and Punishment of Terrorism (Terrorist Convention), 1937.[13] However, these Conventions are substantively different from those of the post-World War II conventions (Abass 2006: 356-357). The provisions of post-World War II conventions, such as Article 4 of the Highjack Convention,[14] Article 5 of the Hostage Convention,[15] Article 6 of the

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general rule the principle of the prosecution of offenses committed abroad, should be punishable in the same way as if the offence has been committed in the territory of that country. The obligation to take proceedings is subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person for some reason which has no connection with the offence'.

[12] Article 8 of the Drugs Convention 1936 explains that '[f]oreigners who are in the territory of a High Contracting Party and who have committed abroad any of the offences set out in Article 2 shall be prosecuted and punished as though the offence had been committed in that territory if the following conditions are realised—namely, that: a) Extradition has been requested and could not be granted for a reason independent of the offence itself; b) The law of the country of refuge considers prosecution for offences committed abroad by foreigners admissible as a general rule'.

[13] Article 10 of the Terrorist Convention provides that '[f]oreigners who are on the territory of a High Contracting Party and who have committed abroad any of the offences set out in articles 2 and 3 shall be prosecuted and punished as though the offence has been committed in the territory of that High Contracting Party, if the following conditions are fulfilled—namely, that: (a) extradition has been demanded and could not be granted for a reason not connected with the offence itself; (b) the law of the country of refuge recognizes the jurisdiction of its own courts in respect of offences committed abroad by foreigners; (c) the foreigner is a national of a country which recognizes the jurisdiction of its own courts in respect of offences committed abroad by foreigners'.

[14] Article 4 of the Convention for the Suppression of Unlawful Seizure of Aircraft 1971 (popularly known as the Hijacking Convention) requires that: (1). Each contracting state shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, in the following cases: (a). when the offence is committed on board an aircraft registered in that state, (b). when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board, and (c)when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that state; (2). Each contracting state shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the states mentioned in paragraph 1 of this Article; and (3). This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

[15] Article 5 of the International Convention Against the Taking of Hostages 1979 provides that: (1). Each state party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in Article 1 which are committed: (a). in its territory or on board a ship or aircraft registered in that state, (b). by any of its nationals or, if that state considers it appropriate, by those stateless persons who have their habitual residence in its territory, (c). in order to compel that state to do or abstain from doing any act, or (d). with respect to a hostage who is a national of that state, if that state considers it appropriate; (2). Each state party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 1 in cases where the alleged offender is present in its territory and it does not extradite him to any of the states mentioned in paragraph 1 of this Article; and (3). This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

European Terrorism Convention,[16] Article 7 of the ICSFT Convention[17] and Article 4 of the Narcotic Convention,[18] obligate parties to take such measures as might be in its jurisdiction over the offences set forth therein. The attempt to premise the universal jurisdiction of the ICC on the *aut dedere* principle is based on the misbelief that obligations found in post-World War II Conventions exactly correspond to the pre-World War II conventions.

To the contrary, as noted above, the pre-World War II conventions contained the conventional *aut dedere* principle that laid down three major conditions for exercise of universal jurisdiction: (1) the domestic law of the asserting state must recognize the offence in question; (2) the asserting state must have received and declined an

[16] Article 6(1) of the European Convention on the Suppression of Terrorism 1977 states that '[e]ach Contracting State shall take such measures as may be necessary to establish its jurisdiction over an offence mentioned in Article 1 in the case where the suspected offender is present in its territory and it does not extradite him after receiving a request for extradition from a Contracting State whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested State'.

[17] Article 7 of the International Convention for the Suppression of the Financing of Terrorism 1999 provides that: (1). Each state party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 2 when: (a) The offence is committed in the territory of that state, (b) The offence is committed on board a vessel flying the flag of that state or an aircraft registered under the laws of that state at the time the offence is committed, (c) The offence is committed by a national of that state; (2). A state party may also establish its jurisdiction over any such offence when: (a) The offence was directed towards or resulted in the carrying out of an offence referred to in Article 2, Paragraph 1, subparagraph (a) or (b), in the territory of or against a national of that state; (b) The offence was directed towards or resulted in the carrying out of an offence referred to in Article 2, Paragraph 1, subparagraph (a) or (b), against a state or government facility of that state abroad, including diplomatic or consular premises of that state; (c) The offence was directed towards or resulted in an offence referred to in Article 2, Paragraph 1, subparagraph (a) or (b), committed in an attempt to compel that state to do or abstain from doing any act; (d) The offence is committed by a stateless person who has his or her habitual residence in the territory of that state; (e) The offence is committed on board an aircraft which is operated by the government of that state; (3). Upon ratifying, accepting, approving or acceding to this Convention, each state party shall notify the Secretary-General of the United Nations of the jurisdiction it has established in accordance with Paragraph 2. Should any change take place, the state party concerned shall immediately notify the Secretary-General; (4). Each state party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the states parties that have established their jurisdiction in accordance with Paragraphs 1 or 2; (5). When more than one state party claims jurisdiction over the offences set forth in Article 2, the relevant states parties shall strive to coordinate their actions appropriately, in particular concerning the conditions for prosecution and the modalities for mutual legal assistance; and (6). Without prejudice to the norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a state party in accordance with its domestic law.

[18] Article 4 of the Single Convention on Narcotic Drugs 1961 mentions general obligations that '[t]he parties shall take such legislative and administrative measures as may be necessary: (a) To give effect to and carry out the provisions of this Convention within their own territories; (b) To co-operate with other States in the execution of the provisions of this Convention; and (c) Subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs'.

extradition request from the state on whose territory the offence was committed before it could exercise jurisdiction; and (3) the alleged crime must affect states on an equal basis (Abass 2006: 357-358).[19] Whereas the post-World War II does not put any such conditions. For example, Article 146 of the fourth Geneva Convention (1949) provides 'to search for persons alleged to have committed or to have ordered to be committed such grave breaches and shall bring such persons, regardless of their nationality before its own courts or hand over such persons for trial to another high contracting party'. Similarly, Article 75 of the Additional Protocol I of the Geneva Conventions merely obligate state parties to surrender 'persons accused of war crimes and crimes against humanity', for the purpose of prosecution, in accordance with the applicable rules of international law.[20] In brief, though the concept of *aut dedere aut*

[19] In contrast, the formulae adopted by the post-World War II Conventions, merely obligates state parties to take necessary measures towards the domestic implementation of the relevant treaties (Abass 2006: 357).

[20] Article 75 of the Additional Protocol I to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts 1977 discuss about the Fundamental Guarantees. Persons who are in the power of a party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each party shall respect the person, honour, convictions and religious practices of all such persons.

The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: (a). violence of the life, health, or physical or mental well-being of persons, in particular: (i) murder, (ii) torture of all kinds, whether physical or mental, (iii) corporal punishment, and (iv) mutilation; (b) outrages upon personal dignity in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; (c) the taking of hostages; (d) collective punishments; and (e) threats to commit any of the foregoing acts. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following: (a). the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against; (b) no one shall be convicted of an offence except on the basis of individual penal responsibility; (c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed shall benefit thereby; (d) anyone charged with an offence is presumed innocent until proved guilty according to law; (e) anyone charged with an offence shall have the right to be tried in his presence; (f) no one shall be compelled to testify against himself or to confess guilt; (g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination witnesses on his behalf under the same conditions as witnesses against him; (h) no one shall be prosecuted or punished by the same party for an offence in respect of which a final judgement acquitting or convicting that person has been

judicare and the principle of universality closely resemble each other, they are two different concepts with a single motto, that is, no perpetrator of serious crime should escape their criminal responsibility and to show solidarity in securing justice to the victims.

1.3. Responsibility to Protect (R2P)

Responsibility to protect (R2P) is a political commitment of states to protect people from mass murder, rape and other avoidable catastrophes.[21] It is an expression of solidarity among states to protect humanity from genocide, war crimes, ethnic cleansing, and crimes against humanity. Fundamentally, each state has the responsibility to protect its population from mass atrocities; if it fails it becomes the responsibility of other states to express their solidarity towards such population. It is not the 'right to intervene' rather a 'responsibility to protect'. The concept of collective security either under the League of Nations or through the United Nations is nothing more than an outcome of this solidarity among states for peace and harmony. Measures under Article 51 or Chapter VII of the UN Charter are primarily directed towards this responsibility to protect humanity and thereby ensure international peace and security.

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previously pronounced under the same law and judicial procedure; (i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and (j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits with which they may be exercised.

Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in case where families are detained or interned, they shall whenever possible, be held in the same place and accommodated as family units. Persons who are arrested, detained or interned for reasons to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply: (a). persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and (b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol. No provision of this Article may be construed as limiting or any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by Paragraph 1.

[21] The *Nicaragua case* (1986), *Tadic cas*e (1999), and *Genocide case* (2007) are good examples to portray the level of control necessary by a state for the attribution of acts of its paramilitary forces, officials or non-state actors. These cases give elaborate discussion about responsibility of states to protect humanity from heinous crimes – which is discussed in Chapter VI.

However, responsibility to protect is a preventive measure, which in turn give rise to the question of what could be the punitive measure to prosecute those who responsible for mass atrocities? International criminal law evolved as a viable answer to prosecute and punish the perpetrators of heinous crimes internationally. Though solidarity among men is ever existent to protect human values, the blood-stained atrocities are omnipresent throughout human history. For instance, despite the existence of the United Nations, international organisations and coalition of governments the world has witnessed, specifically after the end of Cold War, numerous instances of human atrocities from time to time, such as first Liberation Civil War between 1989 to 1996, Gulf War in 1990, Bosnian Genocide in 1992 to 1995, Rwandan Genocide in 1994, crisis in the Democratic Republic of Congo in 1998, Kosovo Crisis in 1999, Battle of Grozny (Russia was Accused of Grozny Massacres) in 1999 and 2000, Second Liberation Civil War in 1999 to 2003, human atrocities at Sierra Leone in 1999 and 2002, war in Darfur region from 2003 to 2012 which lead to the birth of South Sudan, post Kenyan Presidential election crisis from 2007, Georgian – Ossetian Conflict in August 2008, Libyan Civil War in 2011, Syrian Uprising in 2011 and 2012 (Genocide happened in these two years at Syria), Guatemalan Civil War that ended in 1996, and Salvadoran Civil War that ended in 1992. The global community could seldom take action against such violations, provided the internal nature of such disturbances and the non-intervention principle of the UN Charter.[22]

Consequently, the ambit of R2P has evolved from preventive measure to include punitive measures like, prosecution and punishment of the perpetrators of mass atrocities, ensuring justice to the neglected victims, and so on. Responsibility to protect includes efforts to rebuild by bringing security and justice to the victim population and by finding the root cause of the mass atrocities (Evans and Sahunoun 2002: 108). On that account, the international community has adopted various bilateral and multilateral treaties and conventions to declare certain specific crime — like piracy, slavery, genocide, war crimes, crime against humanity, torture, etc. — as

[22] Article 2(7) of the UN Charter provides that '[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII'.

serious crimes internationally condemnable. Numerous international courts and tribunals have been established to prosecute and punish the perpetrators of heinous crimes. In the process of ensuring justice for violation of commonly shared human values, international criminal law has evolved as a distinctive field from public international law to avoid the impunity of perpetrators by imposing individual criminal responsibility. Thus, the sense of responsibility to protect among states in line with the principle of solidarity is one of the essential factors for the foundation of international criminal law.

Since the inception of Westphalianism sovereignty has been understood as a right rather than a responsibility. But in recent times, the global community is gradually moving towards an understanding that sovereignty is not about exercising right against others but of carrying out responsibilities towards its population. The phraseology 'Responsibility to Protect' has been coined by the International Commission on Intervention and State Sovereignty (ICISS). The commission was established by the Canadian Government in 2000 to answer the question raised by the UN Secretary General Kofi Annan that 'if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?' (Annan 2000: 48).

The concept of R2P was found in 2001, at the third round table meeting of the ICISS, as an alternative for 'right to intervene' or 'obligation to intervene' doctrines as well as to provide an answer for humanitarian crises.[23] The ICISS released its report on R2P in December 2001 without being adopted by any nation but was subjected to severe criticisms.[24] The report presented its idea that 'sovereignty is responsibility' and the international community has responsibility to prevent mass atrocities. Whenever other means fails, such as social, political or diplomatic intervention, military intervention may present as a last resort. Later, this has been

[23] In February 2001, at the third round table meeting of the ICISS in London, Gareth Evans, Mohamed Sahnoun and Michael Ignatieff suggested that the phrase responsibility to protect as a way to avoid the right to intervene or obligation to intervene doctrines and yet keep a degree of duty to act to resolve humanitarian crisis.

[24] The ICISS Report 2001 prescribes six major criteria for Responsibility to Protection: right authority, just cause, right intention, last resort, proportional means and reasonable prospects (ICISS Report 2001: 32). But these criteria have been met with severe criticism both from states as well as academia.

reiterated in the World Summit Outcome Document (WSOD) in 2005.[25] The norm of R2P primarily focuses on protecting humanity by preventing four major crimes, namely genocide, war crimes, crime against humanity and ethnic cleansing. UN Office of the Mission Statement views that these crimes as a single form of 'mass atrocity crimes'. Yet further question may arise that whether R2P should also be applicable during natural disasters?

The African Union (AU) demanded that the international community has a responsibility to intervene in crisis situations if the state is failing to protect its population, specifically during crisis situations or natural calamities. But the World Summit Outcome Document addresses only the situation of serious international crimes and not natural disasters, like, flood, drought, volcanic eruption, etc. The scope of R2P under the WSOD 2005 was narrow and well-defined, and the same was reaffirmed by member states in the UN General Assembly debate on R2P in 2009 on the ground that any expansion of R2P would diminish its effectiveness. The Responsibility to Protect principle framed and implemented in WSOD based on three main issues;

1. A state has primary responsibility to protect its population from serious international crimes; or
2. The international community has primary responsibility to assist or patronymic the state to fulfil its primary responsibility; or

[25] Paragraphs 138 to 140 of the WSOD deals with R2P. Paragraph 138 provides that '[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability'. Paragraph 139 explains that '[t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out'.

3. If the state fails to protect its citizens from the heinous international crimes and peaceful means and methods comes to an end, then the international community has the primary responsibility to protect and intervene through forceful means such as economic sanctions, but military intervention as the last resort (Badescu 2010: 110).

The concept of R2P is not a new phenomenon in international law, except the nomenclature, and as a norm this could be found mentioned under the UN Charter. One major criticism on R2P is about its infringement on national sovereignty. Every state is sovereign independent and no state shall interfere in the internal matters of the third state, as specified under Article 2(7) of the UN Charter. However the question of R2P without state consent comes into picture only when the state allows mass atrocities or by itself commits such atrocities. In such cases the state is no longer legitimate to exercise sovereignty and the true sovereignty always lies with the people. For instance, in Libyan case the UNSC passed resolution 1973 imposing primary responsibility on the Libyan Government to protect its population and the global community did not intervene. It was only when the government failed, the resolution imposed a ban flights in Libya's airspace, a no-fly zone, and tightened sanctions on the Gaddafi regime and its supporters and demanded an immediate ceasefire, including an end to the attacks on civilians.[26]

Though UN Security Council decides the matter before any military intervention based on the majority opinion, the questions remain as to whether Security Council would authorize military intervention equally on all situations? What about the status of non-member states? What could be the role of 'Veto' and 'Double Veto' in the decision making process? 'Double Veto' is a 'boon' for permanent members of the UNSC and a 'curse' for others.[27] For instance, the UNSC did not intervene in

[26] UN Security Council approves 'no fly zone' over Libya, authorizing 'all necessary measures' to protect civilians (UNSC/10200) (UN Department of Public Information 2011).

[27] Double Veto is a device by which the five permanent members of the Security Council deploy two successive vetoes, and prevent any substantive decision being taken. Article 27 of the UN Charter draws a distinction between 'procedural and substantial matters'. Article 27(2) provides that 'the decisions of the Security Council on procedural matters shall be made by an affirmative votes of nine members' and Article 27(3) views that ''all other matters', for decisions on which the affirmative vote of nine members (including the concurring votes of the permanent members) is required and thus open to veto. A vote on whether a matter comes under Paragraph 2 or 3 is itself a non-procedural matter, coming under Paragraph 3, and thus open to veto. A permanent member can therefore exercise the veto, first, to decide a matter is procedural or non-procedure issue, and second, to decide the substantial

Chechnya because of Russian Veto (Sweeney 2000). The global community's great expectation is that the UNSC permanent members agree not to use their veto when proven mass atrocity crimes are taking place (Weiss 2005: 188).

In short, the principle of solidarity and its manifestation of legal norms, like *hostis humani generis*, *aut dedere aut judicare* and responsibility to protect provide a solid foundational basis for the existence of international criminal law. Any proposal to expand international criminal law to encompass new-found crimes within its ambit, must ensure that the new-found crimes could effectively be curtailed only through solidarity among international community.

2. PRINCIPLE OF SOVEREIGNTY

Sovereignty is the essence of the existing system of international relations among states without which the question of international or global will never arise. It is the primary source of authority for international law to administer the supranational regulation of the conduct of states. Even the Treaty of Westphalia 1648, the first major international legal instrument to establish order among states, derives its authority from the recognition of sovereignty of the treaty-parties. Many specialised legal regimes in the era of the fragmented international legal system irrefutably have its origin from the concept of sovereignty. Some scholars go even further to proclaim that international law itself a by-product of sovereignty and argue that:

> [t]he Treaty of Westphalia 1648 seems to be the starting point for any discussion as to sovereignty or international law. Most international legal scholars tend to identify the treaty as the starting point of their discipline, though its evolution lies much ahead of the time. During 16th and early 17th century itself the scholars like Domingo de Soto, Francisco de Vitoria, Francisco Suárez, Alberico Gentili, and Hugo Grotius were engaged in defining sovereignty while dealing with European relation with Indians. In the process of defining sovereignty and regulating sovereign relations, international law had evolved as a distinctive field from theology (Thulasidhass 2013: 9-10)

International criminal law is not an exception to this general observation of having its origin from the concept of sovereignty. Nevertheless, scholars in recent time

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issue under Paragraph 3. The concept of double veto has been fist recognized in the Yalta Conference (Rudzinski 1951: 443-461).

vigorously argue that sovereignty and ICL are contradictions to each other, enforcing ICL unavoidably interferes in the sovereign authority of states, sovereignty is the major hurdle for enforcement of ICL, and so on. At the extreme Broomhall is of opinion that 'either one supports the rule of law, or one supports state sovereignty. The two are not…compatible' (Broomhall 2003: 56). But to the contrary, international criminal law has evolved out of a necessity to preserve the essential components of sovereign authority of states, namely autonomy, equality, and immunity.

2.1. Sovereign Autonomy

Sovereign autonomy means 'independence' or 'freedom' from external control or interference in the internal decision making authority of a state, though not absolutely but relatively at the least.[28] Autonomy is an essential component of sovereignty without which a state can no longer claimed to be a sovereign. However, it is irreconcilable with the possibility of crimes over which more than one state could exercise jurisdiction. For instance, crimes like piracy, slavery, genocide, war crimes, crime against humanity, crime against peace or crime of aggression, are serious in

[28] The ICJ had elaborate discussion about the principle of non-intervention and the issue of sovereignty in the *Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua Vs United States* 1986. In July 1979, the government of President Somoza was replaced by a government installed by *Frente Sandinista de Liberacion Nacional* (FSLN). Supporters of the former Somoza government and former members of the national guard opposed the new government. The armed activities against the new government was carried out mainly by: (1). *Fuerza Democratica Nicaragüense* (FDN), which operated along the border with Honduras, and (2) *Alianza Revolucionaria Democratica* (ARDE), which operated along the border with Costa Rica. US supported these groups to fight against the Nicaraguan government (called "*contras*"). Nicaragua alleged that the US devised their strategy and directed their tactics, and that the *contras* were paid and directly controlled by the US. Nicaragua also alleged that some attacks against Nicaragua were carried out directly by the US military (attacked the Nicaraguan ports, oil installations, and a naval base). Nicaragua alleged that US aircrafts flew over Nicaraguan territory to gather intelligence, supply to the contras in the field, and to intimidate the population.

The court found in its verdict that the United States was 'in breach of its obligations under customary international law not to use force against another State', 'not to intervene in its affairs', 'not to violate its sovereignty', 'not to interrupt peaceful maritime commerce', and 'in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956'. The court found that the US could not rely on collective self-defence to justify its use of force against Nicaragua. The court also noted that the US has not sought to justify its intervention in Nicaragua on legal grounds, but had only justified it at a political level. The court find that '…no such general right of intervention, in support of an opposition within another State, exists in contemporary international law'. The court concludes that 'acts constituting a breach of the customary principle of non-intervention and if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations' (ICJ Report 1986: para 202 and 209).

nature over which every state might have a concern. Crimes like piracy might attract multiple jurisdictions based on the principles like active personality, passive personality, territoriality or universality. If public international law attempts to favour any of these principles to confer domestic jurisdiction on one state, it will have a direct negative impact on the sovereign autonomy of other states. But at the same time such conflicts among sovereigns shall not facilitate the perpetrators heinous crimes should go unpunished. As a compromise, ICL has evolved to safeguard sovereign autonomy while prosecuting the perpetrators.

ICL provides a platform for states to agree on commonly shared human values and strive for their preservation beyond the clash sovereign-egos. For instance, prosecution of the perpetrators of heinous crimes during WW II would have been an impossible task in the absence of establishing Nuremberg and Tokyo tribunals. In the absence of international criminal tribunals, there would have been a conflict of interest among Allied powers to exercise domestic criminal jurisdiction over war criminals from Germany, Japan and Italy. Even if they would have found a common arrangement for prosecution of war criminals at the domestic courts, it would have been a violation of the sovereign equality of Axis powers. Further, the outcome would have been nothing more than a victors' justice. Such criticism is already in place even against the trials at Nuremberg and Tokyo tribunals. To avoid such conflicts the allied powers decided for a common pooling of sovereign authority at the supranational level and established international military tribunals to exercise criminal jurisdiction.

Even in situations like Rwandan genocide the state will remain a state, might be a failed state, having territorial integrity, sovereign autonomy, and political independence of its own. No third state can arbitrarily exercise unilateral domestic jurisdiction to prosecute and punish the perpetrators of genocidal crimes, which would amount to intervention in Rwandan sovereignty. Similarly, the breakup of Yugoslavia on account of ethnic conflict in 1990s creates a unique situation as to the existence of sovereignty. The state got split into many parts, including Serbia, Croatia, Bosnia and Herzegovina, Slovenia, Montenegro, Macedonia, and Kosovo and there was no certainty as to the existence of sovereignty or territorial integrity. Yet no third could have exercised domestic criminal jurisdiction over crimes committed during the split-up. Though the exercise of universal jurisdiction by domestic courts could have been a viable option, superseding the principle of judicial

non-intervention, it could only be exercised when the concerned states are unwilling or unable to exercise their criminal jurisdictions.

However, the establishment of International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for Yugoslavia (ICTY) provided a harmonious solution for such complex situations. In continuation to that numerous international criminal tribunals have been established, like Special Court for Sierra Leone, Khmer Rouge Tribunal for Cambodia, International Crimes Tribunal for Bangladesh, International Criminal Court, etc. In short, the purpose of all such courts and tribunals are primarily to ensure sovereign autonomy of states.

2.2. Sovereign Equality

When states are considered as sovereigns there cannot be any superiority or subordination among them. As Pufendorf simplified that 'all persons in a State of nature are equal; the persons of international law are in a State of nature; therefore they are equal' (Pufendorf 1672: 8). It is an essential component of sovereignty on which the authority of international law is based. For instance, Article 2(1) of the United Nations Charter declares that '[t]he Organization is based on the principle of the sovereign equality of all its Members'. Similarly, the Friendly Relations Declaration, 1970 reiterates that '[s]tates shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principle of *sovereign equality* and non-intervention' (emphasis added). It is a juridical principle enforceable by law regardless of the factual differences among states. For instance, RP Anand is of opinion that:

> The necessary concomitant of the principle of sovereignty of States in International law…is the principle of equality of sovereign States. Despite wide and glaring inequalities amongst States – in size of territory or population, economic prosperity or military strength, industrial development or cultural advancement – the equality of States is…an 'absolute' and 'unquestionable' principle upon which international law is based (Anand 2008: 44).

It is true that 'states are equal' but equality is hindrance for exercising domestic jurisdiction over crimes that have transnational implications. The crimes like, piracy, slavery, genocide, war crimes, crime against humanity, or crime of aggression, cannot effectively be prosecuted or punished domestically. Because there is no uniformity among states with regard to measure of culpability, quantum of punishment, nature of

procedure and so on. In case of conflicting jurisdictions no state will accept the exercise of jurisdiction by the other. The only possible remedy is the supranational regulation of serious crimes through international legal system. Treaties and conventions on international criminal law like Genocide Convention or Geneva Conventions provide uniformity among states for prosecution and punishment of serious crimes.

Soon after the Second World War international criminal tribunals, namely Nuremberg tribunal and Tokyo tribunal, have been established not only to avoid any conflict of interest among Allied powers but also to respect the sovereign equality of Axis powers. Even the modern concept of hybrid-tribunals like the one in Sierra Leone, Cambodia or Bangladesh are examples of avoiding such sovereign clash. These tribunals are neither domestic nor international; rather, hybrid of both. The hybrid tribunals ensure that the prosecution and punishment of the perpetrators of serious crimes at domestic courts are not sham, while simultaneously honouring the non-intervention principle under Article 2(7) of the UN Charter. Thus, international criminal law has evolved out of necessity to ensure respect for sovereign equality of states while prosecuting and punishing the perpetrators of heinous crimes.

2.3. Sovereign Immunity

Every state is independent and its officials are immune from civil and criminal responsibility in foreign as well as domestic soil. In ancient times 'king can do no wrong' was a popular concept and rulers enjoyed absolute immunity from legal actions, as a functional necessity for state administration. Under the rules of customary international law heads of state or heads of government and serving officials cannot be prosecuted in foreign jurisdictions and they are immune even when they travel abroad, including when they are accused of having committed serious international crimes (Wardle 2011: 184; Akande and Shah 2011: 847-851). In modern context, immunity is granted through treaties and conventions, like Vienna Convention on Diplomatic Relations, 1961, Vienna Convention on Consular Relations, 1963 and so on. Immunity is granted in recognition of sovereign equality of states, to develop friendly relations among nations, and to facilitate the efficient performance of official functions.

On that account, head of state or other officials cannot be held criminally responsible by domestic courts of any country or of their own, despite being accused

of committing serious crimes, owing to their position as head of state and the consequent immunity they enjoy. As a remedial measure, international criminal law has evolved to deal with such situations disregarding any immunity for the perpetrators of heinous crimes; and thereby ensures that the functional necessity of immunity is not being misused as impunity to commit serious crimes. For example, Article 27(2) of the Rome Statute declares that '[i]mmunities 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'.

However, such restrictions do not have universal application on all states but only on state parties to the treaty. Article 34 of the Vienna Convention on Law of Treaties (VCLT), 1969 provides that 'a treaty does not create either obligations or rights for a third State without its consent'. For instance, in 2011 ICC issued an arrest warrant against Laurent Gbagbo, the President of Cote d'Ivorie, for war crimes and crime against humanity. Though Cote d'Ivoire was not a party to the Rome Statute it voluntarily accepted the ICC's jurisdiction in 2003 and re-affirmed in 2010 and on that basis, the Prosecutor initiated investigation under Article 15 of the Rome Statute. But how far ICC could intervene in the non-party state without state's request? Such issues were raised when the Pre-trial Chamber applied Article 27(2) of the Rome Statute against Al-Basher of Sudan, a non-state party.[29]

After WW II, international criminal tribunals were established in Nuremberg and Tokyo, for the first time, to prosecute and punish the perpetrator of heinous crimes based on the principle of individual criminal responsibility.[30] However, the tribunals

[29] The Pre-Trial Chamber based its removal of customary immunities on four considerations: (1). One of the core goals of the Statute is to 'end impunity for the perpetrators of the most serious crimes of concern to the international community'; (2). That the Statute provides that it will be 'applicable to all persons without distinction based on official capacity' and that 'capacity as head of state or government shall in no case exempt a person from criminal responsibility'; (3). That other sources of law (such as the customary law of head of state immunity) can only be resorted to when there is an irresolvable lacuna in the applicable rules of the statute; and (4). That when referring the situation to the court, the Security Council accepts investigations and prosecutions will take place in accordance with the Statute (*Prosecutor v. Omar al-Bashir*, Case No. ICC-02/05-01/09, 4 March 2009, paras. 42-45). In this case, the court did not apply Omar al-Bashir's head of state immunity; similarly the Pre-Trial Chamber considered and applied the explicit prohibition of immunities that appears in Article 27(2) of the Rome Statute.

[30] International Military Tribunal at Nuremberg (8 August 1945) was established based on the Charter of the International Military Tribunal (IMT/London/Nuremberg Charter). International Military Tribunal for the Far East (4 November, 1948) was established based on the International Military Tribunal for the Far East Charter (IMTFE/Tokyo Charter).

prosecuted only those crimes committed by officials in their personal capacity and not those acts committed in their official capacity. This was to respect the customary international law of sovereign immunity. Later, in the post-cold-war period of 1990s several international criminal tribunals were constituted to deal with grave crimes in developing countries, such as Rwandan genocide, war crimes in the former Yugoslavia, Sierra Leone civil war, war crimes in Kosovo, war crimes and crimes against humanity in Cambodia, war crimes in Bangladesh, etc. Gradually, the principle of sovereign immunity got diluted on account of such serious international crimes.

The possible exceptions for immunity *ratione personae* under customary international law includes: (i) the accused is brought to trial before the domestic courts of their own state; (ii) the state decides to waive the immunity; (iii) at the expiry of tenure of office, for offences committed before, during or after the period of office in private capacity; and (iv) when the official is subject to the proceedings before international courts having jurisdiction (for example, the *Arrest warrant case* 2002). However, the modern treaty provisions disregard any immunity for prosecuting serious crimes.

Wardle views that in international law, the doctrine immunity proposes that serving state officials enjoy immunity *rationae personae*, otherwise known as 'absolute personal immunity', for each and every act undertaken while in office, regardless of whether they are done so in a private capacity (Wardle 2011: 183). This immunity is not limited to heads of state, but attaches to all high-ranking state officials by virtue of the office they hold. On the other hand, former heads of state enjoy a reduced form of immunity *ratione materiae*, otherwise known as 'functional immunity', which only offers immunity for acts carried out in pursuance of the official function as opposed to those undertaken in a private capacity (VCDR, 1969, 500 UNTS 95).

Though law is equal for all, it is not applicable to all equally in practice. For instance, gross human rights violations like war crimes, genocide, torture, rape, etc. occurred in Sri Lanka in 2009 but no action being taken against the perpetrators. Though ICC issued arrest warrants against the Sudan President Al-Bashir and Libyan President Mummer Gaddafi but remains silent against Sri Lankan President Mahinda Rajapaksa, Lieutenant Colonel Nandasena Gotabaya Rajapaksa and other higher

officials with regard to Sri Lankan war crimes. At the hands of barbarous international politics the naive claims of justice always fail.

3. PRINCIPLE OF UNIVERSALITY

By universal natural order every human is equal and all inequalities are man-made. The values, principles, and obligations that are part of this universal order are common for all and its preservation is an essential prerequisite for peaceful coexistence of all. Even before the advent of the law of nations the Roman Empire recognised such commonly shared human values through a legal system called *jus gentium.*[31] However, after the evolution of law of nations and its present form international law the concept of commonality has gradually been shrunk to few core values, known as the peremptory norm of general international law or *jus cogens*. The only additional commonality that exists along with *jus cogens*, as a legal embodiment, is the *obligatio erga omnes*. In order to preserve some of these commonly shared human values international criminal law has emerged as a mechanism to punish and deter the perpetrators. Significance of the principles of universality, namely *jus gentium*, *jus cogens*, and *obligatio erga omnes*, in the evolution of international criminal law could briefly be analysed as under.

3.1. *Jus Gentium*

Jus gentium was a legal system in Roman Empire based on the 'principle of commonality' recognising equality of individuals regardless of their nationality or territorial nexus. The Roman legal system was divided into *jus civile* and *jsu gentium*. *Jus civile* was a set of rules and principles of law that were applicable only between Roman citizens. Whereas, *jus gentium* was a set of rules and principles of law that were applicable to regulate the relation between non-Roman citizens or between Roman and non-Roman citizens. It consisted of *jus gentium privatum* i.e. private international law that regulates the relation between individuals; and *jus gentium publicum* i.e. public international law that regulates the relation between states. The

[31] The concept of 'law of nations' emerged as a distinctive field from theology and developed only after the advent of European states and through their penetration into Asian-African states during 16th, 17th and 18th centuries. Scholars like Domingo de Soto, Francisco de Vitoria, Francisco Suárez, Alberico Gentili, etc. developed the concept as a tool to justify the European intervention into the Asian-African states.

system recognises the principle of commonality and it is considered as universal natural order among all individuals and states. Principle of commonality is one of the structural components for the evolution of international criminal legal system.

The adoption of Genocide Convention, Geneva Conventions, Convention against Torture or other treaties on international crimes attempt to reinforce the system of *jus gentium* in modern era. Most of these legal instruments seek to punish the perpetrators domestically or internationally regardless of their position, nationality or state of residence. For instance, while adopting Resolution 96(1) of 1946 against the crime of genocide the General Assembly declared that:

> Genocide is a denial of the right of existence of entire human groups…such denial of the right of existence shocks the conscience of mankind…and is contrary to moral law and to the spirit and aims of the United Nations…The punishment of the crime of genocide is a matter of international concern.

Therefore, in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide case* the ICJ gave an advisory opinion based on the above resolution that '[t]he first consequence arising from this conception is that the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on states, even without any conventional obligation' (ICJ 1950: 12). And concluded that [t]he Genocide Convention was…intended by the General Assembly and by the contracting parties to be *definitely universal* in scope (emphasis added; *ibid*.). Most of the international tribunals, like the Nuremberg tribunal, Tokyo tribunal, ICTR, ICTY, Special Tribunal for Sierra Leone, or the recent development of permanent International Criminal Court have been established primarily to enforce this system of *jus gentium*. However, the possibility of expanding international criminal law towards newer crimes like terrorism, money laundering, or cyber-crimes shall be analysed in the light of the principle of commonality.

3.2. *Jus Cogens*

Jus cogens or peremptory norm may be defined as a fundamental and overriding principle of international law that operates in an absolute and unconditional way (Kali-

dhass 2014: 218).[32] It is varied form of *jus gentium* of the Roman era, a universal natural order that binds all nations irrespective of their nationality, place of residence, or otherwise. Under contemporary international law the concept of *jus cogens* has been incorporated as a treaty provision in the *1969 Vienna Convention on the Law of Treaties.* Article 53 of the Convention defines *jus cogens* as follows:

> [A] peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[33]

Further, the provision declares that '[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'. The very rationale behind the concept of peremptory norm 'is that the interests of the international community as a whole shall prevail over the conflicting interests of individual States and groups of States' (Orakhelashvili 2006: 67). 'It is the underlying force within a norm that protects the common public interests as opposed to the private interests of any specific actors…It stresses the theme of universality' (Kalidhass 2014: 218-19).

Under international law certain crimes are considered part of *jus cogens* norms that includes: piracy, slavery, war crimes, genocide, crimes against humanity, aggression, apartheid and torture. Sufficient legal basis exists to reach the conclusion that all grave crimes are part of *jus cogens* and the *opinio juris* suggest that these crimes are deemed part of general customary law (Akehurst 1976: 44). Dinstein argues that certain crimes affect the interests of the world community as a whole because they threaten the peace and security of humankind and because they shock conscience of humanity. In such situation, it can be concluded that it is part of *jus cogens* (Dinstein 1988: 109).

Jus cogens is qualitative in nature and not quantity based. For example, a single killing, coupled with the required intent 'to destroy in whole or in part' required under Article 2 of the Genocide Convention, is sufficient to be called genocide. But the killing of an estimated two million Cambodians is not genocide because there was no

[32] The Black's Law Dictionary defines the word 'peremptory' as '[i]mperative; final; decisive; absolute; conclusive; positive; not admitting of question, delay, reconsideration or of any alternative. Self-determined; arbitrary; not requiring any cause to be shown' (*Black's Law Dictionary* 1990: 1136).

[33] The same definition has been readopted under Article 53 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986.

ethnic, religious, or national basis for such killing and that was for political reasons. Political and social groups are excluded from the context of genocide. Therefore, one killing would be genocide and consequently *jus cogens*, while two million killings would not. But it would fall under the category of crimes against humanity and will be punished. The primary object of declaring such crimes as *jus cogens* is that no impunity shall be allowed for the perpetrator of such crimes. As a result international criminal law has evolved as a means to protect the peremptory norm of general international law regardless of a conduct being declared crime under domestic legal system of any state.

3.3. *Obligatio Erga Omnes*

Erga omnes is a Latin phrase which means 'towards all' or 'towards everyone'. It is a concept of higher legal order within international legal system that classifies certain obligations as of fundamental importance to the international community as a whole. 'The *erga omnes* obligations may be defined as obligations of state and non-state actors towards the international community as a whole, in the enforcement of which all states have legal interest' (Kalidhass 2014: 220). In the *Barcelona Traction case*, the International Court of Justice recognises the concept and observed that:

> [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State...By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of *acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination* (emphasis added; *Barcelona Traction case* 1970: 32).

The *erga omnes* obligations with regard to international criminal law include prohibition against genocide, maritime piracy, slavery and slave trade, crimes against humanity, torture, and so on. It is often said that all *jus cogens* norms are *erga omnes* obligation but not vice-versa. *Jus cogens* refers to the legal status that certain international crimes reach and *obligatio erga omnes* pertains to the legal implications arising out of certain crime's characterization as *jus cogens* (Bassiouni 1996: 63). When a state fails to comply with any such obligations, it authorises every other state to compel the

former to carry out its obligations. 'It is the underlying force for certain principles under international criminal law, like universal jurisdiction, extradite or prosecute, and responsibility to protect' (Kalidhass 2014: 221).

Therefore, most of the structural basis for international criminal law has evolved to ensure that individuals, states or non-state actors do not violate the *erga omnes* obligations; and in case of violation no impunity shall be allowed for the perpetrators. The primary object of the international criminal law is to declare the culpability of such conducts irrespective of the same being crime or not under domestic legal systems. Consequently, the authority to prosecute and punish may be exercised either by domestic courts or by international tribunals through ordinary or universal jurisdictions.

4. PRINCIPLES OF LEGITIMACY

As observed by Thomas M. Franck 'Legitimacy is…[a] quality of a rule *which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process*' (emphasis original; Franck 1988: 706). To apply the test to a legal system, whether domestic or international, it must enjoy the perception of those to whom it is applied that the system functions in a right manner. Predominantly, legitimacy is a procedural requirement. For a law to be legitimate it has to be adopted in a right process; whereas, for a legal system to be legitimate it must function on a set of proper procedural principles. On that account, general principles like *nullum crimen sine lege* (principle of legality), *double jeopardy*, rule against self-incrimination, and principle of culpability provide justification for the functioning of international criminal law system.[34] A brief analysis of some of these principles could be discussed as under.

[34] Article 20 of the Indian Constitution recognises some of these principles for the application of criminal laws in India and it provides that: (1). No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence (i.e. principle of legality); (2). No person shall be prosecuted and punished for the same offence more than once (i.e. principle of *double jeopardy*); and (3). No person accused of any offence shall be compelled to be a witness against himself (i.e. rule against self-incrimination).

4.1. Principle of Legality

To incur criminal responsibility the conduct must have been prohibited and carry criminal sanction at the time of its occurrence. This is popularly known as the principle of legality or *nullum crimen sine lege* and *nulla poena sine lege*. It is an essential principle of every national legal system and it is treated as part of customary international law. The principle of legality was implicit in trials at Nuremberg tribunal and Tokyo tribunal; however, it is made explicit in the Rome Statute of the International Criminal Court. For instance, Part 3 of the ICC statute discusses the general principles of ICL and more specifically, Article 22 declares that '[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court'.[35] In short, the principle prohibits the retrospective application of criminal law or its liberal construction to bring any innocent conduct within the purview of criminal responsibility. Thus, the principle provides legitimacy to the system of international criminal law.

However, if a conduct is not a crime under domestic laws that will not necessarily prohibit someone from being tried under international law, if it is a crime under international law. This is similar to the principle under Article 27 of the VCLT where it is provided that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. For example, the acts of Nazi regime like, genocide, war crimes and crimes against humanity during WW II might not have been punishable under German criminal laws but they were punished under international law. A similar approach could be found mentioned under the Statutes of the ICTY and ICTR. Though ICL principles seem to be an intervention for state sovereignty, its primary motto is to protect humanity and to punish the authors of

[35] Further, Article 22 of the Rome Statute of the ICC provides that: (1). The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted; and (2). This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute. Similarly, Article 23 of the Statute that deals with the principle of *nulla poena sine lege* provides that: '[a] person convicted by the Court may be punished only in accordance with this Statute'. Further, Article 15 of the ICCPR also contains a similar provision that '[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby'.

heinous crimes.[36] As rightly observed by the Nuremberg tribunal *nullum crimen sine lege* is not a limitation on sovereignty, rather a principle of justice (*France and others v. Hermann Wilhelm Goering and others* 1946: para. 219).[37]

While applying customary principles under criminal jurisdictions it is essential to determine the exact content of the legal norm violated at the time of crime. A criminal conviction should never be based on a norm that an accused could not reasonably be aware of at the time of the act. The norm must have sufficiently made it clear that what acts or omissions could engage a person's criminal responsibility. For instance, in *Mitar Vasiljevic case* before the ICTY, the accused was charged for 'violence to life and person' under Article 3 of the Statute. Violence to life and person is also one of the prohibited acts under Common Article 3 of the Geneva Conventions. Further, the Appeals Chamber in *Tadic case* declared that 'customary international law imposes criminal liability for all serious violations of common Article 3' (*Tadic case* 1995: para.134). Despite such observations the Trial Chamber refused to convict the accused on the ground of imprecise nature of the norm declaring the conduct as crime and it observed as follows:

> From the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time (*The Prosecutor v. Mitar Vasiljevic* 2002: para 193).[38]

Similarly, in *S.W. v. United Kingdom case*, the European Court of Human Rights (ECHR) held that the principle of legality should be construed and applied in such a way as to provide effective safeguards against arbitrary prosecution, conviction and

[36] Even the sovereignty of state concept itself evolved to protect the humanity as a whole. For instance, the principle of Laissez-faire or the theory of Welfare state came for the purpose to protect the people from the enemy state. But at present the vision of welfare state concept expanded from mere protection of population from enemy state into the protection of other fundamental rights. Therefore, the principle of Welfare state is an extent of international criminal law principles to protect and preserve the rights and responsibility of the individuals and states.

[37] *France and Others v. Hermann Wilhelm Goering and Others* (1946), 13 ILR 203, 1 October 1946.

[38] *The Prosecutor v. Mitar Vasiljevic*, Trial Judgment, (2002), IT-98-32-T, Judgment on 29 November 2002.

punishment. A criminal law cannot be construed by analogy, but must be legally defined.[39] In cases like *Furundzija*, *Kunarac*, *Delalic*, and *Vasilijevic* the tribunals concluded that an act is criminal under customary international law if vast number of domestic jurisdictions has criminalized the conduct or any treaty provision provides for its criminal punishment. However, while assessing those factors the courts must take into account the specificity of international law, in particular that of customary international law (*Mitar Vasilijevic* IT-98-32-T/2002: 196-199; *Anto Furundzija* IT-95-17/1-T/1998: 177-186; *Dragoljub Kunarac* IT-96-23-1T/2001: 438-460; and *Zejnil Delalic et al*. IT-96-21-A/2001: 163-167). Yet, there is no uniformity among states and they differ in their approach to custom as a source of national criminal law, some states do not accept unwritten criminal law, including custom, but others do (Cryer et al. 2010: 74).

The principle of legality is the combination of three principles such as analogy, specificity and non-retroactivity. The principle of specificity requires that the definition of the proscribed act be sufficiently precise; principle of analogy requires the definition to be strictly construed; and the principle of non-retroactive requires that the proscribing law must have existed before the occurrence of the alleged offence. The principle seeks to protect the rights of individuals from the arbitrary exercise of authority by states. In modern European criminal law, the principle of *nulla poena sine lege* has been found to consist of four separate requirements especially reflected in the Constitution Court of Germany (Boot 2002: 94). There are some principles of ICL is also in penetrate with the principle of legality which include the *nullum crimen sine lege praevia* (principle of non-retroactivity),[40] *nullum crimen sine lege stricta* (the principle of interdiction of analogy),[41] *nullum crimen sine lege certa* (the principle of certainty)[42] and *nulla poena sine lege scripta* (no penalty

[39] *S.W. v. United Kingdom*, App. No.20166/92 – ECHR A/355-B./1995: 34-42.

[40] *Nulla poena sine praevia lege poenali:* There is to be no penalty without previous law. This prohibits ex post facto laws, and the retroactive application of criminal law. It is a basic term in continental European legal thinking. It was written by Paul Johann Anslem Ritter vonFeuerbach as part of the Bavarian Criminal Code in 1813 (Boot 2002: 94).

[41] *Nulla poena sine lege stricta:* There is to be no penalty without strict law. This prohibits the application by analogy of statutory provisions in criminal law.

[42] *Nulla poena sine lege certa:* There is to be no penalty without definite law. This provides that a penal Statute must define the punishable conduct and the penalty with sufficient definiteness to allow citizens to foresee when a specific action would be punishable, and to conduct themselves accordingly. The rule expresses the general principle of legal certainty in matters of criminal law. It is recognised in

without a law)[43] (KreB 2010: 6-8). Nonetheless, the non-retroactivity principle is not applicable to rules that are favourable to the accused.

4.2. *Double Jeopardy*

The principle of *ne bis in idem* or *double jeopardy* is a legal doctrine that signifies that 'no one shall be tried twice for the same offence'. It is a procedural defence that forbids an accused from being tried more than once for the same offence after a legitimate acquittal or conviction. The word legitimate is important to ensure that the proceedings shall not be sham to shield the authors of serious crimes. The principle of *ne bis in idem* is as old as the common law itself (Hunter 2007: 3-4). Actual origin of the principle could be traced back to Roman law and even in ancient biblical law as well. Later, it became part of English common law and consequently incorporated by most of the common law countries (Pillai 1988: 1-2). For example, fifth amendment of the US constitution, Section 26(2) of the New Zealand Bill of Rights, Section 35(3)(m) of the South African Constitution, Section 11(h) of the Canadian Charter of Rights and Freedoms and Article 20(2) of the Constitution of India have incorporated the principle of *ne bis in idem*. This principle incorporated at least fifty constitutions across the globe (Bassiouni 1993: 247, 289).

Gradually, the principle found its place in international law in the post-cold-war period. For instance, Article 10 of the ICTY (1993),[44] Article 9 of the ICTR (1994),[45]

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many national jurisdictions, for instance, the European Court of Justice have recognized it as a 'general principle of [European] Union law' (Klip 2011: 69).

[43] *Nulla poena sine lege scripta:* There is to be no penalty without written law. That is, criminal prohibitions must be set out in written legal instruments of general application, normally statutes, adopted in the form required by constitutional law. This excludes customary law as a basis of criminal punishment.

[44] Article 10 of the ICTY Statute talks about '*non bis in idem*'. It consists of three clauses: (1). No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the international tribunal; (2). A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the international tribunal only if: (a). the act for which he or she was tried was characterized as an ordinary crime, or (b). the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted; and (3). In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the international tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

[45] Article 9 of the ICTR Statute discuss the issue of '*non bis in idem'*. It consists of three clauses: (1). No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the

Article 9 of the Special Court for Sierra Leone (2000)[46] and Article 20 of the ICC (1998) recognise the principle of *ne bis in idem* for every trial before them.[47] Article 10 of the ICTY Statute and Article 9 of the ICTR Statute provide that no national court may try a person for acts already tried before the international tribunal. However, Rule 12 of the ICTY Rules of Procedure and Evidence implies that the tribunal are not bound by the final judgments of different national jurisdictions, since, determinations or characterisation of offence by national courts are not binding on the tribunal. The Trial Chamber of the ICTY in *Tadic case* rejected the defence that the domestic courts in Germany have seized the matter for trail and any further proceedings before ICTY would be in violation of the principle of *ne bis in idem.* The Trial Chamber reasoned that the offender had not been subject to a decision in Germany on merits of the indictment and thus, there was no violation of the concept of *ne bis in idem*/double jeopardy (*Dusko Tadic case*, IT-94-1-T/1995). Similar

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International Tribunal for Rwanda; (2). A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if: (a). the act for which he or she was tried was characterised as an ordinary crime, or (b). the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted; and (3). In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

[46] Article 9 of the Statute of the Special Court for Sierra Leone also discuss about the issue of *non bis in idem.* It consists of three clauses: (1). No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court; (2). A person who has been tried by a national court for the acts referred to in Articles 2 to 4 of the present Statute may be subsequently tried by the Special Court if: (a). the act for which he or she was tried was characterized as an ordinary crime, or (b). the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted; and (3). In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Special Court shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

[47] Similarly, Article 20 of the Statute of the International Criminal Court talks about *ne bis in idem*. It consists of three clauses as similar as to that of the ICTY Statute, ICTR Statute and Statute of the Sierra Leone but it has little changes in it: (1). Except as provided in this Statute, no person shall be tried before the court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the court; (2). No person shall be tried by another court for a crime referred to in Article 5 for which that person has already been convicted or acquitted by the court; and (3). No person who has been tried by another court for conduct also proscribed under Article 6, 7 or 8 shall be tried by the court with respect to the same conduct unless the proceedings in the other court: (a). were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court, or (b). otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

reflections could also be found in ECHR cases like *Sergey Zolotukhin v. Russia*, *Tsonto Tsonev v. Bulgaria*, etc.

The situation under the Rome Statute of the ICC is slightly different that the principle of *ne bis in idem* under Article 20 must be read with the principle of complementarity under article 17 that precludes ICC from hearing a case if it is being investigated and prosecuted by an able state. In *Bemba case*, it was argued that the domestic investigation by the Central African Republic authorities into indistinguishable charges as before the ICC and consequent judgment of dismissal order was a decision on the basis of merits. But the trial chamber concluded that the decision of local authorities was not a decision on merits of legal charges against him (*The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08/2010: 79-100).

Under Article 20, ICC may try an individual for conduct that was the subject of a national proceeding on two grounds, namely (i) if the proceedings were sham to shield the person from criminal responsibility; or (ii) if the proceedings were not conducted in an independent and impartial manner ignoring the due process recognised by international law. Further, Article 20 does not prevent the ICC from exercising criminal jurisdiction over the conduct of persons who have been granted amnesty via tribunals of amnesty and truth commissions or for abandoned investigation by the Prosecutor under Article 53 of the Statute (Arsanjani 1999: 73).

Scholars like Triffterer, Tallgren, and Lopez argue that the principles of *ne bis in* operates only within a single legal system; recharging of an accused for same or other offence, new trials, framing of indictment, sentencing of accused on multiple convictions, revision, appeals, etc. are possible between different courts and different countries (Lopez 2000: 1263-1272; Tallgren 1999: 419-421). Serious international crimes like genocide cannot be genuinely prosecuted by the national courts. Numerous obstacles been witnessed for securing justice for serious international crimes at the domestic courts of East Timor and Cambodia. Hence, states shall not deny the jurisdiction of international courts and tribunals on account of sovereignty. The ICTY judge Antonio Cassese in *Tadic case* stated that, ‘it would be a travesty of law and betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights’ (cited in Paust 2000: 14-15).

4.3. Principle of Culpability

The principle of culpability is a measure of the degree to which a person can be held morally or legally responsible for action or inaction. The principle is found in Anglo-American legal system and it requires more than a *mens rea*, knowledge or intent and it requires that the measures of punishment must be based on court's conviction that the defendant is personally reproachable for the crime he or she has committed (Jescheck 2004: 44-45). A person is culpable only if there was a negative event and if the act was intentional, if the act and its consequences could have been controlled and if the person provided no excuse or justification for the actions (Sheppard et al. 1992: 59).[48] From a legal perspective, the term culpability describes the degree of one's blameworthiness in the commission of an offence. Except for strict liability crimes, severity of punishment often follows the degree of culpability.

Culpability requires direct involvement in the wrongdoing such as the instruction or participation as compared with responsibility that merely arise from 'failure to supervise or to maintain adequate controls or ethical culture' (Amone 2014: 297). Nevertheless, the concept of command responsibility under international criminal law is evolved out of the principle of culpability. *In Bemba case,* the accused was a person effectively acting as a military commander with an effective control and authority over the forces that committed the crimes. The defendant argued that he was not directly taking part in any act or commission of crimes; the court rejected the argument and held that despite having 'effective authority and control' or 'effective command and control' he failed to control his subordinates (*The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08/2016). The court found him guilty on two counts, namely crimes against humanity (includes murder and rape) and war crimes (including murder, rape and pillaging); he was sentenced for 18 years of imprisonment.

Culpability ensures that no one can escape from the criminal responsibility for serious crimes irrespective of their position. Subordinates cannot escape responsibility with the argument of obeying superior command. Similarly, superiors or commanders cannot escape their responsibility with the argument of no direct participation in the commission of crimes. Under Article 25 of the Rome Statute of the ICJ individual

[48] That is, the agent knew the likely consequences, the agent was not coerced and the agent overcome hurdle to make the event happen.

criminal responsibility might arise when a person commits a crime individually or jointly with another or through another; orders solicits or induces the commission of a crime; facilitates, aides, abets or assists the commission of a crime; contributes in any way for the commission of the crime; or attempts to commit the crime. Under Article 28 of the Statute command or superior responsibility might arise when the person knew or ought to know owing to the circumstances that his subordinates are committing or about to commit such crimes; the crimes concerned activities are within the effective responsibility and control of the superior; and the superior failed to take all necessary and reasonable measures to prevent. However, a person may avoid criminal responsibility only on the grounds mentioned under Article 33 of the Rome Statute of the ICC.[49]

Culpability might arise for both commission as well as omission of a crime. For example, in the Nazi concentration camps (Buchenwald) commandant Karl-Otto Koch's wife Ilse Koch, abused the prisoners as sadistic as possible to be popularly known as 'the concentration camp murderess' (Przyrembel 2001: 369-399) or 'the beast of Buchenwald' (Alban 2005). She was the first Nazi woman, to be held responsible by the US military court for crimes against Austrian and German prisoners of the Nazis (*Lewiston Evening Journal* 1951: 6). In *Eichmann case*, the accused was held responsible for Nazi Holocaust despite his claim that just followed the orders of his leader. He was convicted on the ground that he had an effective command and control but failed to take a necessary action. However, there is no culpability or criminal responsibility for the omission of the UNSC in Rwandan genocide that claimed the lives of over eight million people (Lippman 1982: 1-34). This was shame on global community.

Around fifty years after the Nuremberg trials, the ICTY was established to prosecute the persons responsible for serious violations of humanitarian law committed in the territory of the former Yugoslavia in 1991. In *prosecutor v. Delalic et al.*, popularly known as the *Celebici case*, the commanders of the armed forces were held criminally responsible for crimes committed by subordinates (*Celebici case*

[49] Article 33 of the Rome Statute provides that 'a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful'.

IT-96-21-T/1998).[50] Other tribunals such as, Special Tribunal for Sierra Leone, Cambodia tribunals, ICC and so on have also followed the principle of culpability to prosecute and punish the authors of serious crimes. For example, Jean-Paul Akayesu,[51] Thomas Lubanga,[52] Germain Katanga,[53] so on and so-forth.

Kunarac et al. case was an important ICTY trial that dealt with charges of sexual violence under international criminal law. The three accused – Dragoljub Kunarac, Zoran Vukovic and Radomir Kovac – are Bosnian Serb Army officers who played a predominant role in organizing and holding the system of notorious rape camps in the eastern Bosnian town of Foca. With this judgement the court widened the ambit of ICL that enslavement as a crime against humanity which include sexual enslavement and held gender offense as violation of customary law. Now-a-days, the principle of

[50] *The Prosecutor v. Zejnil Delalic, Zdravko Mucic (aka 'PAVO'), Hazim Delic and Esad Landzo (aka 'ZENGA')*, which is popularly known as *Elebici case* (IT-96-21-A/2001). The criminal trial against three Bosnian armed forces set a milepost in international criminal justice by recognizing rape as a form of torture which is an absolute form of a grave breach of the Geneva Conventions and it violates the laws and customs of war. They were charged with sexual violence against Bosnian Serb civilians kept in a prison camp in Celebici in central BH. The Trial Chamber considered Esad Landzo's superior responsibility for number of sexual violence charges. Similarly, Zdravko Mucic, the camp commander, was found guilty of sexual violence and other crimes committed by his subordinates. A legal precedent was set in the adjudication of the rape charges committed by the deputy camp commander, Hazim Delic. During interrogations, Delic raped two women detained in the camp. The judges ruled that the purpose of the rape was to obtain information, punish the women for their inability to provide information and to intimidate and coerce them. The Trial Chamber also found that the violence suffered by the two women had discriminatory purpose and it was inflicted on them because they were women. When passing this judgment in 1998, the Trial Chamber considered 'the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity'. The judges held that acts of rape may constitute torture under customary international law. The Appeals Chamber of the ICTY upheld the findings of the Trial Chamber and sentenced Hazim Delic to 18 years, Esad Landzo to 15 years and Zdravko Mucic to 9 years of imprisonment. But a fourth accused Zejnil Delalic was acquitted on all counts due to lack of evidence.

[51] The Judgment of ICTR against Akayesu established that the term 'rape as a crime against humanity'. He stood trial for 15 counts majorly of genocide, war crimes and crimes against humanity including rape during the Rwandan Genocide and violations of the Geneva Convention. It was also the first conviction of an individual for rape as a crime against humanity. This was the first conviction ever for genocide and it was the first time that an international tribunal ruled that rape and other forms of sexual violence could constitute genocide. Akayesu's appeal against the life sentence imposed upon him were rejected. (*The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A/2001).

[52] Rebels under his effective command have been accused of massive human atrocities, including murder, torture, ethnic massacres, rape, mutilation and forceful usage of child soldier in the Ituri conflict 1999 to 2007. He was not excused from the criminal responsibility and based on culpability he was sentenced to 14 years of imprisonment by the Trial Chamber 1 of the ICC. The Appeals Chamber brought a plan for symbolic collective reparations and approved on 21st October 2016 (*The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06/2016).

[53] He is punished for one count of crime against humanity and 4 counts of war crimes committed on 24th February 2003 at Bogoro village (Democratic Republic of Cong). Later, he was prosecuted and punished by the ICC and sentenced him for 12 years imprisonment; and possible reparations were also granted to the victims. At present, he is under the custody of the ICC (*The Prosecutor v. Germain Katanga*, ICC-01-04-01/07/2015).

culpability also extended to TOCs as well for example, the principle applicable against corruption issue which also extended to other TOCs as well.

Professor Kremnitzer and Hornle argues that, 'the culpability concept is also significant at the sentencing stage of the trial. It requires that the severity of the punishment reflect what the offender deserves from a retributive perspective and that it match the degree of culpability of the offender' (Kremnitzer and Hornle 2011: 131). If an accused person chose to commit a capital crime he is not being abused for deterrent purposes through punishment but is made responsible for his own choice (Kant et al. 1797; referred in Kremnitzer and Hornle 2011: 141).

In short, the structural principles of international criminal law—i.e. principle of solidarity, principle of sovereignty and principle of universality—provides a threshold to determine a conduct as serious crimes under international law. Nevertheless, competing claims between domestic courts and international tribunals to exercise authority over such crimes depend on the jurisdictional principle of international criminal law. Some of those jurisdictional principles are elaborately discussed under Chapter IV of this study.

CHAPTER IV

JURISDICTION UNDER INTERNATIONAL CRIMINAL LAW

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Jurisdiction means the authority of an entity to exercise command and control over the legal relationship of person and property within its dominion. Predominantly, '[it] is a manifestation of state sovereignty…[and it is] the capacity of a state under international law to *prescribe* or to *enforce* a rule of law' (emphasis added; Bowett 1982: 1). Shaw is also of opinion that '[j]urisdiction is a vital and indeed central feature of state sovereignty, for it is an exercise of authority which may alter or create or terminate legal relationship and obligations. It may be achieved by means of legislative, executive or judicial action' (Shaw 2008: 645). Being a manifestation of state sovereignty, how and who will exercise jurisdiction over international crimes is an interesting question to be analysed for.

Criminal law and forum have always been closely associated with state sovereignty and primarily emerged out of the concepts like *oikonomos* of Greek and *paterfamilias* of Rome—that gave unlimited and exclusive authority to the male family-head to discipline the members of the household. This family system had evolved into state system whereby the exclusive power to punish and discipline had been succeeded by the heads of sovereign states. On that account, no state is willing to compromise or being counselled by any external sources in the administration of criminal justice within its territory. However, over a period of time certain crimes, like piracy, slavery, genocide, war crimes, crimes against humanity, torture, and terrorism, have emerged as serious crimes over which the international community as a whole having concern. The present study seeks to address the jurisdictional issues on such serious crimes and not about the regular domestic crimes like theft, robbery, murder or rape, even if they transcend the territorial boundaries of a state.

Declaring certain crimes as international in character is not to confer a special status on such crimes or its perpetrators; rather to put an end to the impunity for commission of such crimes on account of social, political or economic reasons. The impunity could be avoided either by existing domestic courts or by establishing of international tribunals. With regard to the latter it is direct enforcement of international criminal law through prosecution and punishment; whereas for domestic courts it is a two phase process. At first phase, international criminal law should be incorporated into domestic legal system, known as prescriptive jurisdiction of states;

and at second phase, the courts should exercise jurisdiction to enforce the incorporated criminal law, known as enforcement jurisdiction of states. Necessary distinction needs to be made between prescriptive jurisdiction and enforcement jurisdiction of states. 'The former embraces those acts by a state, usually in legislative form, whereby the state asserts the right to characterize conduct as delictual…The later embraces acts designed to enforce the prescriptive jurisdiction…by way of judicial action through courts' (Bowett 1982: 1).

This chapter is divided into three parts: first part evaluates the existing jurisdictional principles—like active personality, passive personality, territoriality, universality and protective principles—conferring authority on domestic courts to enforce international criminal law. Second part analyses the jurisdictional basis for international courts and tribunal to enforce criminal law preventing serious crimes, like the complementary principle, communitarian principle and the principle of surrender. Part three addresses the prescriptive jurisdiction of states over international criminal law with special reference to Indian state practice.

1. ENFORCEMENT JURISDICTION OF DOMESTIC COURTS

In ancient time it was only 'common law for common enemies' and there was no specific law for different serious international crimes; they were prosecuted and punished under the common umbrella of domestic criminal legal system. For instance, the Lieber code or the Hague Conventions were applicable to all sort of international crimes equally without any difference as to its nature. Separate conventions for specific crimes were only of later developments, like Genocide Convention, 1948 to prevent and punish the crime of genocide, Torture Convention, 1984 to prevent the crime of torture and so on. Though the conventions dealt with serious crimes under international law, jurisdiction for prosecution is still conferred on the domestic courts of member states. The question of establishing international criminal tribunals occurs only when domestic courts are unable or unwilling to prosecute the perpetrator of serious crimes under international law.

Domestic courts seek to exercise jurisdiction over serious crimes under international law through some legal nexus, like territoriality (the place of occurrence), active personality (nationality of the perpetrator), passive personality (nationality of the victims), protective principle (right of a state to protect the national interests), or universal jurisdiction (authority of domestic courts without any direct

nexus). The first three are considered standard jurisdictional principles under international law and the last two are only of recent developments. Some of these jurisdictional principles could briefly be analysed as under.

1.1. Standard Jurisdictional Principles

Principle of Territoriality

Every crime—from international to local and serious to petty cases—had been adjudicated predominantly through domestic courts having territorial nexus. Adjudication through other nexus, like nationality of the accused, nationality of the victims, universal jurisdiction or establishing international tribunals is only of recent developments. As early as 1889, the Treaty of International Penal Law acknowledged that, 'crimes are tried by the courts and punished by the laws of the nation on whose territory they are perpetrated, whatever may be the nationality of the actor, or the injured' (AJIL 1935: 638). The Permanent Court of International Justice (PCIJ) while deciding the *S.S. Lotus case* held that 'jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention' (*S.S. Lotus case* 1927: 18-19). In *HM Advocate v. Hall* (1881), Lord Young stated the general rule that criminal law is strictly territorial so that a man is subject only to the criminal law of the country where he is, and that his conduct there, whether by acting, speaking, or writing, shall be judged of as criminal by that law and no other (Arnell 2001: 955).[1]

The principle of territoriality determines jurisdiction over a crime based on the place of occurrence. Every state is sovereign independent and all sovereign states prohibits intervention either by foreign courts or by international institutions. India has witnessed numerous terrorist attacks within its territory against which only the domestic courts should have primary jurisdictional authority. For instance, the prosecution of Afzal Guru in parliament attack case or the prosecution of Ajmal Kasab for 26/11 attack has been tried by the domestic courts in India based on the territorial nexus; despite the fact that the subject matter of terrorism falls under

[1] The criminal law is strictly domestic and not outside. Scottish Philosopher David Hume writes that 'a person domiciliated here, whether a Scotsman or a foreigner, for any crime he may have committed abroad, is not liable to be tried before our courts. They are not instituted to administer justice over the world but in our country, or a particular district of it only; and, therefore, if the crime charged has been committed beyond those limits, they are neither called upon not entitled to step forward for its correction'.

international law as a serious crime and perpetrators having Pakistani connection.[2] Even in the *Enrica Lexie case* (i.e. *Italian marines case*), India claimed jurisdiction based on the principle of territoriality on the ground that the cause of action occurred within the contiguous zone of India.[3] In this case, Italian marine officials killed two Indian fishermen from Kerala at the contiguous zone of India.

Even the jurisdictional authority of International Criminal Court (ICC) is derived from *ratione loci* i.e. the principle of territoriality. The member states waive their jurisdictional authority towards the court.[4] The territorial jurisdiction of the ICC not only applies to state parties but also extended to non-party states if they surrender their territorial sovereignty towards ICC.[5] Only the principle of territoriality well sync with the concept of territoriality. '[A] primary objection to the passive personality principle, as well as to other types of extraterritorial jurisdiction, is that it infringes upon the sovereignty of the country with territoriality jurisdiction' (McCarthy 1989: 322-323). Similarly, Blakesley asserts that the concept of territoriality is the jurisdiction in the highest priority. While the country with territorial jurisdiction has a great interest in asserting jurisdiction in order to ensure peace in its territory, the state whose citizens are targeted as victims has a greater interest because more likely than not the perpetrators of the terrorist act are more concerned with the persons they target than where the act happens (Blacksley, 1987: 909).

The Gacaca court is another example for the principle of territoriality. It is a system of community justice inspired by Rwandan tradition where the Gacaca can be translated as the 'justice amongst the grasses'. These courts prosecute and punish the crimes irrespective of its serious nature or international character. For instance, ICTR was established by the UNSC Res. 955/1994 to prosecute and punish Rwandan

[2] *State v. Mohd. Afzal Guru and Others* (2003), 107 DLT 385. *Mohd. Ajmal Amir Kasab v. State of Maharashtra* (2012), 9 SCC 1. This case is popularly known as *Ajmal Kasab case*, the Bombay Metropolitan Magistrate court dealt the issue against the Pakistani terrorist.

[3] *Republic of Italy v. Union of India* (2012), Writ Petition No. 135 of 2012.

[4] Article 12(2)(a) of the Rome Statute provides that 'the Court may exercise its jurisdiction if one or more of the following States are parties to this Statute or have accepted the jurisdiction of the Court [i.e.]…The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft'.

[5] Article 5 of the Rome Statute speaks about the Crimes within the Jurisdiction of the Court. It express that 'the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression'.

genocide, but it could prosecute and punish just 93 perpetrators. The tribunal was closed officially on 31st December 2015. Most of the remaining perpetrators were brought back justice only through the Gacaca courts.[6] Judgements of Gacaca courts are based on the principle of morality and encourage civil reparation rather than physical punishment (Ingelaere 2008: 40-41).

However, the territoriality of criminal law is not an absolute principle of international law. Over a period of time, domestic courts gradually asserted extraterritorial jurisdiction under international law based on the principles of active personality and passive personality.

Active Personality

Sovereign states have jurisdiction over their citizens for crimes committed by them which are specified in their domestic criminal law. It is a sovereign right of states to claim jurisdiction over illegal conduct of its nationals either committed within the state or abroad. The principle was prevalent in civil law countries but later recognized by common law countries as well. However, problems might arise when a person hold dual nationality or having citizenship of two states simultaneously. Many of the Lebanese living in West Africa have dual nationality. In such cases who will get jurisdiction based on active personality? And how to resolve jurisdictional conflicts between states? The ICJ have answered the questions in *Nottebohm case*[7] that the jurisdiction goes to the country where the person has genuine link and effective nationality. The case was decided in the context of private international law to decide property issues and how far it could be used in international criminal law is yet to be analysed.

In *Pinochet case* though UK arrested Pinochet while he was in London for medical treatment based on the principle of universal jurisdiction, he was prosecuted

[6] Though the affected victims of Rwandan genocide got monetary benefit from the authors of Rwandan genocide but they did not get proper punishment for their serious crimes of rape, torture, and other crimes against humanity in Rwanda. Some of the sovereign states all around the world severely criticized that the Gacaca courts merely conducted the proceedings for the sake of global community and not for justice to the victims of Rwandan genocide.

[7] *Liechtenstein v. Guatemala* (known as *Nottebohm case*) (1955), First Phase ICJ 1, and Second Phase ICJ Rep. 4, Judgment of 6th April 1955, [Online: web] Accessed 11 December 2016, URL: *http://www.worldlii.org/int/cases/ICJ/1955/1.html*.

only by the domestic court based on his nationality.[8] Spanish court issued an international arrest warrant against Pinochet based on passive personality, since victims include Spaniards along with Chileans. Spain requested UK for extradition but it was opposed by Chile.[9] On the other side, Pinochet's attorney Pablo Rodriguez Grezargued argued that he was entitled to immunity from prosecution as a former head of state. Finally, he was sent back to home i.e. Chile for prosecution based on active personality and territoriality.[10] Active personality often compared with extraterritorial authority of domestic courts. In Indian context, active nationality principle is recognised both under Indian Penal Code, 1860 as well as under Criminal Procedure Code, 1973.[11] Therefore, any criminal activities committed by citizens of the state, either within or abroad, the state of the offender will get jurisdiction based on the principle of active personality irrespective of any territorial sovereignty.

[8] It was the first time that several European judges applied the principle of universal jurisdiction and declaring themselves competent to judge crimes committed by former heads of state.

[9] Even the former UK PM Margret Thatcher and former US President George H.W. Bush requested to grant immunity to the former Chilean President and they called upon the British government to release Pinochet (These facts are available in CNN News on 12th April 1999 and BBC News on 6th October 1999 respectively).

[10] This release was occurred because after Pinochet's medical tests, the home secretary of UK Jack Straw rules in January 2000; stated that he should not be extradited. This incident triggered the human rights (NGOs including Amnesty International) activists at Belgium; therefore, the Belgian government depose a complaint against Straw's decision before the ICJ along with other six human rights groups. There were some countries like: Belgium, Switzerland, and France were deposed extradition requests in the wake of Spain's demand. Due to heavy protest by legal as well as medical experts against Straw finally ruled in March 2000, 'to set-free Pinochet and authorize his free return to Chile' (BBC News: 2nd March 2000).

[11] Section 3 of the IPC 1860 states that 'any person liable, by any [Indian law] to be tried for an offence committed beyond [India] shall be dealt with according to the provisions of this Code for any act committed beyond [India] in the same manner as if such act had been committed within [India]'. Similarly, Section 4 of the IPC 1860 explains that '[t]he provisions of this Code apply also to any offence committed by (1) any citizen of India in any place without and beyond India; (2) any person on any ship or aircraft registered in India wherever it may be'. Explanation – In this section the word 'offence' includes every act committed outside India which, if committed in India, would be punishable under this Code.

Illustration: 'A', who is a citizen of India, commits a murder in Uganda. He can be tried and convicted of murder in any place in [India] in which he may be found. Section 12 of CRPC deals with a situation that 'when an offence is committed outside India – (a) by a citizen of India, whether on the high seas or elsewhere; or (b) by a person, not being such citizen, on any ship or aircraft registered in India, he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found: Provided that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government'.

Passive Personality

Passive personality allows a state to exercise jurisdiction over an act committed by an individual outside its territory but the victims are the nationals of that state. In *Yunis case*, the passive nationality principle recognized that each country has a legitimate interest in protecting the safety of its citizens when they journey outside national territories (*United States v. Yunis* 1988). Similarly, Lord Finlay in his dissenting opinion in the *S.S. Lotus case* observed that:

> The passing of such laws to affect aliens is defended on the ground that they are necessary for the 'protection' of the national. Every country has the right and the duty to protect its nationals when out of their own country. If crimes are committed against them when abroad, it may insist on the offender being brought to justice (*S.S. Lotus case* 1927: 55).

The principle is not a new concept and existed as early as 1886, when there was a jurisdictional conflict between Mexico and United States in the *Cutting's case*.[12] Many countries have countries implemented the principle of passive personality in their penal codes.[13] Though the passive personality principle became controversial in practice but the international community largely recognized and increasingly accepted over the last two decades. In 1972, Israel amended its criminal law and codified the principle of passive personality; similarly in 1987, France amended its penal code by adding the passive nationality principle to prosecute and punish the alien offenders. In 2012, a writ petition was filed before the supreme court of India to resolve the question regarding whether the high court of Kerala has jurisdiction to try the Italian

[12] Mr. Cutting, a US national, published an article in a Texas Newspaper criticizing a Mexican citizen with whom Mr. Cutting had a disagreement. Mexican officials arrested Mr. Cutting when he was in Mexico and charged him with criminal libel. Mexico's assertion of passive personality jurisdiction caused great friction between Mexico and the United States. But the United States protested Mexico's assertion of the above said jurisdiction over the crime. Finally, the conflict concluded, nevertheless, without a decision on the validity of the passive nationality principle because each country dropped the issue after Mr. Cutting was released for diplomatic reasons (Moore 1906: 228-229).

[13] Article 3 of the Japanese Penal Code 1907 (i.e. Keiho Penal Code, Law No. 45 of 1907), Article 5 of the Peruvian Penal Code 1924 (i.e. Codigo Penal Code 1924) and Article 6 of the Turkish Penal Code 1926 (i.e. Ceza Hukuku Code 1926) discusses about the concept of passive personality. Article 6 of the Turkish Criminal Code stated that, *any foreigner who commits an offence abroad to the prejudice of a Turkish subject shall be punished in accordance with the Turkish Penal Code* (Translated by Hudson in World Court Reports 1934: 31-32). Similarly, Article 7 of the Uruguay Penal Code stated that its courts have jurisdiction over, 'offenses committed in foreign territory by an alien, to the injury of a citizen' (Uruguay Penal Code translated in the Harvard Research Project 1906: 578).

Marines or not? The Apex court recognized the principle of passive personality and held that the high court has jurisdiction to try two Italian marines.

There is always a conflict between active personality (nationality of the offender) and passive personality (nationality of the victims) over jurisdictional claims. While exercising active personality, the victim state blames the state of accused that it tries to shield the offenders. Similarly, while exercising passive personality, the state of the offender blames the victim state for over exaggeration of common crime into serious crime.[14] For instance, in the *Yunis case*, the US court claimed jurisdiction over Lebanese national, based on passive personality, who had hijacked Jordanian flight and two victims are nationals of the United States.[15] Victim states try to claim jurisdiction not only to punish the perpetrators but also to award compensation to the victims. For instance, rights of victims have been strengthened by the European Union with the council Framework Decision on the Standing of Victims in Criminal Proceedings (15th March 2001).

However, difficulty might arise when victims are from multiple states or having dual nationality. In *Yunis case*, the US claimed jurisdiction based on passive personality on the ground that two of the victims are its nationals; if every other state claims jurisdiction over the same person for same cause of action it would be contravene the principle of *double jeopardy*. Hence, Judge Moore in his dissenting opinion in the *S.S. Lotus case* rejects the idea of passive personality and encourages the territoriality principle in the following words:

> an inhabitant of a great commercial city, in which foreigners congregate, may in the course of an hour unconsciously fall under the operation of a number of foreign criminal codes. This is by no means a fanciful supposition; it is merely an

[14] Though the laws grant equality, sometime state itself suppress and violates certain fundamental rights of the citizens without any guiltiness. In this situation, the affected neglected victims expecting and seeking the intervention of the international community through its courts and tribunals to try the offenders irrespective of their official capacity and bring-back peace and security in the nation. Most of the developed nations never respect the sovereignty of the developing nations and intervenes without respecting the domestic laws as well as international law. Hence, the developing countries feel that the international law itself in the hands of or in-favor to the powerful nations. Most of the eminent scholars say that international law is a '*watch dog*' and it do nothing against the powerful countries while they involve in serious international crimes at third state (For instance, US intervention in Iraq, Russia's intervention in Ukraine, etc.); but at the same time, if the developing countries commit any crimes then the watch dog (UNSC) become barking dog or biting dog.

[15] *United States v. Yunis* (known as *Yunis case*), 859 F.2d 953, D.C. Cir. 1988.

illustration of what is daily occurring, if the 'protective' principle is admissible. (*S.S. Lotus case* 1927: 92).

1.2. Universality Principle

Universal jurisdiction means an authority of domestic courts to exercise jurisdiction over serious crimes, without any jurisdictional bond, to serve the interest of humanity as a whole. This is an exception to the principle *extra territorium jus dicenti impune non paretur* which means 'one who exercise jurisdiction out of his territory is not obeyed with impunity' (Black's Law Dictionary 1979: 528). The principle authorises domestic courts to try international crimes committed by anybody anywhere in the world. The concept has evolved for two reasons: on the one hand, to punish the crimes that are grave and harmful to the entire humanity; and on the other, to ensure no safe haven is available to those who have committed serious crimes. Originally, the concept of universal jurisdiction had evolved out of necessity to protect the commercial interest of colonial powers from the menace of piracy on the high seas.[16] Later, the concept was expanded to include slavery and slave trade practices.[17] After the Second World War, it had rapidly grown to punish war criminals who had perpetrated genocide or crimes against humanity. Nowadays an attempt is made to include even torture and terrorism as well.

Some international conventions and treaties specifically focus on the concept of universal jurisdiction. For instance, the provisions of four Geneva Conventions and two additional protocols—like, Article 49(2) of GC I, Article 50(2) of GC II, Article 129(2) of GC III, Article 146 of GC IV and Article 6 of the Additional Protocol II—impliedly recognises universal jurisdiction against serious crimes, such as genocide,

[16] The phenomenon of piracy is the base for the origin of the universality principle. Piracy is viewed as an offence against the universal law of society. Piracy is often noted in international law that it represents the earliest invocation of the concept of universal jurisdiction. The crime of piracy is considered as a breach of *jus cogens* that states must uphold.

[17] In sixteenth and seventeenth century the concept of slavery became a legal practice. The question is: why the international community (especially developed countries like, Britain, France, Spain and Portugal) announced piracy and slavery as international crimes at the end of 17th and early 18th century? There may be two reasons for the inclusion of slavery as an international crime: first, there were continuous protests in the colonial countries against slavery and slave trade practices; and second, colonial powers became well developed and there was no need to bring slaves to their country and (especially the food expenses) overburdened the colonial powers. Later, these two concepts were adopted in 1958 High Seas Convention (Article 14-22) and 1982 UN Convention on Law of the Sea (Article 100-110). Piracy and slave trade are 'serious crime' because these two are pursued for private gain and those who are involving in piracy and slave trade are prosecuted under universal jurisdiction.

war crimes, and crime against humanity.[18] Further, two major international conferences were held, one at Cairo in 2000 and another at Princeton in 2001, to adopt the *Princeton Principles on Universal Jurisdiction.* The Principles define international crimes to include: piracy, slavery, war crimes, crime against peace, crime against humanity, genocide and torture. Principle 1(5) explains that 'a State shall exercise universal jurisdiction in good faith and in accordance with its rights and obligations under international law*'*. Under customary norms like *hostis humani generis* it was an option for states to exercise criminal jurisdiction over serious crimes; however, under treaties and conventions the principles like *aut dedre aut judicare* makes it an obligation for states to prosecute or extradite the perpetrator for prosecution. Accordingly, the principle of universal jurisdiction has been changed from 'an option' into 'an obligation'.[19]

Belgium and Spain are the leading users of the concept of universal jurisdiction in their domestic courts. Belgium adopted a domestic legislation called as Universal Jurisdiction Act, 1993 to prosecute the perpetrators of serious international crimes regardless of any jurisdictional link. Based on the Act, Belgium issued arrest warrant against Yerodia Ndombasi, the Congolese Minister of Foreign Affairs in office. Protesting the warrant Congo filed a case before the ICJ and consequently, the court cancelled the warrant and held that the warrant 'constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of Congo…under international law' (*Arrest Warrant case* 2000: 33). Later, Belgium amended its law on universal jurisdiction in 2003 declaring that the '*link*' is necessary for courts to exercise jurisdiction, like affected parties from Belgium or alleged criminals from Belgium or any other territorial connection. It was a '*great blow*' to the concept of universal jurisdiction.

[18] The four Geneva Conventions contain a common Article (Art. 49, 50, 129, and 146) relating to penal sanctions. Paragraph 2 of these Article states that 'Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case'.

[19] Extradition is the official process whereby one nation or state surrenders a suspected or convicted criminal to another nation or state. Between nation states, extradition is regulated by treaties. Where extradition is compelled by laws, such as among sub-national jurisdictions, the concept may be known more generally as rendition. It is an ancient mechanism, dating back to at least the thirteenth century, when an Egyptian Pharaoh negotiated an extradition treaty with a Hittite King (Carter, 2007: 22).

Spain earned its reputation of exercising universal jurisdiction after issuing arrest warrant against Chilean General Augusto Pinochet, triggering his arrest in London and setting of a justice cascade in Chile and throughout Latin America. Moreover, Spanish courts have advanced investigations of alleged crimes in El Salvador and Guatemala, issued warrants for top Rwandan leaders and convicted an Argentine official for '*dirty war*' killings. But after the *Arrest Warrant case*, Spain also repealed and amended some provisions relating to the principle of universality under its domestic legislation.

However, the possibility of abuse of universal jurisdiction cannot be ruled out. For instance, the principle has never been used against developed countries but only against the developing world, more specifically against the African countries.[20] Post WW II disturbances in the developing world have been used as chance to intervene through universal jurisdictions.[21] Hence, the UNGA and UNSC passed several resolutions to regulate the use and abuse of universal jurisdiction.[22] Kissinger observes that the concept of universal jurisdiction plays out differently in different parts of the world. Some powerful countries use the principle of universality against the weaker state in the name of *actio popularis* but in reality, the conduct of prosecution may be to take revenge against the political enemies of the weaker state, rather than bringing universal justice (Kissinger, 2001: 86-96). Nevertheless, the state

[20] African countries condemn the attitude of the developed countries because international arrest warrant so far was issued mostly against African leaders in the name of universal jurisdiction. It proves that the developed countries are misusing the concept of universal jurisdiction severally.

[21] From 1960 to 2000 several internal wars killed millions of people. These sort of serious crimes occurred due to various reasons, namely: poverty, ideological variations, lack of education, ignorance of law, lack of laws, over population, etc. But in reality, it happens mainly because of the powerful countries interference in the developing countries to secure economic interest; and because of some developing countries leaders interest to protect their own race and to vanish the other races that often led to ethnic cleansing (what we call it as 'Hitlorism').

[22] UNGA Res. 67/98 (14/01/2013) mainly talks about the scope and application of the principle of universal jurisdiction and recalls the previous Resolutions of 67/117 (16/12/2009), 65/33 (06/12/2010), 66/103 (09/12/2011). Similarly, UNSC Resolutions are also impliedly related to the concept of universal jurisdiction, such as Res. 1265 (17/09/1999) relating to the protection of civilians during armed conflict, 1296 (19/04/2000) relating to the steps to enhance the protection of civilians during armed conflict, 1373 (28/09/2001) relating to the counter terrorism measure specifically passed after the 9/11 terrorist attack of the twin towers, 1631 (17/10/2005) relating to the co-operation between the United Nations and regional organisations in the maintenance of international peace and security, 1674 (28/04/2006) relating to the basis for humanitarian intervention in situations of armed conflict, 1973 (17/03/2011) formed the legal basis for military intervention in the Libyan civil war, demanding 'an immediate ceasefire'' and authorizing the international community to establish a no-fly zone and to use all means necessary to protect civilians.

practice shows that the exercise of universal jurisdiction is not the monopoly of developed countries alone.[23]

'Although the legislation and implementation of universal jurisdiction by Belgium and Spain cannot be deemed representative of the entire international community, they have been among the most active states in exercising universal jurisdiction' (Pocar and Maystre 2010: 291). An effective implementation of universal jurisdiction equally in all countries is missing. International law does not provide precise guidelines for the enforcement of universal jurisdiction. Hence, its application differs from country to country without any homogeneous practice (Philippe 2006: 379). Therefore, the principle of universal jurisdiction still remains more theoretical than practical in many states.

1.3. Protective Principle

Protective principle is a rule of international law that recognises the sovereign authority of states to exercise domestic jurisdiction over a conduct that threatens the

[23] The cases relating to the concept of universal jurisdiction and the countries claimed the universality are as follows: Dusko Cvjetkovic (1994) proceedings conducted by Austria and crimes occurred in Former Yugoslavia (Bush et al. 2003); proceedings conducted by Belgium and crimes occurred in Iraq (Castro et al. 2001-2003); proceedings conducted by Belgium and crimes occurred in Cuba (Tommy Franks 2003-2004); proceedings conducted by Belgium and crimes occurred in Iraq (Pros. v. Ntezimana et al. 2001); proceedings conducted by Belgium and crimes occurred in Rwanda (Ariel Sharon 2001-2003); proceedings conducted by Belgium and crimes occurred in Lebanon (Ely Ould Dah 2002-present); proceedings conducted by France and crimes occurred in Mauritania (Javor et al. contre X 1995-1996); proceedings conducted by France and crimes occurred in Former Yugoslavia (Rumsfeld et al. 2004-present); proceedings conducted by Germany, France, USA and crimes occurred in Iraq (Maksim Sokolovic 1999-2001); proceedings conducted by Germany and crimes occurred in Former Yugoslavia (Pros. v. Adolf Eichmann 1961-1962); proceedings conducted by Israel and crimes occurred in World War II (Ricardo Cavallo 1999-2011); proceedings conducted by Argentina, Mexico, Spain and crimes occurred in Argentina (Desire Bouterse 2000-2001); proceedings conducted by The Netherlands and crimes occurred in Suriname (Hesamuddin Hesam 2005-2008); proceedings conducted by The Netherlands and crimes occurred in Afghanistan (Habibulla Jalazoy 2005-2008); proceedings conducted by The Netherlands and crimes occurred in Afghanistan, (Darko Knesevic 1996-1997); proceedings conducted by The Netherlands and crimes occurred in Former Yugoslavia (Hissene Habre 2000-present); proceedings conducted by Belgium, Chad, Senegal and crimes occurred in Chad (Jiang Zemin et al. 2005-present); proceedings conducted by Spain and crimes occurred in China (Lia Oinglin 2004-2006; proceedings conducted by Spain and crimes occurred in Guatemala (Adolfo Scilingo 1998-2007; Rigoberta Menchu et al. v. Rios Montt et al./*Guatemala Genocide case* 1999-present); proceedings conducted by Spain and crimes occurred in Argentina (Bush et al. 2003); proceedings conducted by Switzerland and crimes occurred in Iraq (R. v. Sarwar Zardad 2003-2005); proceedings conducted by United Kingdom and crimes occurred in Afghanistan (Dolly M. E. Filartiga & Joel Filartiga v. Americo Norberto Peña-Irala 1980); proceedings conducted by United States and crimes occurred in Paraguay (Tel-Oren v. Libyan Arab Republic 1984); proceedings conducted by United States and crimes occurred in Libya (Khaled Nezzar 2011-present); proceedings conducted by Switzerland and crimes occurred in Algeria (T. 2010-present); proceedings conducted by Denmark and crimes occurred in Rwanda (Krasniqi (Naser), Krasniqi (Nexhmi), Limaj (Fatmir) and Shala (Naser) (1999-present); proceedings conducted by Kosovo and crimes occurred in Kosovo (EULEX), etc.

national security, territorial integrity, political independence or other governmental functions, irrespective of where and by whom the act is committed. The origin of protective principle could be traced back to the Monroe Doctrine of the United States in 1823 for regional protection, which declared that 'any attempt [by European power] to extend their system to any portion of this hemisphere' will be seen as 'the manifestation of an unfriendly disposition toward the United States'. A similar claim could be found in Article 12 of the 1926 Draft Convention of the American Institute of International Law, in the context of seas, that '[t]he American Republics may extend their jurisdiction beyond the territorial sea for a supplementary distance of marine miles, for reasons of security and in order to ensure the enforcement of sanitary and customs regulations'. During 1930s the protective principle was used to limit the concept of freedom of the seas to ensure security for costal states. Once again, through the Panama Declaration of 1939 twenty-one American Republics came together and reiterated the Monroe Doctrine for regional protection as follows:

> As a measure of continental self-protection, the American Republics, so long as they maintain their neutrality, are as of inherent right entitled to have those waters adjacent to the American continent, which they regard as of primary concern direct utility in their relations, free from the commission of any hostile act by any non-American belligerent nation, whether such hostile act be attempted or made from land, sea or air.

The declaration put fresh agility to the doctrine of Monroe as a continental policy and expanded its scope from protecting territorial sovereignty to authorise jurisdictional extraterritoriality. As a result, the principle has gradually become an appeal to every other fields of international law, including international criminal law, to claim extraterritorial jurisdiction. It is conclusively proved that the principle of protective jurisdiction has become firmly established in law and practice (Jessup 1927: 105; Masterson 1929: 123-27).

Sometimes, exercise of protective jurisdiction is a necessary evil to protect the vital interest of a state. For example, planning and preparations for counterfeiting currencies, sabotaging government, or terrorist activities could occurs beyond territorial boundaries of a state but that would have direct negative impact on the

state.[24] In those cases, domestic courts may claim jurisdiction over such conduct based on the protective principle. However, in the absence of uniform state practice protective jurisdiction should be exercised in a proper manner with due limits; otherwise it would amount to intervention in the sovereign authority of a third state (Cameron 1994: 32-34).

Under international law the protective principle recognizes the authority of sovereign states to adopt laws to criminalise the conduct that occurs outside its territorial borders but affects national security or vital state interests. Sometimes the protective jurisdiction goes beyond mere state interest to serve the social, religious, or ethnic interests as well. For instance, Mossad of Israel exercised extraterritorial authority over Adolf Eichmann of Germany, violating Argentine sovereignty during capture, for his retroactive offences against Jews during Second World War. Protective principle is an inherent right of states derived from the concept of self-defence; and basis for the concept of universal jurisdiction

Though the conduct under consideration for protective jurisdiction, like counterfeiting currency, cross-border terrorism, or sabotaging government, may not fall under the strict classification of serious crimes, yet they could well be classified as crimes under international law. Though states are free to declare their individual vital interest, possibility of misuse should be avoided. The concept is like a double edged sword; on the one hand, it attempts to protect the vital interest of one state, but without unnecessary intervention in the domestic affairs of a third state, on the other.

2. ENFORCEMENT JURISDICTION OF INTERNATIONAL TRIBUNALS

2.1. Principle of Complementarity

International criminal law always respects the jurisdiction of domestic courts on any crime, irrespective of its serious nature. In fact, the ICL has always relied on the domestic courts for enforcement. The necessity for international tribunals arise only when the domestic courts are ‘unable to prosecute’ or ‘unwilling to prosecute’ or conduct ‘sham prosecution to shield the perpetrator’. Existence of international

[24] For instance, some terrorists were planning in Kashmir border area to attack India; in October 2016, based on protective principle the Indian military intervened and crossed the line of control to destroy the planning and execution of the attack; destroyed the terrorist base in the name of right of self-defense (mentioned in Article 51 of the UN Charter); after the surgical strike India immediately reported to the UNSC.

criminal law and criminal tribunals are not to replace but to supplement the domestic criminal legal systems. However, once the international tribunals are established to deal with specific crimes under international law, they were conferred with exclusive jurisdiction denying the authority of domestic courts.

For instance, when the Peter von Hagenbach trial of 1474 was tried before an international forum, for sack, pillage, rape, and burning the German city of Breisach, it had absolute jurisdiction excluding the domestic jurisdiction of all states under the Roman Empire. The same principle of exclusivity has been followed while establishing Nuremberg tribunal and Tokyo tribunal to prosecute the major war criminals of the Axis powers during Second World War. But this exclusivity has been criticised as flagrant violation of the territorial sovereignty of states and non-intervention principle; and was perceived as a forced victors' justice. Therefore, the future international criminal tribunals gradually conceded their authority towards domestic courts.

When the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) was established during 1990s, they have accepted the concurrent jurisdiction of domestic courts. For instance, Article 9(1) of the Statute of the ICTY provides that '[t]he International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991'. A similar provision could also be found under Article 8(1) of the Statute of the ICTR. However, the Statutes recognise the jurisdiction primacy of international forums over domestic courts if it is required. Article 9(2) of the Statute of the ICTY declares that '[t]he International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute'. A similar provision could also be found under Article 8(2) of the Statute of the ICTR.

The next stage of evolution for jurisdictional claims under international criminal law was hybrid tribunals. These forums were established with the mixture of domestic as well as international authority; they are neither international nor domestic, rather a mixture of both. The Khmer Rouge Tribunal of Cambodia was established under the authority of the Royal Government of Cambodia and the United Nations to prosecute the perpetrators of Cambodian genocide during 1970s; The Special Court for Sierra

Leone was established under the authority of the government of Sierra Leone and the United Nations to punish the perpetrators of serious crimes during Sierra Leone civil war during 1990s; Special Tribunal for Lebanon was supposed to be established under the authority of the Lebanese government and the United Nations but due to certain political impasse the tribunal was established under the authority of Chapter VII measures of the UN Security Council, to prosecute those responsible for the assassination of Rafic Hariri, the former Lebanese Prime Minister, and the connected attacks from 2005 onwards; The International Crimes Tribunal (Bangladesh) is a domestic war crimes tribunal established under the authority of Bangladesh government to prosecute the perpetrators of genocide during 1970s. The jurisdictional primacy of domestic or international law cannot be identified with these tribunals and their authority is too much blended.

The principle of complementarity of international criminal law is only of recent origin, specifically after the adoption of the Rome Statute of the International Criminal Court (ICC) in 1998. Preamble to the Rome Statute of the ICC declares that 'the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'. Further, Article 1 of the Statute reiterates that the court 'shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred in this Statute, and shall be complementary to national criminal jurisdictions'.[25] The reason for ICL to accept the principle of complementarity may be twofold: on the one hand, to attract more states to become parties to the Rome Statute; and on the other, it is not a locus-specific criminal tribunal like ICTR or ICTY.[26] Norway signed the Rome Statute only because the ICC jurisdiction is complementary to domestic criminal courts and national courts have precedence to prosecute war crimes, crimes against humanity, crimes of genocide and even the crime of aggression. Article 108 of the Norwegian

[25] Article 13 of the Rome Statute speaks about the Exercise of Jurisdiction. In which, the court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if: '(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15'.

[26] Locus-specific criminal tribunal are those tribunals that are established to deal with specific conducts occurred in specific place or during a specified period of time and whose function will come to an end at the completion of its mandate.

Military Penal Code, 1902 provides for the prosecution of international crimes by domestic penal law.[27] (Oluwatoyin and Abegunde 2014: 73-74). Article 17 of the ICC elaborates the principle of complementarity jurisdiction with domestic courts.[28]

The principle of complementarity and the primacy of domestic courts found support from various scholars. It is argued that the international criminal forums along with foreign judges and staffs cannot be a right place and right persons who understand the people and their nations along with the socio-cultural background of the society will majorly affects the feeling and sentiments in the name of bringing-out the justice to the international community (Nkansah 2011: 11-15). There is a possibility of misunderstanding the witnesses and perpetrators in their local languages with new atmosphere.[29] Lydia argues that, 'there is the lack of passion of foreign

[27] Similarly, Norwegian criminal law is applicable to acts committed abroad by Norwegian national or any other person domiciled in Norway when the act is a felony under the law of the country in which it is committed. There is a general discretion to decline a prosecution, which occurred in a case brought against former Israeli Prime Minister Ehud Olmert and former Foreign Minister Tzipi Livini along with seven other Israeli military officials for 'massive terror attacks primarily directed at the population in Gaza' (Reuters 2009 and *JURIST News Archive* 2009).

[28] Article 17 of the Rome Statute provides the grounds for admissibility of crimes before ICC as follows: (1). Having regard to Paragraph 10 of the Preamble and Article 1, the court shall determine that a case is inadmissible where: (a). the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution, (b). the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute, (c). the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the court is not permitted under Article 20, Paragraph 3, (d). the case is not of sufficient gravity to justify further action by the court; (2). In order to determine unwillingness in a particular case, the court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a). the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court referred to in Article 5, (b). there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice, (c). the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice; and (3). In order to determine inability in a particular case, the court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

[29] All the international criminal forums including ICC, ICTY, ICTR, SCSL, and other mixed tribunals as well as special tribunals appoints even language experts to translate the facts and arguments of the perpetrators as well as the witnesses to convey the details to the judges and the advocates. Some of them might think that – why the facts and arguments have to be translated to foreign judges and advocates which lead to time consuming and incurs huge expenses. On the other side, if it is not translated then the victims or the accused may get biased decision in the international criminal forum. Here, the judges and lawyers are not only the experts of regional/state laws but they are all experts in international law as well. Therefore, the issue always looks into international law perspective to preserve the global justice and peace rather than domestic perspective.

judges who are not in any way affected by the outcome of this trial to see that justice is done. There is also the sense of betrayal that the accused persons feel when they stand trial before foreigners' (Lydia 2011: 14). Charles Taylor asserted before the Special Court for Sierra Leone that 'if I have offended my people, they should sit in judgment over me and not hand me over to strangers' (Bigi 2007: 303).[30]

According to Holmes, 'justice as an ideal is localized rather than universalised and thrives on emotion for its effectiveness. As the passion wanes, justice loses its meaning and offenders get less punishment' (Holmes 2002). Such opinion is also strengthened by the former UN secretary General Kofi Annan that, 'no rule of law reform, justice construction, or transitional justice initiative imposed from outside can hope to be successful or sustainable' (Annan 2004).

2.2. Principle of Communitarianism

Principle of Communitarianism represents collective authority of states as opposed to the individual authority of domestic courts exercising jurisdiction. Establishing international criminal tribunal to punish the perpetrators of serious crimes is nothing more than an expression of this collectiveness among states. Most of the criminal tribunals, including the International Military Tribunals in Nuremberg and Tokyo, have been established by the international community of states to prosecute and punish the perpetrators of serious crimes to establish a sense of justice among the humanity as a whole. The later international tribunals like ICTY, ICTR along with the hybrid tribunals in Sierra-Leone, Cambodia and Lebanon have been established under the authority of the UN Security Council. It implies that such tribunals derive their jurisdictional authority directly from the community of states to maintain peace and harmony within the meaning of Article 24 read with Article 29 and Chapter VII of the UN Charter.

In resolution 955 of 1994, the Security Council declared that 'genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda…constitute a threat to international peace and security'.

[30] Other than the official from the weaker states there are many officials from the powerful states accountable for heinous atrocities but the international criminal forums not able to take an effective action against them due to lack of police force of their own; hence, those forums cannot compel to apprehend suspect and difficult to collect evidence. Therefore, the activities of these criminal forums seems to be a 'quasi-victor's justice' or 'power-oriented justice' in the name of international peace and security.

A year earlier the Security Council had already established the ICTY on similar reasoning. In resolution 808 of 1993, the Security Council declared that 'widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, including…mass killings and the continuance of the practice of 'ethnic cleansing'…constitutes a threat to international peace and security'. These independent tribunals have been established primarily to protect the community interest.

The adoption of the Rome Statute in 1998 and the successful establishment of permanent International Criminal Court in 2002 is also an outcome of the sense of communitarianism among states. Though the ICC is not an organ of the UN nor had any direct link with the Security Council in its establishment; but the Rome statute was negotiated within the UN system. Article 2 of the Statute requires that the court shall be brought into relationship with the United Nations through an agreement. Accordingly the UN General Assembly resolution 58/318 of 2004 authorized the Relationship Agreement under which the ICC has to submit annual report to the General Assembly. Further, Article 13(b) of the Statute provides that '[t]he Court may exercise its jurisdiction…if [a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations'.

Though many states are yet to become parties to the Rome Statute of the ICC, the process of negotiation, establishment and the arrangements between ICC and the United Nations clearly indicates that the court is established to safeguard community interest. As a permanent forum the court has become a preventive as well as punitive mechanism against serious violations of human rights and humanitarian principles. The mere existence of the court sends a strong message to the potential perpetrators that there exists a possibility for prosecution and punishment in case of committing serious crimes; and the possibility for impunity is very much unlikely. It also provides a sense of security to the people from violent dictators to authoritarian governments.

2.3. Principle of Surrender

The system of international law is built on the concept of 'common consent' or 'auto-limitation' or 'voluntary surrender' by sovereign states. The legal maxim *pacta tertis nec nocent nec procent,* which means a treaty binds the parties and only the parties, explains the importance of consent in international law. Article 34 of the Vienna

Convention on Law of Treaties, 1969 further reiterates that '[a] treaty does not create either obligations or rights for a third State without its consent'. However, all such principles on consent clearly indicate that international law derives its authority primarily from individual states through voluntary surrender of their authority towards a common pool. Similarly, the authority of international courts and tribunals,[31] institutions and organisations are also derived from sovereign states through a system of voluntary surrender.

With regard to the exercise of jurisdiction over crime, whether serious or non-serious, either under domestic or international law is always vested with the domestic courts. However, when domestic courts surrender their authority towards international forums, only then international tribunals could be established to prosecute the perpetrators. Surrender could be made either through treaties or conventions, special agreements, specified requests to the UN and so on. There are three possible ways in which surrender of jurisdictional authority over serious crimes takes place, namely voluntary surrender; forced surrender; and assumed surrender.

[31] There are several international courts and tribunals established all around the world: PCIJ 1922-1946 replaced by the ICJ 1945-present resolves global categories of general disputes; Eastern Caribbean Supreme Court (1967-present) and the Caribbean Court of Justice is a regional court to resolve the general disputes among the Caribbean states; WTO Appellate Body (1995-present); International Tribunal for Law of the Sea (1994-present); COMESA Court of Justice (1998-present); Court of Justice of the Andean Community (1983-present); Benelux Court of Justice (1975-present); Economic Court of the Commonwealth of Independent States (1994-present); all these courts resolve the disputes in-related with trade and economy among the nations.

Similarly, African Court of Justice (2009-present) came for the purpose to interpret the African Union Treaties; ECOWAS Community Court of Justice(1996-present); East African Court of Justice (2001-present); SADC Tribunal (2005-2012); European Court of Justice (1952-present); European Free Trade Association Court (1994-present) these courts established to interpret their respective laws. There are certain human rights courts came into exist for the protection of neglected victims, namely: African Court on Human and People Rights (2006-present); Inter-American Court on Human Rights (1979-present); European Court of Human Rights (1959-present); but there is no human rights court in the Asian region. It raises many issues, whether Asia is not violating human rights in the region? or whether the national human rights courts in Asia is strong enough to protect human rights of domestic as well as foreign nationals? or whether the Asian region is unable to establish the human rights court in the region?

Several international criminal forums were established by the UNSC to prosecute the perpetrators of serious crimes. This international criminal prosecution culture starts from 1945 onwards; immediately after the conclusion of WW II; IMT, Nuremberg (1945-1946); IMTFE, Tokyo (1946-1948); ICTY (1993-present); ICTR (1994-2015); ICC (2002-present); similarly, the special tribunals were also brought for the criminal prosecution against the offenders of serious crimes; these hybrid courts are Special Panels of the Dili District Court in East Timor (2000-2006); Special Court for Sierra Leone (2002-present); Khmer Roue Tribunal (2006-present) which is popularly known as Cambodian Tribunal; Special Tribunal for Lebanon (2009-present) and the Extraordinary Chambers in Senegal (2013-present). These courts and tribunals get jurisdiction by surrender of the sovereign states or by forceful surrender in-case of shielding an offender.

Voluntary Surrender

A state may voluntarily surrender its jurisdictional authority towards international tribunal when it is not able to take legal action against the perpetrators of serious international crimes due to political or economic reasons. For instance, serious human rights violations occurred in Rwanda following the political assassination of the then president Juvenal Habyarimana on 6th April 1994. Riots started from Kigali the capital of Rwanda between the majority Hutu and the minority Tutsi communities in the state that was continued for hundred more days. The brutal conflict resulted in the massacre of nearly eight lakh fellow human beings (Africa Recovery Report 1998: 4).[32] By that time, the Rwandan government was not in a position to take legal action against the perpetrators of genocide and was ready to surrender its jurisdiction to the international forum. Consequently, the UN Security Council established the International Criminal Tribunal for Rwanda (ICTR) as an *ad hoc* forum to deal with the situation. Security Council Resolution 955 of 1994 acknowledges the request of Rwandan government in this regard as follows:

> [H]aving received the *request of the Government of Rwanda* (S/1994/1115), to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 and to this end [the Security Council decides] to adopt the Statute of the International Criminal Tribunal for Rwanda (emphasis added; Para. 1).

The same is true with the establishment of the Special Court for Sierra-Leone. Security Council Resolution 1315 of 2000 acknowledges the request made by the Government of Sierra Leone as follows:

> *Taking note* in this regard of the letter dated 12 June 2000 from the President of Sierra Leone to the Secretary-General and the Suggested Framework attached to it (S/2000/786, annex)…[and] the steps already taken by the Secretary-General in

[32] In Rwandan riots, majority Hutu militia groups acted like butchers between 6th April 1994 to July 1994 and Rwanda became the house of human slaughter in those hundred days; literally the concept of human rights in Rwanda was buried. During the period of Rwandan genocide the UN has withdrawn its forces from the state of Rwanda. It is a major reason for Rwanda genocide.

response to the request of the Government of Sierra Leone to assist it in establishing a special Court (emphasis original).

Forced Surrender

Sometimes, international community may force a state to surrender its authority towards international forum for exercising jurisdiction over serious crimes. Such situation might arise when a state is unwilling to prosecute the perpetrator or initiates domestic proceedings merely to shield the perpetrator. Generally, such issues are handled by the Security Council through its authority under Chapter VII of the UN Charter. For instance, the Prime Minister of Lebanon requested the UN Secretary-General to establish a tribunal of an international character to try all those who are responsible for the terrorist bombing that killed former Lebanese Prime Minister Rafiq Hariri and other incidents connected there with. The UN Security Council passed a resolution 1664 of 2006 requesting the Secretary General to take further action in this regard. Accordingly, an agreement was signed between the United Nations and the Lebanese Republic on the establishment of Special Tribunal for Lebanon. But due to certain local political impasse the agreement was not ratified by the government. However, the Security Council passed resolution 1757 of 2007 to establish the tribunal under its chapter VII authority without waiting for the consent of the state. The resolution declares that:

> Acting under Chapter VII of the Charter of the United Nations, [the Security Council decides] that: (a) The provisions of the annexed document including its attachment, on the establishment of a Special Tribunal for Lebanon shall enter into force on 10 June 2007, unless the Government of Lebanon has provided notification…before that date.

The political stalemate could not be resolved before that date and hence the agreement came into force on 10 June 2007 as specified.

Assumed Surrender

At times, it is impossible to expect a formal surrender from states, either voluntary or forced, to transfer jurisdiction authority towards international forums. The situation will arise in case of failed states or when a state is divided into multiple parts without central control. In such cases the international community will assume the surrender and proceed with the establishment of international tribunals. For instance, the ethnic

conflict in the former Yugoslavia split the country into different nations, namely, Croatia, Serbia, Slovenia, Macedonia, Bosnia-Hercegovina, and Kosovo. There was no central power to request for the establishment of international criminal tribunals to punish the perpetrators of serious crimes during the conflict. Hence, the Security Council adopted resolution 808 of 1993 establishing the International Criminal Tribunal for Former Yugoslavia without any formal request from the erstwhile state. The resolution declares that the Security Council is:

> Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them, [and convinced] that in the *particular circumstances of the former Yugoslavia* the establishment of an international tribunal would enable this aim to be achieved and would contribute to the restoration and maintenance of peace (emphasis added).

However, the principle of jurisdiction by surrender in the ICC is slightly different from other criminal tribunals. Under the Rome Statute national courts have primacy over ICC in prosecuting the perpetrators of serious crimes and ICC will not get jurisdiction unless otherwise the state party surrender its jurisdiction or the Security Council refer the issue to the prosecutor.[33] Despite that some African countries like Gambia, South Africa, and Burundi, perceived ICC jurisdiction as intervention, neo-colonialism, and African bias and hence, in January 2017 the African Union agreed to go for 'collective withdrawal' from ICC. However, the former chief prosecutor of the ICC Luis Moreno-Ocampo raised a counter-question that, 'without the ICC, who will protect the African victims when African governments attack them' (Luis Moreno-Ocampo 2010: 49).[34] Further, he justifies the ICC jurisdiction over Africa as follows:

[33] Article 13(a) and (b) of the Rome statute recalls the role of state party as well as the Security Council. In this, the serious international crimes are referred to the Prosecutor of the ICC by the sovereign member states or the Security Council acting under Chapter VII of the UN Charter.

[34] But it raises several other questions that whether African national courts or African Court of Human Rights do not have legal capacity to protect its victims? Does the ICC protect African victims or neo-colonize Africa by punishing its political leaders? If the ICC really trying to protect the African victims from the attacks of African governments then the whole global community may salute the effectiveness of the ICC; but why does the ICC is not protecting the American Red Indians and American Negros from the attack of American government? Whenever these sorts of issues raised then the ICC replies that the American government has not ratified the Rome Statute yet; so, the ICC cannot get jurisdiction over the non-state parties. If it is so, then how the ICC issued an international arrest warrant against the Sudanese leader Omar Al-Bashir which is also a non-ratified state? Actually, the rule is equal for all irrespective of their political or other powers.

1. *All the accused persons of the ICC are from Africa:* Why? Because there are five million African victims displaced, thousands of African victims were raped and even more than forty thousand African victims were brutally killed; similarly, thousands of African children were forcefully transformed into rapists and killers. Hence, hundred percent of the victims are Africans similarly hundred percent of the perpetrators are also from Africa. He recalls the words of Nobel Laurette Desmond Tutu that: 'choose your side. Do you associate with the victims or the perpetrators? I am on the victims' side. I will not apologize for that'.
2. *Ignoring Bigger Criminals from the North:* Africans are tired of double standards. Here the issue is, are we going to implement one standard? Or are we going to reinforce the double standard? Luis was the prosecutor of the State parties to the Rome statute and he is not the world prosecutor. Though some of the States like Sri Lanka, Iraq, USA, Lebanon committed heinous crimes of war crimes, crimes against humanity, genocide but they are not States parties of the ICC's Rome statute.

Under Article 12(3) ICC accepts cases from non-party states provided if they fulfil two main conditions: (i) non-party state has lodge a declaration with the Registrar of the ICC to accept the exercise jurisdiction by the court with respect to the crimes in question; and (ii) shall cooperate with the court without any delay or exception. Even part 9 of the Rome statute discusses the need of international cooperation and judicial assistance from the jurisdictional accepting state irrespective of states parties as well as non-state parties.

3. PRESCRIPTIVE JURISDICTION AND INDIAN STATE PRACTICE

For a domestic court to exercise jurisdiction over international crime, the state must characterise the conduct as delictual within domestic legal system through incorporation. Incorporation is a process through which international treaties and other obligations of international law become part of municipal legal system of a sovereign state. However, it is not an easy task and it is more so with respect to international criminal law. The reason may be twofold: on the one hand, there is no uniformity of state practice in the incorporation process on account of varied theoretical understandings and ideological differences in the absorption of international law principles; and on the

other, administration of criminal justice is claimed to be an exclusive authority of sovereign states.

In Indian legal system legislature shall enact municipal laws to bring the principles of international law into domestic sphere. Mere being a signatory to an international legal instrument does not bind the nation or its organs to enforce such laws within its territory unless adopted through a ratification process. Ratification is the formal expression of consent by states to be bound by treaty or agreement.[35] Indian Constitution lays down the procedure for expressing such a consent whereby the Parliament is empowered to enact domestic legislations to implement international treaties, agreements or conventions. However, in case of a legal vacuum or *non-liquet* in the domestic legal system courts and judges are free to refer the principles of international treaties, conventions or customs without any prior approval from the Parliament. But such references shall not be in contravention to the basic structure of the Indian Constitution or sovereignty of the state.

Though Indian constitution allocates legislative, executive and judicial functions on three different organs it does not impose strict absorption of the *doctrine of separation of powers*. The powers and functions of each organ may well overlap with one another. For instance, high courts and supreme court of India exercise administrative functions when they supervise their subordinate courts and frame rules for regulating the practice and procedure of the court.[36] This flexible nature enables Indian judiciary, at times, to act as a quasi-legislative authority in bringing international law into domestic. In many occasions the judiciary has played such an active role to protect human values and promote environmental standards.

In the era conflicting global issues like environment *versus* development, development *versus* human rights, international *versus* domestic, and so on judiciary has to play such a lead role in bringing international cooperation through innovative approaches and judicial activism. Proper functioning of an international treaty frame-

[35] In Indian context ratification occurs either by adoption of municipal legislation domestically and deposit of instrument of ratification internationally; or by exchange of instrument of ratification. Generally, the former is the mode of adoption for law-making treaties and the latter is the mode for adoption of treaty-contracts.

[36] Article 145 of the Indian Constitution authorises the Supreme Court to make rules for regulating the practice and procedure of the court. Similarly, Article 229 authorises the High Courts to make rules with regard to officers and servants and the expenses of the High Courts. In addition, Article 227 confers supervisory power on High Courts over subordinate courts.

work is not possible in the absence of an effective support and co-operation from domestic judicial systems; similarly, municipal courts cannot ensure justice by mere reference to national laws ignoring the principles of international law. For that reason, authoritative nature of municipal law and dynamic nature of international law must interact with each other for a better future world.

3.1. Domesticating International Criminal Law

Article 38 of the Statute of the International Court of Justice declares that the function of the court is to decide disputes as are submitted to it in accordance with international law. The provision also lists out the sources from where the principles of international law could be found, namely: international conventions, international customs, general principles of law, and judicial decisions and juristic opinions.[37] While bringing international law domestic states do not or rarely adopt municipal legislations to incorporate the principles of international customs, general principles, or judicial decisions and juristic opinions. Whereas, incorporating international treaties and conventions require different procedural formalities like, signature, accession, ratification or adoption of domestic legislations. Since obligations under treaties are more precise that should earnestly be carried out to avoid any issues of non-compliance, states prefer to be more cautious while expressing their consent to be bound.[38]

Treaties and conventions may be classified into two types, namely, law-making treaties and treaty contracts. Law-making treaties are those that attract the participation of numerous states establishing rules regulating international conduct of their own and of others as well. United Nations Charter, Vienna Convention on the Law of Treaties, and the Hague Conventions are good examples of law-making treaties. Whereas, treaty-contracts are those that regulates the relation only between the parties

[37] Article 38 of the ICJ Statute provides that, '[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States; b. International customs, as evidence of general practice accepted as law; c. The general principles of law recognized by civilized nations; d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

[38] Article 2 of the Vienna Convention on Law of Treaties (VCLT) 1969 defines that 'treaty' means 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. Different designation of 'treaty' includes treaties, conventions, protocols, or agreements.

with regard to specific or exclusive issues among them. Bilateral investment treaties, double taxation avoidance agreements, and extradition treaties are good examples of treaty contracts. Such treaties do not directly become the sources of international law but may assist the formation of international customs. However, in both cases signing and ratifying of treaties are essential to bring them domestic.

State practice in implementing international treaties is diverse among different states and there is no uniform procedure to incorporate them into domestic legal system. Theoretical difference between monism and dualism continues to be a relevant factor for centuries in understanding and transforming international law into domestic sphere. Monists argue that international law is the superior legal system that automatically forms part of every domestic legal system; but to the contrary, dualists maintain that rules of international law do not automatically apply in municipal sphere unless incorporated through municipal legislations. Law, either domestic or international, is made for human welfare and hence, the Vienna Convention on Law of Treaties (VCLT), 1969 attempts to harmonize the conflicting approaches to meet the common interests of the international community. Article 11 of the Convention upholds that '[t]he consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed'.[39] The provision encompasses all forms of transformation process to bring international law into domestic. This is a compromise between the theoretical differences and ideological conflicts between states following monism and dualism.

In accordance with the provision there are three modes for expressing consent to be bound by a treaty namely, (i) signature; (ii) exchange of instrument constituting treaty; and (iii) ratification, acceptance, approval, or accession. While signing a treaty the signature may be a definitive-signature or a simple-signature. Definitive-signature implies the full power of the representative signing the treaty and it is an expression of state's consent to be bound by the treaty without any further requirement of ratification, acceptance or approval by domestic parliament. Article 46 and 47 of the

[39] Usage of different words in the provision indicates the varied process in which states express their consent to be bound by a treaty. However, the significance of every such process in expressing consent is equally valid. Article 2(1)(b) of the VCLT declares that 'ratification', 'acceptance', 'approval' and 'accession' mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty. The procedural mechanism for expressing consents by each of these ways is detailed in Article 12 to 16 of the Convention.

VCLT make it clear that once a definitive-signature is put on a treaty then the state shall not be allowed to claim the defence that the consent is expressed in violation of its internal laws; or against specific restrictions on the authority to express consent.[40] To the contrary, simple-signatures are those that are subject to approval by state either through exchange of instrument of ratification, adoption of domestic legislation, or through ratification, approval or acceptance. In either case once, Article 27 makes it clear that, once the state becomes a party to a treaty it 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

However, problems and conflicts occur only when states sign the treaty but fail to ratify the same. Such states are mere signatories but not parties to the treaty. Article 2(1)(g) holds that ''party' means a State which has consented to be bound by the treaty and for which the treaty is in force'. Further, Article 34 makes it clear that '[a] treaty does not create either obligations or rights for a third States without its consent'. Consent is a prerequisite for binding a state with legal commitments of the treaty; mere signatories are not bound to carry out obligations under the treaty. However, there are few exceptions to this general rule, namely, (i) *jus cogens* or peremptory norm of general international law; and (ii) object and purpose rule. A state could be required to be bound by a treaty despite being a non-party or even non-signatory if the treaty codifies the principles of customary law or comprises the principle of peremptory norm of general international law.[41] Similarly, Article 18 of the VCLT provides that a state could legally be compelled to refrain from defeating the object and purpose of a treaty despite being a signatory without ratification if 'it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty'.

[40] Article 46 of the VCLT provides that '[a] State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance'. Similarly, Article 47 declares that '[i]f the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent'.

[41] Article 53 of the VCLT defines that 'a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

With regard to Indian position, international law binds the state only when it is transformed into domestic legal system either through parliamentary incorporation or through judicial incorporation. Otherwise, the principles of international law are not directly enforceable in the country. In *Jolly George Verghese and Another* v. *The Bank of Cochin*, supreme court of India made it clear that Article 51(c) of the Constitution obligates the State to 'foster respect for international law and treaty obligations in the dealings of organised peoples with one another'. Even so, until the municipal law is changed to accommodate [international law] what binds the court is the former, not the latter'. However, even if the country signs and ratifies a treaty internationally, it cannot be implemented domestically unless adopted through a municipal legislation. In such case, the country may be held accountable internationally for non-compliance; nevertheless, organs of the state or its apparatus cannot be compelled to implement the principles of the treaty so signed or ratified.

3.2. Parliamentary Incorporation

Implementing international treaties, conventions or agreements is a two-phase process under Indian Constitutional framework: firstly, signing and ratifying treaty internationally (i.e. treaty-making power); and secondly, enacting legislation domestically (i.e. law-making power). There is a difference between the formation and the performance of obligations constituted by international treaties. The former is vested with the executive-head and the latter is vested with the parliament. In accordance with Article 53 read with Article 73, the executive power of the Union of India is vested in the President and it extends to all matters with respect to which the Parliament has the power to make laws.[42] On the other hand, Article 253 lays down the procedure for incorporation whereby it provides that 'Parliament has power to make any law for the whole or any part of the territory of India *for implementing* any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body' (emphasis added). However, presidential power extends only to those matters with respect to which Parliament can make laws.

[42] Article 53 of the Indian Constitution provides that '[t]he executive power of the union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with [Indian] Constitution'. Further, Article 73 of the Indian Constitution provides that 'the executive power of the Union shall extend: (a) to the matters with respect to which Parliament has power to make laws; and (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the government of India by virtue of any treaty or agreement'.

On that account, whether parliamentary legislation a prerequisite for exercising presidential power? In *Union of India v. Manmul Jain and Others*, the high court of Calcutta answers the question in negative and makes clear the difference between the two phases of incorporation as follows:

> 9. Making a treaty is an executive act and not a legislative act. Legislation may be and is often required to give effect to the terms of a treaty. Thus if a treaty, say, provides for payment of a sum of money to a foreign power, legislation may be necessary before the money can be spent; but the treaty is complete without the legislation … The President makes a treaty in exercise of his executive power and no court of law in India can question its validity.
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> 10. [W]hen the president, in whom Article 53 of the Constitution vests all the executive power of the Union, has entered into a treaty, the municipal courts cannot question the validity of the treaty.

Similarly, in *Maganbhai Ishwarbhai Patel v. Union of India and Another*, the supreme court of India Observed that:

> The executive is qua the State competent to represent the State in all matters international and may by agreement, convention or treaties incur obligations which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List I of the Seventh Schedule.

However, in the absence of a domestic legislation international law cannot be considered as part of the municipal legal system and its principles will not be implemented in the territory of India. This implementing process is an exclusive authority of Parliament excluding the role of state legislatures. Under Seventh Schedule of the Constitution '[p]articipation in international conferences, associations and other bodies and *implementing of decisions* made thereat' (emphasis added) as well as '[e]ntering into treaties and agreements with foreign countries and *implementing of treaties, agreements and conventions* with foreign countries' (emphasis added) exclusively fall under entry 13 and 14 of the Union List and no similar entries could be found under

State List or Concurrent List.[43] The consequences of entries found under different lists are well established under Article 246 that:

> *Parliament has exclusive power* to make laws with respect to any of the matters enumerated in List I [i.e. Union List] in the Seventh Schedule…. Parliament [and State Legislatures] have power to make laws with respect to any matters enumerated in List III [i.e. Concurrent List] in the Seventh Schedule…[and] the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II [i.e. State List] in the Seventh Schedule (emphasis added).

With this exclusive power Indian Parliament has enacted thousands of domestic legislations to incorporate international treaties, conventions and agreements addressing issues of economics, trade, environmental, human rights, humanitarian, labour standards, and so on. However, India's response towards treaties addressing issues of criminal law is very much selective and multiplex. Such treaties may be classified into the following categories for a proper analysis of Indian state practice, namely: (i) treaty conferring authority; (ii) treaty imposing responsibility; and (iv) treaty of complementarity. The first type of treaties is those that bequeath jurisdictional authority on domestic courts and tribunals over newer crimes or expanding authority over existing crimes. Generally, India become parties to such treaties and conventions and do not show any reluctance in signing or ratifying the same. For instance, India is party to Hijacking Convention,[44] Sabotage Convention,[45] Hostage Convention,[46] Nuclear Ter-

[43] Other issues relating to international law and international relations like, '[f]oreign affairs; all matters which bring the Union into relation with any foreign country' (entry 10); '[d]iplomatic, consular and trade representation' (entry 11); 'United Nations Organisations' (entry 12); '[w]ar and peace' (entry 15); '[f]oreign jurisdiction' (entry 16); and '[e]xtradition' (entry 18) are also exclusively fall under the Union List in the Seventh Schedule.

[44] Convention for the Suppression of Unlawful Seizure of Aircraft 1970 is a multilateral treaty to prohibit and punish hijacking of civilian aircraft. India signed the treaty on 14th July 1971 and enacted a domestic legislation 'The Anti-Hijacking Act 1982' and deposited the instrument of ratification on 12th September 1982.

[45] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 is a multilateral treaty to prohibit and punish behaviour which may threaten the safety of civil aviation. India signed the treaty on 11th December 1972 and enacted a domestic legislation 'The Suppression of Unlawful Acts against Safety of Civil Aviation Act 1982' and deposited the instrument of ratification on 12th November 1982. Similarly, India is also a party to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988.

[46] International Convention against the Taking of Hostages 1979 is a multilateral treaty to prohibit and punish taking of hostage based on the principle of *aut dedere aut judicare* (i.e. extradite or prosecute) the perpetrators. India's accession and ratification to the treaty came on 7th September 1994.

rorism Convention,[47] etc. Most of these multilateral treaties specialise and expand the authority of domestic courts over certain crimes that originally could only be dealt under domestic criminal law (i.e. Indian Penal Code, 1860) like any other normal crimes.

The second type of treaties is those that hold states and state apparatus accountable for their repressive activities against individuals. Generally, India avoids ratifying such kinds of treaties and reluctant to take any legal commitments that interferes in their sovereign freedom either directly or indirectly. For instance, India signed the Convention against Torture, 1984 on 14 October 1997 but it is yet to ratify the convention even after two decades.[48] The Convention primarily seeks to curtail sovereign freedom to engage torture as a tool extract information or imposing punishment against individuals for any wrong committed. Article 1 of the Convention defines that 'torture' means 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person…by or at the instigation of or with the consent or acquiescence of a *public official or other person acting in an official capacity*' (emphasis added). Under Article 4 the Convention requires the state parties to ensure that all acts of torture are made as offences under their criminal law. In addition, Article 13 and 14 confer rights on the victims of torture to complain and receive compensation for their sufferings. However, unless and until the present condition of police and prison system in the country, both before and after conviction, undergoes a vital transformation India cannot afford to ratify the treaty.[49] It is not that torture is the common phenomenon of criminal legal system and states reluctant to ratify the treaty; rather it is the belief that states have fundamental freedom and authority to engage

[47] International Convention for the Suppression of Acts of Nuclear Terrorism 2005 is a treaty to criminalise the acts of nuclear terrorism and to promote police and judicial cooperation in prevention, investigation and punishment of those acts. India signed the treaty on 24th July 2006 and ratified on 1st December 2006. In addition to this, India is already a party to the other twelve international terrorism conventions and protocols.

[48] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 is a United Nations treaty for prevention of torture and other cruel, inhuman or degrading treatment or punishment against individuals by states or their officials in order to extract any information or while imposing any punishments. India signed the treaty on 14th October 1997 but yet not ratified.

[49] A 2015 Tamil-language movie 'Visaranai' (means 'Interrogation') is a good starting point to understand the police brutality, corruption and loss of innocence in the face of injustice in India. The film won the Amnesty International Italia Award in the 72nd Venice Film Festival and it is also an official Indian nomination for the Best Foreign Language Film Category at the 89th Academy Awards.

torture in criminal administration and hence states reluctant to become party to the treaty.[50]

Similarly, India signed the Convention on Enforced Disappearance on 06 February 2007 but even after a decade the country is yet to ratify the treaty.[51] Primary object of the Convention is to regulate the state practice of detaining individuals outside the protection of law and makes the state answerable for such activities. Article 2 defines that 'enforced disappearance' means 'arrest, detention, abduction or any other form of deprivation of liberty *by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State*… which place such a person outside the protection of law' (emphasis added). The provision directly targets the state from engaging in any kind of illegal arrest or detention. Further, Article 4 requires the state parties to ensure that all acts of enforced disappearance shall be made as offences under their domestic criminal law. In addition, Article 24(4) requires that '[e]ach State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation'. However, considering the prevailing situation in Jammu and Kashmir, Assam, Nagaland, Manipur as well as the menace of Naxalism in different parts of the country, along with the practice of fake encounters and extra-judicial killings, it is very much unlikely that the county could soon ratify the convention.[52]

The third type of treaties is those that share the authority of domestic courts towards international courts and tribunals over certain crimes. India is always reluctant to sign or ratify such treaties that take away or share domestic authority towards international. For instance, India has neither signed nor ratified the Rome Statute of the

[50] Minister for Home Affairs introduced the Prevention of Torture Bill 2010 to enable India to ratify the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984. But it is yet to become an Act of the Parliament.

[51] International Convention for the Protection of All Persons from Enforced Disappearance 2006 is a multilateral treaty to prevent forced disappearance of individuals at the hands of states. India signed the treaty on 6th February 2007 but yet not ratified.

[52] India's stand on Armed Forces (Special Powers) Act (AFSPA) 1958 is highly criticised by many states and civil society organisations internationally. The Act grants special powers to security forces to search without warrant, arrest persons, and use deadly force in disturbed area. But still Section 6 of the Act provides that: '[n]o prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act'. Many people criticised that the Act indirectly authorises and encourages enforced disappearance of individuals in the so called disturbed areas.

International Criminal Court, 1998.[53] Article 1 and Article 5 of the Statute makes it clear that the court's jurisdiction is only complimentary to national criminal courts and only with regard to most serious crimes of international concern such as, genocide, crimes against humanity, war crimes and crime of aggression.[54] Despite that India has not even signed the treaty so far. However, parliamentary incorporation of international criminal law in India is possible only with regard to those treaties that confer authority on state's criminal administration. With regard to the treaties imposing responsibility, in most cases, India has signed the treaty but very much reluctant to ratify or adopt a domestic legislation to incorporate into municipal legal system. However, mere signing of the treaty serves two different purposes: on the one hand, as a largest democracy India would like to project itself as country that supports the promotion of human rights and fundamental freedoms; and on the other, yet the country will not be legally bound to implement the same domestically. This is a kind of complicity in the garb of convenience.[55] With regard to treaties of complementarity India is not even ready to sign.

3.3. Judicial Incorporation

Indian judiciary is known for judicial activism and judicial creativity that has never been restricted within the confines of black-letter laws. Whenever there is a scope for, courts and tribunals in the country has made extensive reference to philosophical, ideological, mythological, moral, social, and cultural principles to expand the meaning and ambit of constitutional as well as other legal principles. Often they also make reference to judgments of foreign courts from Australia, Canada, South Africa, United Kingdom, and United Sates as and when required. With regard to the implementation

[53] Rome Statute of the International Criminal Court 1998 is a multilateral treaty to establish permanent international criminal court to deal with certain serious crimes of international concern.

[54] Article 1 of the Rome Statute provides that '[a]n International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be *complementary to national criminal jurisdiction* (emphasis added)'. Article 5 of the Rome Statute provides that 'jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression'.

[55] Article 17 of the Indian Contract Act 1872 declares that 'a promise made without any intention of performing it' amounts to 'fraud'. Applying the same principle internationally would make activities of the State as fraudulent when it signs a treaty without any intention of ratifying it'.

of international law into municipal legal system the supreme court and the high courts do not wait for the Parliament to makes laws; rather, they directly make reference to the principles of international law. Common law doctrine of precedent and *stare decisis* are very much applicable in the Indian context. For instance, Article 141 of the Constitution provides that '[t]he law declared by Supreme Court shall be binding on all courts within the territory of India'. However, there is no similar provision that confers binding authority on the decisions of the high courts, but it could be inferred from Article 215 read with Article 227 of the Constitution.[56] In *East India Commercial Co. Ltd. Calcutta and Another* v. *The Collector of Customs Calcutta*, the supreme court observed that:

> It would be anomalous to suggest that a tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of it…[Though] there is no specific provision, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate courts…[it] is implicit in the power of supervision conferred on a superior tribunal that all the tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working: otherwise there would be confusion in the administration of law and respect for law would irretrievably suffer.

With this freedom and authority on many occasions the judiciary has performed a quasi-legislative function to bring international law into domestic. Direct reference to the principles of international law is made, in most cases, either to protect human values or to preserve the ecology when there is a legal vacuum in municipal laws. For instance, most of the international environmental law principles like sustainable development, precautionary principle, polluter pays principle, and public trust doctrine have been brought to domestic only through land mark judgements of the supreme court and not by parliamentary legislations.[57] In *Vellore Citizens Welfare Forum* v. *Union of India and Others*, the supreme court held that:

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[56] Article 215 of the Indian Constitution provides that '[e]very High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself'. Similarly, Article 227 provides that '[e]very High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction'.

[57] The Precautionary Principle is incorporated from Principle 18 of the Stockholm Conference on Human Environment 1972 and Rio Declaration 1992; the Polluter Pay Principle is incorporated from

> It is almost accepted proposition of law that the rule of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law … [and] we have no hesitation in holding that 'Sustainable Development' as a balancing concept between ecology and development has been accepted as a part of the Customary International Law.
>
> Some of the salient principles of 'Sustainable Development', as culled out from Brundtland Report and other international documents, are inter-Generational Equity, Use and Conservation of Natural Resources, Environmental Protection, the Precautionary Principle, Polluter Pays principle, Obligation to assist and cooperate, Eradication of Poverty and Financial Assistance to the developing countries. We are, however, of the view that 'The Precautionary Principle' and 'The Polluter Pays' principle are essential features of 'Sustainable Development'.

In addition, the court also directed the Central Government to establish an authority under Section 3(3) of the Environmental (Protection) Act, 1986 to protect the degrading environment in the country. Similarly, in *MC Mehta* v. *Kamal Nath and Others*, the supreme court made its observation on public trust doctrine that:

> Our legal system - based on English Common Law - includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea- shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.

With regard to the protection of human rights and fundamental freedoms Indian judiciary on many occasions have made direct references to the principles of international human rights law. For instance, in *Nilabati Behera* v. *State of Orissa*, the supreme court referred Article 9(5) of the International Covenant on Civil and Political Rights (ICCPR), 1966 to provide compensation for unlawful arrest and detention as a public

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Principle 16 of the Rio Declaration 1992 and Sustainable Development from the Report of the World Commission on Environment and Development 1987 (also known as Brundtland Report).

law remedy under Article 32 of the Constitution.[58] Similarly, in *Vishaka and Others* v. *State of Rajasthan and Others*, the supreme court made a reference to Article 11 and 24 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979 to prevent sexual harassment at the workplace.[59] On that account, the court laid down number of guidelines and norms to be followed in all workplaces and other institutions until legislation is enacted for the purpose; and emphasised that the guidelines and norms would be treated as the law declared by this court under Article 141 of the Constitution. With regard to making direct references to international law the court was opinion that:

> In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein.

However, one major exception to this judicial freedom is that no reference could be made if it contravenes: (i) basic structure of the Constitution; (ii) sovereignty of the state; or (iii) express provision of law enacted by the Parliament. If any reference is made in contravention to any of these principles, such judgements are not valid and shall be considered as *per incurium*. For instance, in *Gramaphone Company of India Ltd.* v. *Birendra Bahadur Pandey and Others*, the supreme court observed that:

> The comity of Nations requires that Rules of International law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to exter-

[58] Article 9(5) of the ICCPR provides that '[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'.

[59] Article 11 of the CEDAW provides that 'States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to work as an inalienable right of all human beings; (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction'. Article 24 of the Convention provides that 'States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention'.

nal rules except to the extent legitimately accepted by the constituted legislatures themselves.

Further, the court continued to make the following specific observation with regard to judicial incorporation of international law that:

> Comity of Nations or no, Municipal Law must prevail in case of conflict. National Courts cannot say yes if Parliament has said no to a principle of international law. National Courts will endorse international law but not if it conflicts with national law. National courts being organs of the National State and not organs of international law must perforce apply national law if international law conflicts with it. But the Courts are under an obligation within legitimate limits, to so interpret the Municipal Statute as to avoid conformation with the comity of Nations or the well established principles of international law. But if conflict is inevitable, the latter must yield.[60]

Finally, with regard to interpretation of statutes the supreme court, in *Tractor Export, Mascow* v. *Tarapore & Company and Another*, comprehended that '[i]f statutory enactments are clear in meaning, they must be construed according to their meaning even though they are contrary to the comity of nations or international law'. Further, in *ADM Jabalpur* v. *Shivakant Shukla*, Justice Khanna in his minority opinion made the following comprehensive observation to resolve the conflict between municipal law and international law that:

> [It is a well-established rule of construction that] if there be a conflict between the municipal law on one side and the international law or the provisions of any treaty obligations on the other, the courts would give effect to municipal law. If, however, two constructions of the municipal law are possible, the court should lean in favour of adopting such construction as would make the provisions of the municipal law to be in harmony with the international law or treaty obligations.

[60] Hersch Lauterpacht also gave a similar opinion as follows: 'While it is clear that international law may and does act directly within the State, it is equally clear that as a rule that direct operation of international law is within the State subject to the overriding authority of municipal law. Courts must apply statutes even if they conflict with international law. The supremacy of international law lasts, *pro foro interno*, only so long as the State does not expressly and unequivocally derogate from it. When it thus prescribes a departure from international law, conventional or customary, judges are confronted with a conflict of international law and municipal law and, being organs appointed by the State, they are compelled to apply the latter' (Lauterpacht 1970: 227).

With regard to incorporation of international criminal law into domestic legal system Indian judiciary always reluctant to make a direct reference international treaties and conventions. The reason is that criminal administration of a country is always closely associated with the sovereignty of the state. Since independence, supreme court of India have dealt with numerous cases involving issues of custodial torture, custodial death, inhuman or degrading treatment or punishment, enforced disappearance, and so on and categorically condemned the activities of the state;[61] but in no occasion made any attempt to derive criminal law principles from treaties or conventions to punish the perpetrating public officials. In *Kesavananda Bharati* v. *State of Kerala*, Justice SM Sikri speaking for the supreme court observed that:

> [I]t seems to me that, in view of Article 51 of the directive principles, this Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India.

It is easy for the supreme court to declare that the *Constitution is after all a municipal law* and should be *understood in the light of the UN Charter* or other principles of international law, as long as it is not in contravention to the administration of criminal justice system. However, the opinion would not be same if it abridges or takes away the sovereign authority over prevention or punishment of crime or if it attempts to hold the state criminally responsible for any act or omission. Indian judiciary has come across numerous opportunities—like, custodial death, custodial torture, enforced disappearance, fake encounters, abolishing death penalty, and so on—to incorporate the principles of international criminal law into domestic, the courts have made not even an attempt.

Though scholars may argue that it is an era of globalization and man-made boundaries are no longer a barrier for global governance with principles of universal international law, like, UN Charter, Universal Declaration of Human Rights (UDHR), international trade and investment regime, new-found concept of global

[61] For instance, the cases include: *Nandini Satpati* v. *P.L Dani*, *Sunil Batra* v. *Delhi Administration*, *Raghbir Singh* v. *State of Haryana*, *Khatri* v. *State of Bihar*, *State of U.P* v. *Ram Sagar Yadav*, *D.K Basu* v. *State of West Bengal*, *Joginder Kumar* v. *State of U.P*, *Secretary, Hailakandi Bar Association* v. *State of Assam*, *Nelabati Behara* v. *State of Orissa*, *Extra Judicial Execution Victim Families Association (EEVFAM) and Another* v. *Union of India and Another*, etc.

administrative law, and so on, states are yet to give-up their sovereignty over criminal administration within their respective territorial boundaries.

Despite the existence of numerous jurisdictional principles under international criminal law, a clear-cut jurisdictional demarcation between domestic courts and international tribunals is still a difficult task. Considering the exponential growth of ICL in terms of number of crimes and modes of perpetration, the traditional judicial institutions are no more sufficient to deal with all possible situations. The conventional understanding of serious crimes under international law is in constant transformation to encompass new forms of crimes like torture, terrorism, enforced disappearance, and transnationally organised crimes. Such developments have led to the growth of new forms of adjudicatory mechanisms like hybrid tribunals and Russell tribunals. The following chapter addresses some of these issues in detail.

CHAPTER V

EXPANSION OF THE REALM OF INTERNATIONAL CRIMINAL LAW

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Law cannot be static and it has to grow along with the evolution of societal needs and demands. 'Change is the law of life' and international criminal law is not an exception to this rule of nature (Anand 2008: 1). Conventionally, international criminal law was understood as a bunch of rules within public international law. However, the establishment of military tribunals at the end of the Second Word War and mushroom growth of criminal tribunals after the end of cold war has contributed for the system to evolve as a specialised legal regime. Since then international criminal law has undergone an exponential growth in terms of juristic opinions, judicial decisions, institutional growth, subjects covered, and culpability of conducts. Though scholars, jurists and states have suspicion over desirability of such developments, it is not predetermined or planned to have an effective control over the same. A conduct becomes 'international crime' primarily because of its inherent gravity and violation of universal values and interests. Any conduct that fulfils the criterion along with other structural requirements may come under the purview of international criminal law.

Till the period of Second World War there was nothing called international criminal law. Even though the Laws of Geneva 1874 came to regulate certain criminal activities internationally, it was part and parcel of general international law and not a separate branch of law. During those times only piracy, slavery and slave trade were considered crimes under international law. At the end of Second World War international military tribunals were established to punish the perpetrators of heinous crimes during the war. For the first time the tribunals have introduced the concept of individual criminal responsibility, distinct from the traditional understanding of state responsibility. The tribunals have also expanded the scope of international law by adding crime against peace, war crimes, and crime against humanity as serious crimes. In the meantime, with the adoption of Genocide Convention in 1948, genocide also added to the list of serious crimes.

The next stage of evolution came at the end of Cold War during 1990s that has witnessed the establishment of two important criminal tribunals, namely ICTY and ICTR, truly with international character under the authority of the UN Security Council. This has contributed for the evolution of international criminal law as a

specialised legal regime from public international law. However, the post millennium stage compels the system for an unprecedented change posing great challenges, like the regulation of over abuse of state power (i.e. torture or enforced disappearance), terrorism related activities, and transnational organised crime (i.e. money laundering, trafficking humans, drugs, or weapons, and cybercrimes). There is a major difference between conventional crimes and modern-day crimes: traditional crimes, other than piracy and slavery, always had a link with sovereign states; whereas the modern-day crimes are majorly carried out by individuals and non-state actors, excluding the state system. Thus, the ICL has to leap from conventional to transnational to cyber-world; and sovereign states shall cooperate for such a social transformation.

1. CONVENTIONAL PERCEPTIONS

The conventional understanding of core international crimes implies only five major conducts, namely genocide, war crimes, crimes against humanity, crime of aggression, and crime against peace. Though they were considered as serious crimes under international law, their enforcement relied on the authority of sovereign states alone. The military tribunals after First World War and Second World War were established not under the authority of the international community, rather under the agreement of the coalition of sovereign states. Same is true with the novel concept of private judicial bodies like the Russell tribunal as well, even that to failed to inspire the international community for prosecution and punishment of serious crimes. The traditional conception of international criminal law could briefly be analysed as under.

1.1. Core International Crimes

Until the end of the twentieth century only those conducts were considered core international crimes, if it had any link with the state system. The crimes that could be committed outside the state system were never part of the core crimes under international criminal law. For instance, piracy and slavery were considered as crimes under public international law, yet no treaties or convention recognise them as core international crimes. Even though Article 100 of the UNCLOS requires that '[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State', it does not declare piracy as a core international crime. Similarly, Article 99 of the UNCLOS declares that '[e]very State shall take effective measure to prevent and punish the transport of

slaves in ships authorised to fly its flag and to prevent the unlawful use of its flag for that purpose', but does not specifies slavery as a core international crime.

During colonial period privateering, piracy and slavery were practiced legally.[1] For instance, privateering and piracy was legally permitted by Queen Elizabeth of British Empire in their colonial territories and Elizabethan privateers were fighting and defeating the Spanish Armada in 1588.[2] The notable Elizabethan pirates or privateers divided their profits with Queen Elizabeth along with the government. The pirates of the Elizabethan England operated successfully around the Caribbean and the Spanish Main, who were also referred to as Buccaneers which was popularly known as Golden Age of Piracy (Anderson and Adam 1991: 99-104). Privateering was legally permitted by European colonial powers to destroy and capture the enemy ship to steal and drain the things/wealth of captured ship in war either such capture might be legal or illegal but were legally permitted and honoured.[3] It was only in the

[1] A privateer was a private person or ship that engaged in maritime warfare under a commission of war. The commission, also known as a letter of marque, empowered the person to carry on all forms of hostility permissible at sea by the usages of war (including attacking foreign vessels during wartime and taking them as prizes). Captured ships were subject to condemnation and sale under prize law, with the proceeds divided between the privateer sponsors, ship owners, captains and crew. A percentage share usually went to the issuer of the commission. Since robbery under arms was common to seaborne trade, all merchant ships were already armed. During war, naval resources were auxiliary to operations on land so privateering was a way of subsidizing state power by mobilizing armed ships and sailors (Thomson 1994: 310-315).

[2] Privateers at the beginning acted only on a commissioned licence authorizing to specific ships or groups of individuals to clutch the queen's or king's enemies at sea in return for ripping the proceeds. The commission or license recognized later under the Law of Nations (which is known as a *Letter of Marque and Reprisal*). Elizabeth was succeeded by the first Stuart monarchs – James I and Charles I – who did not permit the concept of privateering.

[3] The European powers legitimized their attack and such piracy became privateering; whatever wealth they steal from the ship considered as gift; and those who participated in the privateering equally shared with each other. For example, in *Paquete Habana case*, Two fishing boats (the *Paquete Habana* and t*he Lola*), were owned by Spanish citizens and they used to fish regularly in the coast of Havana, Cuba. Spain maintained control of Cuba until this control was challenged by the United States in the Spanish-American War of 1898. During the war, the United States created a blockade around Cuba. The owners of the fishing boats, however, had no knowledge of the war or the blockade. When they attempted to access the usual fishing port in Havana, the two ships were captured as prizes of war by the US and their cargo contained no arms or ammunition, but contained only fresh fish.

The ship owners brought suit against the US in federal district court, which held that the two fishing ships and their cargoes to be prizes of war but the ship owners appealed. The US supreme court cited after the lengthy legal precedents established to support the existence of a customary international law that exempted fishing vessels from prize capture. Dating all the way back in 1403, King Henry IV of England issued his officers to leave fisherman alone during times of war and he signed a treaty with France reaffirming this act between both parties. Again in 1521, Emperor Charles V and Francis I also assigned a treaty. Using this as a basis for customary law, the court then eventually found the capture of both vessels as 'unlawful and without probable cause'; reversed the decision of the district court and ordered that 'any profits made from her cargo to be restored to the claimant with damages and costs' (The *Paquete Habana* case 1900: 175 U.S. 677).

end of 17th and the beginning of 18th centuries the colonial powers like Britain considered piracy and slavery as illegal; and thus the concept of '*hostis humani generis*' came into exist for the preservation and development of humanity.

The first initiative taken by the Royal Navy of England in 1690 was against unauthorized pirates but not against authorized pirates of the governments. It was for the first time in 1856, through the Declaration of Paris, that Great Britain, France, Russia, Prussia, Austria, and Sardinia formally abolished privateering and piracy. But the United States refused to accede to the declaration because its navy was small in size and weak. Hence, it needed to encourage privateering and piracy that would help US navy in war time against the enemy states. During that time high seas were considered as no man's land and therefore, piracy took more on the high seas. At a later point of time, the global community adopted the legal maxim that *pirata est hostice humani generis* which means a pirate is an enemy of the human race.

Similarly, during 16th and 17th centuries the system of slavery was never considered illegal and it was legally practiced by almost all colonial powers. They treated slaves as cattle and utilized them for various purposes like construction works, sexual labours, house-keeping, and so on. Majorly, they were transported to Western Europe for the development of construction works to develop their cities. The Great Britain's great capital London built with the blood of British slaves (Emine Sinmaz 2011). The researchers found the massive number of skulls along the course of the river Walbrook, a watercourse which has been lost to time and history (Zen Gardner: 2011). This evidence shows that the great London might have been built by forced labours. In reality, most of the European cities as well as the cities of other colonial powers were all developed by forced labours of slaves from their colonies.[4] Slaves were supplied with legal documents either through exchange of islands or exchange of different slaves. It was only in the Treaty of Paris adopted in the Congress of Vienna 1814, the practice of slavery and slave trade was expressly condemned by European powers. Act No. XV to the Treaty of Paris deals with the Declaration of the Powers, on the Abolition of the Slave Trade and it provides that:

[4] Tribesmen were majorly imported from African and Asian continents; and they were severally affected by their masters. It was often stated that most of the cities of colonial powers were constructed by skulls of slaves not by bricks.

> Having taken into consideration that the commerce, known by the name of 'the Slave Trade', has been considered, by just and enlightened men of all ages, as repugnant to the principles of humanity and universal morality…[Thus] all civilized countries, calls aloud for its prompt suppression; [and wish to put] an end to a scourge, which has so long desolated Africa, degraded Europe, and afflicted humanity;

Yet no international treaties and conventions so far acknowledged either piracy or slavery as a core crime under international law. Under the traditional understanding core international crimes include: genocide, war crimes, crime against humanity, crime of aggression, and crime against peace.[5] Numerous treaties and conventions recognise such crimes as serious crimes. The reason could be that all such crimes have strong territorial nexus with state system, without which a crime do not form part of core crimes under international criminal law. For instance, under Article 1 of the Genocide Convention, 1948 '[t]he Contracting Parties confirm that *genocide*, whether committed in time of peace or in time of war, *is a crime under international law* which they undertake to prevent and to punish' (emphasis added). Further, under Article 2 it is defined that 'genocide means any…acts committed with intent to destroy, in whole or in part, a *national, ethnical, racial or religious group*' (emphasis added). Article 1 declares genocide as a crime under international law and Article 2 provides the reason for such a declaration i.e. the crime of genocide has territorial nexus with the state system like national, ethnical, racial or religious group.

With regard to war crimes, many treaties and conventions—including the Charters of the Nuremberg and Tokyo tribunals; Statute of the ICTY and ICTR; Rome Statute of the ICC—recognise the conduct as a serious crime under international law. Article 6 of the Charter of the International Military Tribunal, Nuremberg defines war crime as violations of the laws and customs of war;[6] which means the war crimes un-

[5] For instance, Article 5 of the Rome Statute declares that '[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression'. Similarly, Article 6 of the Charter of the Nuremberg Tribunal provides that '[t]he Tribunal is established to try and punish the (a) crimes against peace; (b) war crimes; and (c) crimes against humanity'. Similar listing of crimes could also be found under Article 5 of the Charter of the Tokyo Tribunal.

[6] Article 6(6) of the Charter extended the jurisdiction of the Nuremberg Tribunal to war crimes (namely, violations of the laws and customs of war). Such violation shall include: murder, ill-treatment, deportation to slave labour or for any other purpose of civilian population; murder or ill-treatment of

der Articles 46, 50, 52 and 56 of the Hague Convention 1929 automatically forms part of the Nuremberg Charter. Similarly, Article 5(b) of the Charter of the Military Tribunal for the Far East, Tokyo contains a similar provision with regard to war crimes.

The Concept 'war crimes' is evidenced even from the treaty of Versailles as well as Westphalian Treaties. For the first time, St. Petersburg Declaration 1868 took an initiative for the permissible means and methods of warfare. 1899 and 1907 the two Hague Peace Conferences brought-out certain regulations on methods of warfare for the protection of succeeding generations.[7] After the First World War the League of Nations tried its best to find a solution without any much success. A proper codification of international humanitarian law occurred only at the adoption of four Geneva Conventions in 1949.[8] Those rules were not to define war crimes but to avoid brutal warfare. Article 8 of the Rome Statute of the ICC defines 'war crimes' means '[g]rave breaches of the Geneva Conventions of 12 August 1949'. Article 2 of the Geneva Convention 1948 provides that 'the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties'. The combined reading of Article 8 of the Rome Statute and Article 2 of the Geneva Convention clearly establishes the fact that war crime has a strong territorial nexus with state system, and hence it has become part of the core crimes under international criminal law.

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prisoners of war or person on the sea; killing hostages; plunder of public or private property; wanton destruction of cities, towns, or villages; or devastation not justified by military necessity. The subsequent international instruments like Statute of the ICTY, the Statute of the ICTR and the Rome Statute of the ICC (under Article 8 (20)(a)) have also restructured and expanded these provisions; which represents a compilation or compendium of the grave breaches provisions (Oluwatoyin, Babatunde Issac and Abegunde Babalola LUWATOYIN 67-68: 2014).

[7] The Hague Laws were expanded by the Gas Protocol 1925, the Convention for the Protection of Cultural Property in the Event of an Armed Conflict 1954, the Convention on the Prohibition of the Development, Prohibition, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction 1972, the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may Deemed to be Excessively Injurious to have Indiscriminate Effects 1980, and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction 1993.

[8] The Geneva Laws were established by four Geneva Conventions 1949 and two additional protocols 1977, namely: Geneva Convention I (GC I) – Protects the Sick and Wounded in Armed Forces at Land in Wartime, Geneva Convention II (GC II) – Protects the Sick and Wounded in Warfare at Sea, Geneva Convention III (GC III) –Status and Protection of Prisoners of War, Geneva Convention IV (GC IV) – Protection of Civilians in Wartime. Similarly, Additional Protocol I (AP I) – contains additional rules for the Protection of Persons in International Armed Conflict, and Additional Protocol II (AP II) – regulations for the Protection of Non-International Armed Conflicts.

Similar to war crimes, many treaties and conventions recognise the crime against humanity as a serious crime under international criminal law. Crime against humanity is nothing but the acts are deliberate and systematic attack against any civilian or identifiable part of civilian population. The Turkey massacre of innocent Armenian in 1915 could be considered as the first major crime against humanity, but it was consider as genocide during that time.[9] For the first time the proceedings took place against the crimes against humanity at the Nuremberg tribunal under article 6(c) of the Nuremberg Charter.[10] Later, various courts and tribunals, including the ICC, adopted the crime as part of core crime under international law. Article 6 of the Charter of the International Military Tribunal, Nuremberg defines 'crimes against humanity' means and includes 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any *civilian population, before or during the war*; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal' (emphasis added). The words 'civilian population' and 'before or during war' clearly establishes the territorial nexus with the state system.

The sexual crimes like the act of rape was not recognised as a crime against humanity in Nuremberg tribunal because of its confusion that such crime occurs both in time of war as well as peace. But it is regarded as a crime against humanity under Article 7(1)(g) of the Rome Statute. This particular clause includes 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity'. Here, the sexual slavery appears to overlay with the stand-alone crime against humanity of 'enslavement' (Schabas 2011: 114-116). Even the term 'forced pregnancy' also included in the Rome Statute, since it is

[9] The Armenian genocide was treated as crimes against humanity but the criminals have never been prosecuted in any international or domestic criminal forums. Even the London Charter ignores Armenian genocide and prosecutes mainly the Nazi Criminals (who involved in the WW II). The Allied Powers or the international community ignored or neglected the Armenian victims for the massacre of Ottoman Empire.

[10] Article 6(c) of the Charter of the Nuremburg Tribunal talks about Crimes Against Humanity. This clause mentions certain categories of crimes under crimes against humanity, namely: murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population (before or during the war); or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal (whether or not in violation of the domestic law of the country where perpetrated).

both physical as well as mental torture.[11] In *Kunarac* issue the ICTY Appeal Chamber said that sexual violence essentially provides severe pain or suffering, whether it may be physical or mental in addition to that it was not essential to grant visual indication of suffering by the victim which could be expected (*Kunarac et al*.2002: 150).[12]

The crime of aggression and crime against peace do not require a deep analysis, since they do not have much attention of the international community. However, before and after the Second World War period the concept of 'crimes against peace' was widely popular and it was treated as a serious international crime along with other heinous crimes. Nuremberg and Tokyo tribunals claimed jurisdiction to prosecute and punish the authors of crimes against peace.[13] The Nuremberg tribunal acknowledged in its verdict that the 'invasion of Austria was premediated, aggressive step in furthering the plan to wage aggressive war against other countries' (Opinion and Judgment, Washington, 1947: 21).

1.2. International Military Tribunals

The crimes like genocide, war crimes, crimes against humanity, crime of aggression and crime against peace, have been considered as serious crimes under international criminal law. However, until the end of cold war the prosecution and punishment of such crimes were solely relied on the authority of domestic courts or interstate tribunals. The international community had very less role to play in the prevention and

[11] Article 7(1)(g) of the Rome Statute mentioned that the crime of forced pregnancy is also be a part of crimes against humanity. 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. The definition was legally agreed by the drafters as well as the member of the ICC Rome Conference but this definition will not affect the domestic laws in related with pregnancy.

[12] *Kunarac et al*. (IT-96-23 and IT-96-23/1-A), Judgment of 12 June 2002, para 150.

[13] Article 6 and 5 of the Nuremberg and Tokyo Charters respectively discuss about the Jurisdiction over Persons and Offences. In which, Article 6 of the Nuremberg and Article 5 of the Tokyo Charters are more or less similar; Article 6 of the Charter of the Nuremberg already discussed in a greater detail. Here, Article 5 of the Tokyo Charter provides that the tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offences (including crimes against peace). The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: crimes against peace; the planning, preparation, initiation or waging of a declared or undeclared war of aggression; or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing. The Nuremberg and Tokyo Trials was another step towards international criminal justice. Some of the nations (like Germany and Japan) revealed that these criminal forums and the universal organizations (especially UN) come out of victor's justice of the four Allied Nations. Because of the four allied nations' initiative and influence over such trials, the accusing states and the perpetrators gets doubt about its impartiality.

punishment of such crimes. Many scholars view the establishment of international military tribunals after the end of Second World War as an act of the international community and such tribunals held the status of international tribunal. However, they were merely inter-state tribunals established under the authority of the coalition of Allied powers to prosecute and punish the criminals of Axis powers. The Military Tribunals of WW I or WW II were neither established under the authority of the international community nor exercised an impartial jurisdiction over the perpetrators of serious crimes during War.

The Treaty of Versailles, 1919 is an important multilateral treaty between Germany and the Allied powers that put an end to the First World War; established the League of Nations; and established military tribunals for prosecution and punishment of the perpetrators of serious crimes during war. Some of these were inter-state tribunals and others were domestic. Article 229 of the Treaty provides that '[p]ersons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power'. The provision clearly indicates that the perpetrators of criminal acts during First World War were prosecuted and punished under the authority of domestic courts and not under the authority of the international community.

As part of its commitments under the Treaty of Versailles, 1919 Germany conducted series of Leipzig War Crimes Trials in 1921 to try the alleged German war criminals, during First World War, before the *Reichsgericht* (supreme court of Germany) in Leipzig. However, the trials were seen only as a travesty of justice because of the small number of cases being tried and the leniency of the court towards the perpetrators of serious crimes. Further, Article 229 continues that '[p]ersons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned'. Even such military tribunals were only of inter-state tribunals and did not have the status of an international criminal tribunal.

The post-Second World War scenario has witnessed the establishment of the United Nations in 1945 'to save succeeding generations from the scourge of war'. Similarly, two international military tribunals were established—namely, International Military Tribunal, Nuremberg and International Criminal Tribunal for Far East, Tokyo—to bring war criminals to justice. These tribunals were primarily inter-state tribunals established under the authority of the coalition of Allied powers, specifically

to punish the war criminals of Axis powers and not vice versa. The tribunals shall not be confused as international tribunal having impartial jurisdiction over all perpetrators of serious crimes during war. Article 1 of the Charter of the International Military Tribunal, Nuremberg provides that:

> In pursuance of the Agreement signed on the 8th August, 1945, by the *Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics,* there shall be established an International Military Tribunal (hereinafter called 'the Tribunal') for the just and prompt *trial and punishment of the major war criminals of the European Axis* (emphasis added).

The provision clearly indicates that the Nuremberg tribunal is only an interstate tribunal established under the coalition agreement of four states, namely UK, USA, France and Russia; and it is not an international criminal tribunal. This proves that during that period states had the conventional perception that serious crimes under international law shall be prosecuted only under the domestic authority of sovereign states. Similarly, the words '*trial and punishment of the major war criminals of the European Axis*' clearly explains that the tribunal is the product of the victorious against the defeated. It had no impartial universal jurisdiction against all perpetrators of serious crimes during War; and hence, it cannot claim to be an international criminal tribunal.

Similarly, the Special Proclamation of the Supreme Commander for the Allied Powers at Tokyo declares that 'the United States and the Nations allied therewith in opposing the illegal wars of *aggression of the Axis Nations,* have from time to time made declarations of their intentions that war criminal should be brought to justice' (emphasis added). Further, Article 5 of the Charter of the International Military Tribunal for the Far East, Tokyo provides that '[t]he Tribunal shall have the power to *try and punish Far Eastern war criminals* who as individuals or as members of organisations are charged with offenses which include Crime against Peace' (emphasis added). The provisions clearly indicate the partial nature of the tribunal's jurisdiction that it only try and punish the perpetrators from Far East and has no authority to try and punish the perpetrators of Allied powers.

Whether the Allied powers did not commit any serious atrocities against German and Japan during the Second World War is an important question to be asked for. The USA bombing of Hiroshima and Nagasaki of Japan during war is the worst form of

war crimes committed ever. Similarly, the inhuman atrocities of the Allied powers in the Battle of Berlin and its aftermath have witnessed nearly ten lakh civilian deaths and that will certainly fall under the categories of war crimes and crimes against humanity. But the so called International Military Tribunals did not had jurisdiction to try not even one soldier of the Allied powers to be called as international crimes tribunal in the interest of justice.

1.3. Russell Tribunals / Private Tribunals

Russell tribunal is a private judicial body to perform the role as an international crimes tribunal to investigate and adjudge war crimes in accordance with international law, which is not prosecuted or punished by any state or international tribunals on account of power, politics or other reasons. It has no legal status but acts as a court of the people faced with injustices and violations of international law, that are continued with complete impunity due to the lack of political will of the international community. The idea of establishing such a tribunal was proposed by the British philosopher and Nobel laureate Lord Bertrand Russell and supported by eminent intellectuals such Jean-Paul Sartre and Lelio Basso. The first of such international war crimes tribunal was constituted in 1966 to investigate the crimes committed by American forces in Vietnam and judge them according to international law. In his address to the first meeting of Members of the Vietnam War Crimes Tribunal, on 13 November 1966, Lord Russell explains the nature of the tribunal as follows:

> The Tribunal has no clear historical precedent. The Nuremberg Tribunal, although concerned with designated war crimes, was possible because the victorious allied Powers compelled the vanquished to present their leaders for trial. Inevitably, the Nuremberg trials, supported as they were by state power, contained a strong element of *realpolitik*…[However], we do not represent any state power, nor can we compel the policy makers responsible for crimes against the people of Vietnam to stand accused before us. We lack *force majeure*…[Despite that], we must record the truth in Vietnam. We must pass judgment on what we find to be the truth. We must warn of the consequences of this truth…[At the least], may this Tribunal prevent the crime of silence (Russell 1966: 48-50).

The idea of establishing such a tribunal was based upon a speech of justice Robert H. Jackson, made as the Chief Prosecutor of Nuremberg war crimes trials that '[i]f certain acts and violations of treaties are crimes, they are crimes whether the United

States does them or whether Germany does them. We are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us' (Russell 1967: 125). Judges of the tribunal are appointed from eminent intellectual around the world. The legitimacy of the Russell tribunal does not come from sovereign authority of states, government or any political community; rather, from the prestige and professional interests of its members and their commitment to fundamental rights.

Later, similar tribunals have been established in many situations to provide a sense of justice to the neglected victims. For instance, the Russell tribunal on Latin America was established in 1973 to investigate the human rights violations during dictatorship and military coup in Argentina, Brazil and Chile; Human Rights in Psychiatry was established in 2001 in Berlin; Russell tribunal on Iraq in 2001; Russell tribunal on Palestine in 2009; and Russell tribunal on East Ukraine War in 2014. The evolution of private international war crimes tribunals is an important milestone in the evolutionary process of international criminal law. However, though it is a private judicial body, it still concerned about the same state centric crimes like genocide, war crimes, and crimes against humanity. So far no Russell tribunals have been established to deal with any new-found crimes like, terrorism, torture or transnational organised crimes. The restriction may be because of the fundamental object for which Russell tribunal came into exist i.e. to investigate only those crimes which are not dealt with by any existing international jurisdictions. Nevertheless, the possibility of future tribunals dealing with such crimes cannot be rule out.

2. INSTITUTIONAL GROWTH AND EXPANSION

It was only after the end of cold war the international community played an active role in the establishment of international criminal tribunals. After the formation of criminal tribunals on Yugoslavia and Rwanda situations, international criminal law for the first time had exercised jurisdiction under the authority of international community; but only restricted to specific situations. However, after the establishment of International Criminal Court by the end of twentieth century, the jurisdictional ambit of the ICL gradually extended to the entire globe. From the beginning of twenty-first century, the scope of ICL started influencing even the domestic legal systems through the establishment of hybrid criminal tribunals. Some of these developments could briefly be analysed as under.

2.1. International Criminal Tribunals

After the end of German occupation during Second World War and followed by a bitter civil war, a federation of six Balkan Republics—including, Serbs, Croats, Bosnian Muslims, Albanians, Slovenes and others—were brought together under a communist regime as a single state of Yugoslavia. Under the leadership of president Tito ethnic tension between these groups were successfully suppressed; but after the Tito's death in 1980 ethnic tensions re-emerged and that lead to the 1990s breakup of former Yugoslavia into six new states, namely Croatia, Serbia, Slovenia, Macedonia, Bosnia-Hercegovina, and Kosovo. However, the break up was not at all peaceful and the ethnic conflict had witnessed more than lakh civilians dead; international peace efforts through UN peacekeeping missions had failed; numerous war crimes and crimes against humanity were perpetrated during the civil war. Consequently, the UN Security through Resolution 808 of 1993 decided that 'an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991'.

This was the first international criminal tribunal, in true sense, under the authority of the international community. For instance, Preamble to the Statute of the International Criminal Tribunal for the former Yugoslavia declares that the tribunal is being 'established by the Security Council acting under Chapter VII of the Charter of the United Nations'. The tribunal has jurisdiction over the crimes like: grave breaches of the Geneva Conventions 1949 (Art. 2); violations of the laws or customs of war (Art. 3); genocide (Art. 4); and crimes against humanity (Art. 5). However, the only limitation is that the jurisdiction of the tribunal extends only to the specific situation of former Yugoslavia since 1991. Article 1 of the Statute makes it clear that '[t]he International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed *in the territory of the former Yugoslavia since 1991* in accordance with the provisions of the present Statute' (emphasis added).

After the ethnic conflict of Yugoslavia in 1991 the world has witnessed another worst and most horrifying ethnic conflict of Rwanda in 1994. In just hundred days of conflict nearly eight lakh people were slaughtered. About eighty-five percentages of Rwandans are Hutus but the country was long dominated and ruled by the Tutsi minority. In 1959, the majority Hutus overthrew the minority Tutsi monarchy, which led

to the thousands of Tutsis fleeing to the neighbouring countries. The Tutsi exiles formed the Rwandan Patriotic Front (RPF) and invaded the country in 1990 and the fight continued till the 1993 peace deal. On 6th April 1994, a plane carrying the then President Juvenal Habyarimana was shot down killing everyone on board. This escalated the worst ethnic conflict in the human history. The international peace efforts through United Nations Peacekeeping missions failed; and genocide and other serious violations of international humanitarian law were carried out with full liberty by majority Hutus against minority Tutsis.

Consequently, the UN Security Council through its Resolution 955 of 1994 decided 'to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda'. Like the ICTY, the tribunal was also established under the authority of the United Nations. Preamble to the Statute of the International Criminal Tribunal for Rwanda provides that the tribunal is being 'established by the Security Council acting under Chapter VII of the Charter of the United Nations'. The tribunal was conferred with jurisdictions over the crimes of genocide (Art. 2), crimes against humanity (Art. 3), and violation of common Article 3 to the Geneva Conventions and of Additional Protocol-II (Art. 4). It was also an incident-specific tribunal and had jurisdictional restrictions. For instance, Article 1 of the Statute provides that '[t]he International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed *in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states*, between 1 January 1994 and 31 December 1994' (emphasis added).

The international criminal tribunals for former Yugoslavia and Rwanda are completely different from the post-Second World War military tribunals in Nuremberg and Tokyo. The post-war military tribunals had the source of authority from the domestic sovereign authority of Allied powers solely to punish the perpetrators of Axis powers. The military tribunals were not free to investigate the war situation to find the perpetrator of serious crimes; rather, its authority was restricted to try only those alleged offenders presented before the tribunal for trial. It was more or less an institution to administer 'victor's justice' after war and nothing more. The only contribution towards the development of international criminal law was the enforcement of individual criminal responsibility, distinct from state responsibility, under international

law. Whereas, the ICTY and ICTR were established under the authority of the United Nations to prosecute any person responsible for serious violations of international humanitarian law, regardless of his/her allegiance. The tribunals had complete jurisdiction over the situations referred. Consequently, the tribunals have created history by lifting the enforcement jurisdiction of international criminal law from domestic authority of states to the authority of the international community.

The year 2000 has witnessed establishment of Women's International War Crimes Tribunal on Japan's Military Sexual Slavery. This was an initiative by voluntary organisations from the offending country Japan and from the countries where people were victimized, such as South Korea, North Korea, China, Taiwan, the Philippines, Indonesia, Malaysia and others. Article 2 of the Statute of the Tribunal deal with jurisdictional authority and provides that '[t]he Tribunal shall have jurisdiction over crimes committed against women as war crimes, crimes against humanity and other crimes under international law…by Japan before and during the Second World War. These crimes include, but are not limited to the following acts: sexual slavery, rape and other forms of sexual violence, enslavement, torture, deportation, persecution, murder, and extermination'. Like the Russell tribunals, it is an important major initiative for gender justice under international criminal law.

2.2. International Criminal Court

The idea of establishing an international tribunal to prosecute the political leaders accused of international crimes during First World War was proposed in the Paris Peace Conference of 1919. Accordingly the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties was established to investigate and recommend the perpetrators of serious crimes for prosecution. The Commission proposed an international tribunal for war crimes, but on account of non-cooperation from German Government the idea could not be materialised. Similar idea was emerged once again after the Second World War, but the Allied powers could establish only coalition courts in Nuremberg and Tokyo. Finally, at the end of Cold War in 1989 the Prime Minister of Trinidad and Tobago ANR Robinson resuscitated the idea of permanent international criminal court to deal with drug trafficking. Following the proposal, the General Assembly through its Resolution 47/33 of 1992 requested 'the International Law Commission to continue its work on…a draft statute for an international criminal court as a matter of priority as from its next session'. The ILC present-

ed its final draft to the General Assembly in 1994; the General Assembly convened a conference in Rome in 1998; and the Rome Statute of the International Criminal Court was adopted in 1998. The court has jurisdiction over 124 member states who are parties to the Rome Statute. However, India is not a party to the Statute of the ICC and the same is true with the United States as well.

The permanent International Criminal Court was established in 2002 in accordance with the Rome statute. The court has jurisdiction only with regard to those states who are parties to the Statute. The non-state parties may confer jurisdiction upon the court through a specific declaration with the registrar of the court. Article 12(2) read with Article 12(3) of the Statute provides that:

> the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court [by declaration lodged with the Registrar]: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national.

The provision is in compliance with the principle of *pacta tertiis nec nocent nec prosunt*, which means a treaty binds only the parties and not others. Even Article 34 of the Vienna Convention on the Law of Treaties, 1969 recognise the principle that '[a] treaty does not create either obligations or rights for a third State without its consent'. So far the ICC has dealt with ten situations, such as: civil war in Central African Republic in 2002; civil war in Central African Republic in 2012; Darfur situation of Sudan in 2002; post-election violence in Côte d'Ivoire in 2010/2011; armed conflict in the Democratic Republic of Congo in 2002; international armed conflict in Georgia in 2008; post-election violence in Kenya in 2007/2008; situation in Libya since 15 February 2011; war crimes committed in the Republic of Mali in 2012; and civil war in Uganda since 2002.

Out of these ten countries two are neither parties to the Rome Statute of the ICC nor made any declaration under Article 12(3) of the Statute, namely, Sudan and Libya. Nevertheless, the court exercised its jurisdiction based on the referral made by the UN Security Council. The Darfur situation of Sudan was referred to the ICC by the UN Security Council through its Resolution 1593 of 2005 declaring that 'the situation in Sudan continues to constitute a threat to international peace and security'. Similarly, the Libyan situation was also referred to the ICC by the UN Security Council

through its Resolution 1970 of 2011 declaring that '[a]cting under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41…*decides* to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court' (emphasis original).

Article 13 of the Statute provides that the court may exercise jurisdiction over a crime when it is referred to the prosecutor by a state party; or referred to the prosecutor by the Security Council under Chapter VII of the United Nations; or the Prosecutor has initiated the investigation *proprio moto* in accordance with Article 15.[14] The authority of the UN Security Council under Chapter VII clearly indicates that the court has elaborate jurisdiction and might exercise its authority over any situation referred to it. However, the reference must fall under Article 5 of the Statute that lists out the punishable crimes before the court, such as: the crime of genocide, crime against humanity, war crimes, and the crime of aggression.[15] This is an important step forward for international criminal law on the ground that there is a possibility for the court to exercise jurisdiction over entire globe. Another milestone in this regard is that sovereign immunity of a person will not bar the court from exercising its jurisdiction. Article 27 of the Rome Statute provides that:

> 1. This Statute *shall apply equally to all persons without 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 of itself, 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 (emphasis added).

[14] Section 13 of the Rome Statute provides that '[t]he Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

[15] Article 5 of the Rome Statue provides that '[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression'.

The Pre-Trial Chamber of the International Criminal Court issued an international arrest warrant against the serving President of the Republic of Sudan, Omar Al Bashir based on the above provision. It was severely criticised by many states and scholars on the ground of functional immunity. When Bashir visited Malawi and Chad, both are parties to the Rome Statute, they refused arrest and surrender the person in accordance with the arrest warrant issued by the ICC. The countries defended their position under Article 98 of the Statute that '[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity'. Despite that the court proceeded against the countries for non-cooperation under Article 87(7) of the Statute.[16] In the *Malawi Decision* the Pre-Trial Chamber held that:

> Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply (*Malawi Decision* 2011: para. 43).

However, many scholars have criticised the court for its anti-African bias. Most of the convictions of the ICC so far are against the African leaders, like Lubanga and Katanga of Democratic Republic of Congo, or Bemba of Central African Republic. Most of its international arrest warrants have been issued against African leaders. Even though international criminal court issued arrest warrants against the Sudan President Al-Bahir[17] and Libyan President Mummer Gaddafi, so far no warrants have been issued

[16] Article 87(7) of the Rome Statute of the ICC provides that: '[w]here a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council'.

[17] The Pre-Trial Chamber based its removal of customary immunities on four considerations: (i). One of the core goals of the Statute is to 'end impunity for the perpetrators of the most serious crimes of concern to the international community'; (ii). That the Statute provides that it will be 'applicable to all persons without distinction based on official capacity' and that 'capacity as head of State or government shall in no case exempt a person from criminal responsibility'; (iii). That other sources of law (such as the customary law of head of state immunity) can only be resorted to when there is an irresolvable lacuna in the applicable rules of the Statute; and (iv). That when referring the situation to the

against George W. Bush for his unauthorised war in Iraq and Afghanistan and consequent war crimes.

In November 2015, the ICC's Assembly of State Parties responded to Kenya's calls for an exemption for sitting heads of state by agreeing to consider amendments to the Rome Statute to address the concerns (Judie Kaberia 2013). On 7th October 2016, Burundi announced that it would leave the ICC, after the court began investigating political violence in that nation. In the next two weeks, South Africa and Gambia also announced their intention to leave the court, with Kenya and Namibia also reportedly considering departure. All three nations cited the fact that all 39 people indicted by the court over its history have been African and that the court has made no effort to investigate war crimes tied to the 2003 invasion of Iraq (Jane 2016; Ofeibea 2016).

Similarly, the court remains silent with regard to Sri Lankan President Mahinda Rajapaksa, Lieutenant Colonel Nandasena Gotabaya Rajapaksa and other higher officials, despite proven evidences of genocide, war crimes, and crimes against humanity during Sri Lankan civil war. Though law is equal for all, it is not applicable to all equally in practice. Such failures of ICC might challenge the positive expansion of international criminal law towards ensuring global justice in the interest of the international community. The International community, International Criminal Court, and its Prosecutor shall always remember the words of Kofi Annan with regard to the object behind the establishment of the court that:

> In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you to do yours in our struggle to ensure that no ruler, no state, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they too have rights, and that those who violate those rights will be punished (Annan 1998).

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court, the Security Council accepted that investigations and prosecutions will take place in accordance with the Statute (*Prosecutor v/s. Omar al-Bashir* (Case No. Icc- 02/05-01/09, 4 March, 2009, paras. 42-45). Further, the conclusion that Omar al-Bashir's head of state immunity could not apply before the court, the Pre-Trial Chamber considered and applied the explicit prohibition of immunities that appears in Article 27(2) of the Rome Statute.

2.3. Hybrid Crimes Tribunals

Hybrid crimes tribunals are neither international nor domestic; rather a mixture of both, deriving authority from the international community in addition to the authority of the state concerned. Such tribunals apply a mix of national and international law with regard to substantial as well as procedural issues. There is no uniform static feature to establish a hybrid tribunal; preferably, it is flexible to the needs and requirements of individual states and situations. For instance, the Special Tribunal for Lebanon was established with international character having its seat at The Hague; but applies the Lebanese criminal law for trial guided by the Lebanese Code of Criminal Procedure and the standards of international criminal procedure. To the contrary, the International Crimes Tribunal for Bangladesh was established as a domestic war crimes tribunal to try the crimes under international law.

The idea of establishing hybrid war crimes tribunal came for the first time in 1997 when the Co-Prime Ministers of Cambodia wrote a letter to the Secretary-General of the United Nations for assistance in trial proceedings to try the perpetrators of genocide and other serious crimes committed during the Khmer Rouge regime from 1975 to 1979. Accordingly, an agreement was entered into between the Royal Government of Cambodia and the United Nations. Consequently, the UN General Assembly through its Resolution 57/228 of 2003 recognised the Extraordinary Chambers in the Courts of Cambodia (ECCC). The tribunal is also known as Cambodia tribunal or Khmer Rouge tribunal. The composition of the Chamber includes both international as well as Cambodian judges; and the tribunal exercises jurisdiction over the violations of the Penal Code of Cambodia, Genocide Convention 1948, Geneva Conventions 1949, Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Vienna Convention on Diplomatic Relations, and other violations of international humanitarian law. Thus, the applicable law is both domestic criminal law as well as international criminal law.

Similarly, in the year 2000 the President Ahmad Tejan Kabbah of Sierra Leone wrote a letter to the Secretary-General of the United Nations requesting the international community to try those responsible for serious crimes during civil war in 1996. Accordingly, an agreement was signed between the government of Sierra Leone and the United Nations establishing the Special Court for Sierra Leone (SCSL) in 2002. The tribunal had jurisdiction over the violations of domestic as well as international

criminal law. Gradually, international criminal law occupied the domain of domestic courts as well.

For instance, following the invasion of Iraq in 2003 a special court, namely Iraqi High Tribunal (IHT), was established to try the serious crimes committed by the previous Saddam Hussein regime from 1968 to 2003. The Special Tribunal was created as a domestic court under a domestic legislation to deal with crimes both under domestic and international criminal law. International Crimes Tribunal for Bangladesh is another example for an international crimes tribunal established purely under the domestic authority. The tribunal was established under the domestic legislations, International Crimes (Tribunals) Act of 1973, to investigate and prosecute the perpetrators of genocide and other serious war crimes committed during Bangladesh Liberation War in 1971. The tribunal applies both domestic and international criminal law with regard to substantial and procedural issues.

The United Nations Mission in Kosovo (UNMIK) took an extraordinary innovative step in 2000 by appointing an international judge and an international prosecutor to the Mitrovica district court and followed by the appointment of an international judge to serve on Kosovo supreme court. This was part of an effort to establish rule of law and mechanism of accountability after the war in Kosovo and emerging civil disorder. This program is popularly known as International Judges and Prosecutors Program in Kosovo (IJPP or Regulation 64 Panels). Similarly, Special Panels for Serious Crimes in Timor Leste (SPSC) or the East Timor Tribunal was a hybrid war crimes tribunal established in 2000 by the United Nations Administration in East Timor (UNTAET), to prosecute the perpetrators of serious crimes that took place in 1999. The tribunal was established within the district court in Dili as panels of judges with exclusive jurisdiction to deal with serious criminal offences. The tribunal was conferred with ‘universal jurisdiction’ to try criminal offences irrespective of whether committed within the territory of East Timor; or committed by an East Timorese citizen; or the victims are East Timorese citizen during the period between 1 January 1999 and 25 October 1999.

The War Crimes Chamber of the Court of Bosnia and Herzegovina (WCC) is another example of national efforts for establishing war crimes chambers within domestic courts to deal with serious violations of domestic and international criminal law during the ethnic conflict from 1992 to 1995. The Chamber began its work in 2005 with national judges and international judges serving together, but envisaged gradual-

ly to phase out international judges. This was another innovative approach where the tribunal begins its work as an international tribunal with domestic characters but gradually become a national court. The Extraordinary African Chambers (CAE) is the most recent development in the hybrid tribunals to exercise the jurisdiction under international criminal. The tribunal was established under an agreement between the African Union and Senegal in 2013 to try the serious international crimes committed in Chad during Chadian President Hissene Habre regime from 1982 to 1990.

The major contribution of hybrid tribunals for the expansion of growth of international criminal law is that its principles are directly applied in the domestic jurisdiction of states without undergoing any formal incorporation process. Generally, the application of international law in domestic sphere is possible only through the ratification process i.e. either through adoption of a domestic legislation incorporating international law or through higher judiciary incorporating the principles of international in its judicial pronouncements. However, the hybrid tribunals and more specifically, the Iraqi High Tribunal, International Crimes Tribunal for Bangladesh, International Judges and Prosecutors Program in Kosovo, Special Panels for Serious Crimes in Timor Leste, War Crimes Chamber for Bosnia and Herzegovina, and the Extraordinary African Chambers in Senegal, facilitates international criminal law to be applicable directly before domestic courts to try the nationals of a state within the territorial jurisdiction of the state concerned.

3. HORIZONTAL DIVERSIFICATION

Apart from institutional diversification and territorial expansion, the international criminal law simultaneously spreads across newer subject areas—like torture, enforced disappearance, terrorism, and transnational organised crimes—that were traditionally within the exclusive jurisdiction of domestic courts and tribunals. A crime is considered as serious under international law when it is grave and shatters the commonly shared human values of the international community. However, a crime to fall under the jurisdiction of international criminal law it has fulfil the requirements of structural principles as discussed under Chapter III of this study. There are certain newer crimes—like torture, enforced disappearance, terrorism and transnational organised crimes—that fulfil both the threshold to be considered as crime under international criminal law.

3.1. Torture and Enforced Disappearance

There is unanimity of opinion among states that torturing or inhumanly treating a person is a grave crime under international law. Preamble of the UN Charter declares that the organisation 'reaffirm[s] faith in fundamental human rights, in the *dignity and worth of the human person*, in the equal rights of men and women' (emphasis added). It clearly indicates that the international community hereby acknowledges that protecting 'the 'dignity and worth of the human person' is an essential prerequisite 'to save succeeding generation from the scourge of war''. In recognition of this inherent right of human person the UN General Assembly through its resolution 3452 of 1975 adopted the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In 1984 the United Nations have also adopted the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[18] Article 1 of the Convention defines:

> 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions (emphasis added).

The Convention seeks to cover only the conducts of public officials or any person acting in official capacity with regard to torture. It is primarily guidance for sovereign states to adopt domestic legislations preventing torture within their territory; rather than to declare 'torture' as a crime under international law. However, torture is already being recognised as serious crime under international law through the Charter

[18] The Convention was drafted on 10th December 1984 which was signed by the sovereign states on 4th February 1985 and came into force on 26th June 1987. India signed this treaty on 14th October 1997 but till now it is neither accessed nor ratified. At present, around sixty countries ratified this treaty.

of the International Military Tribunals in Nuremberg and Tokyo, Statute of the ICTR and ICTY and the Rome Statute of the International Criminal Court.[19]

Though torture is not a standalone crime under international criminal law, it is recognised as part of crime against humanity. Article 7(2)(e) read with Article 7(1)(e) of the Rome Statute defines that 'torture means the intentional infliction of server pain or suffering, whether physical or mental upon a person in the custody or under the control of the accused' but only 'when committed as part of widespread or systematic attack directed against any civilian population, with knowledge of the attack'. However, the provision indicates two important limitations: (i) the torture should have been committed as part of widespread or systematic attack and it negates any individual incidents of torture; and (ii) the provision applies only to those tortures that occurs during armed conflict and not those occurs during peace time.

When torture is declared as a standalone crime it would cover both the situations of war and peace. Otherwise, the jurisdiction of the international criminal tribunals will be incapable of penetrating the mysterious lands like Guantanamo Bay. The prohibition against torture meets the international standard to be declared as serious international crime and various judicial opinions considers it as part of customary norms of international law. In *Prosecutor v. Delalic* and others the Trial Chamber of the ICTY declared that 'the prohibition on torture is a norm of customary law. It further constitutes a norm of jus cogens' (footnote omitted; *Prosecutor v. Delalic* 1998: para. 454). Similarly, in *Prosecutor v. Furundzija* the Trial Chamber of the ICTY gave an important opinion that:

> [T]reaty and customary rules on torture acquiring a particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination (*Prosecutor v. Furundzija* 1998: para. 147)

Further, the Trial Chamber in *Prosecutory v. Kuranrac* held that '[t]orture is prohibited under both conventional and customary international law and it is prohibited both in times of peace and during an armed conflict. The prohibition can be said to consti-

[19] Article 6 of the Charter of the Nuremberg tribunal, Article 5 of the Charter of the Tokyo tribunal, Article 5 of the Statute of the ICTY, Article 3 of the Statute of the ICTR, and Article 7 and 8 of the Rome Statute of the ICC, recognise torture as a crime against humanity.

tute a norm of *jus cogens*' (footnotes omitted; *Prosecutory v. Kuranrac* 2001: para. 466). The above judicial opinions clearly indicate the normative standard of the prohibition of torture under international law. Accordingly, it is time for international criminal law to expand its scope to include torture as a serious standalone crime, distinct from crime against humanity, during peace as well as war.

Enforced Disappearance

Enforced disappearance is another crime that has reached the standard to be considered as serious crime under international criminal law. Enforced disappearance simply means abduction or deprivation of the liberty of a person that keeps him outside the protection of law. The USSR had witnessed such a situation during the era of Joseph Stalin from 1927-1953. However, '[t]he crime of enforced disappearance of persons became known for the first time when Adolf Hitler (on December 7, 1941) issued '*Nacht und Nebel Erlass*' (the Night and Fog Decree)'. During 1960s to 1980s the practice was prevalent in Latin American dictatorships. Recently, this could be found in Iraq, Sri Lanka and Yugoslavia (Dalia and Zilinskas 2010: 197-98). Even India is criticised internationally for the crime of enforced disappearances in the state of Jammu and Kashmir since Independence.

Similar to that of torture the enforced disappearance is also considered as part of crime against humanity during armed conflict, but not as a standalone crime under international criminal law. For the first time the UN General Assembly through its resolution 47/133 of 1992 adopted the Declaration on the Protection of All Persons from Enforced Disappearance; followed by the International Convention for the Protection of All Persons from Enforced Disappearance, 2006. Article 2 of the Convention defines the crimes as follows:

> '[E]nforced disappearance' is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law

This is a cruel and sadistic form of crime to be recognised in human history, because it keeps the kith and kin of the disappeared in darkness without any information as to the presence or absence, death or life of the person. It is a crime against the both the

person disappeared as well as the relatives. However, the Convention imposes mere obligations upon the state parties to adopt domestic legislations declaring the conduct as a crime; and does not declare it as a crime under international law. The crime is also included in the ICC Statute as part of the crimes against humanity under Article 7; however, the inclusion is not the codification of the customary law. In this regard Cassese observes as follows:

> [W]ith respect to this crime the ICC statute has not codified existing customary law but contributed to the crystallization of a nascent rule, evolved primarily out of treaty law (that is, the numerous treaties on human rights prohibiting various acts falling under this heading) as well as the case law of the Inter-American Commission and Court of Human Rights, in addition to a number of UN General Assembly resolutions. These various strands have gradually contributed to the formation of a customary rule prohibiting the enforced disappearance of persons. The ICC Statute has upheld and codified the criminalization of this conduct

Therefore, the crime of enforced disappearance is evolved out of treaty practice of states and consequently, emerged as customary rule of international law and not vice-versa. Article 7 of the Rome Statute of the ICC has a similar definition declaring the enforced disappearance 'for a prolonged period of time' as part of the crimes against humanity.[20] The provision applies only when it is carried out as part of a widespread or systematic attack directed against any civilian population, during an armed conflict. These restrictions provide a loophole for the perpetrators of such crime, on political reasons during peace time, to escape prosecution and punishment under international criminal law. Various international and regional courts and tribunal have recognised that the crime of enforced disappearance is a serious crime under international law.[21] It is right time for international criminal law to expand its ambit and declare the crime of enforced disappearance as serious and standalone crime under international law.

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[20] Article 7(2)(i) of the Rome Statute defines that '[e]nforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time'.

[21] The Inter-American Court of Human Rights, the European Court of Human Rights and the Human Rights Committee have dealt with most notorious cases of enforced disappearances, such as *Velasquez-Rodrigez v. Honduras*, *Bazorkina v. Russia*, and *Edriss El Hassy v. the Libyan Arab Jamahiriya*.

3.2. Terrorism Activities

Virtually there is no country in the world that could truly claim that it is unaffected by the act of terrorism or threat of terrorism so far. It has caused the lives millions in human history than any other, but it is yet to be considered as a serious crime under international criminal law. As early as 1937, the League of Nations adopted a convention to prevent and punish the crime of terrorism. Article 1 of the League of Nations Convention for the Prevention and Punishment of Terrorism, 1937 defines the acts of terrorism as 'criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of person or the general public'. This was the first international effort to define terrorism; the convention was signed by twenty-five member countries but India was the only country to ratify the convention.

Despite that, the crime was outside the scope of the Nuremberg and Tokyo tribunals; nor included in the Rome Statute of International Criminal Court; nor was it expressly part of the Statute of the ICTY or ICTR. However, Article 22 of the Hague Rules of Air Warfare 1923 prohibits 'any air bombardment for the purpose of terrorizing the civil population…without military character or injuring non-combatants'; similarly, Article 6 of the New Delhi draft Rules for Protection of Civilians 1956 provides that '[a]ttacks directed against the civilian population, as such, whether with the object of terrorizing it or for any other reason, are prohibited'.

Further, Article 51 of the Additional Protocol-I and Article 13 of the Additional Protocol-II of the Geneva Conventions 1949 declares that '[a]cts or threats of violence the primary purpose of which is to spread *terror among the civilian population are prohibited*' (emphasis added). Article 3 of the Statute of the ICTY prohibits the violations of the laws or customs of war which includes the Geneva Conventions and their Additional Protocols. While having a combined reading of the above provisions, the ICTY for the first time held a person accountable for the act of terror. In *Prosecutor v. Stanislav Galic*, the Trial Chamber of the CITY declared that 'acts of violence wilfully directed against the civilian population or individual civilians…with the primary purpose of spreading terror among the civilian population – namely the crime of terror [is] a violation of the laws or customs of war' and sentence the accused for twenty years (*Prosecutor v. Stanislav Galic* 2003: para. 138). The Trial Chamber in *Prosecutor v. Dragomir Milošević* recognised the prosecution's definition, which captures the essence of terror, as given below:

> No one knew whether they might be the next victim. It affected every waking moment of their lives. People for 15 months over the period of this indictment knew absolutely no sense of safety anywhere in the city. Terror is…the intentional deprivation of a sense of security. It's been [sic] the primal fear that people feel when they see someone in front of them gunned down and that moment of panic when they try and run to help the victim, waiting for the next shots to come, and you've had ample evidence about that.
>
> And it's not just…the fear that comes from being nearby the combat. This is a fear calculated to demoralise, to disrupt, to take away any sense of security from a body of people who have nothing…to do with the combat (footnotes omitted; *Prosecutor v. Milošević* 2007: paras. 885-85).

However, through its decisions the ICTY made the crime of terrorism as an autonomous war crime under international law. Terrorism shall be considered as a serious crime under international criminal to prosecute the perpetrators either committed during war or peace time. Some scholars claim that it should be considered as part of transnational organised crime, but it cannot be considered so. TOCs are carried out as a business venture for profit, whereas terrorism has no motive of business or profit. From the end of the Second World War, the United Nations adopted numerous treaties and conventions to prevent the conduct of terrorism through domestic legislations.[22]

[22] Nearly fifteen Conventions have been adopted so far to prevent and punish the crime of terrorism, which includes: Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963 (Tokyo Convention), Convention for the Suppression of Unlawful Seizure of Aircraft 1970 (Hague Convention), Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971 (Sabotage Convention or Montreal Convention), Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons 1973 (Diplomatic Agents Convention), International Convention against the Taking of Hostages 1979 (Hostages Convention), Convention on the Physical Protection of Nuclear Material 1980 (Nuclear Materials Convention), Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation 1988 (Airport Protocol), Convention for the Suppression of Unlawful Acts Against Safety of Maritime Navigation 1988 (Maritime Convention), Protocol for the Suppression of Unlawful Acts Against Safety of Fixed Platforms Located on the Continental Shelf 1988 (Fixed Platform Protocol), Convention on the Marking of Plastic Explosives for the Purpose of Detection 1991 (Plastic Explosives Convention), International Convention for the Suppression of Terrorist Bombings 1997 (Terrorist Bombing Convention), International Convention for the Suppression of the Financing of Terrorism 1999 (Terrorist Financing Convention), International Convention for the Suppression of Acts of Nuclear Terrorism 2005 (Nuclear Terrorism Convention), Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation 2010 (Beijing Convention), Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft 2010 (Beijing Protocol). However, the proposal for adopting the Comprehensive Convention on International Terrorism is under negotiations for the last two decades without any much success.

Specifically, after the 9/11 attack of 2001 in the United States and 26/11 attack of 2008 in India, the international community seriously perceives the crime of terrorism as a serious and most heinous crime under international law. Series of recent terrorist attacks in United Kingdom, France, Russia and other country accelerates the emergency to have a proper legal mechanism under international criminal to prosecute and punish the perpetrators of this heinous crime. As a preliminary step the Rome Statute of the International Criminal Court may be amended to include the crime of terrorism as a serious crime over which the ICC exercise jurisdiction. This jurisdiction expansion is unavoidable in the context of growing threat against global peace and harmony.

3.3. Transnational Organised Crimes

Transnational organised crimes (TOC) are those crimes that are coordinated across national borders, involving groups or networks of individuals working in more than one country to plan and execute illegal business ventures. In order to achieve their goals, these criminal groups use systematic violence and corruption (Voronin 2000; Siegel 2013). Some of the transnational organised crimes include: money laundering, drug trafficking, trafficking in humans, arms smuggling, cybercrimes, and environmental. TOCs are more dangerous than conventional crimes that it causes invisible destruction of the global order. During cold war the ideological confrontation between the super powers was the fertile ground for the transnational organised crimes to carry out their illegal activities, actively supported by the states to destroy the ideology of the other. However, after the cold war the existence of failed states, states in political transition, and states having weak legal system are the suitable targets for TOCs to thrive with their illegal activities. Due to negligence of the global community since long period of time, the transnational organised crimes have grown to such an extent that it destroys our rule of law, it destroys our international security; threatens the world economy; and it may also threaten our common principle of nation-state in the near future (Shelley 1995: 464-465).

Globalization has brought the international community within a global village. The technological advancements like the usage of telecommunications, commercial airlines, access to computer and internet, accelerated the growth of TOCs. In the era of cyber-life the possibility of hacking, cyber-crime and cyber-terrorism had become a serious global threat. Hacking security networks and gaining access to military

secrets, hospital secrets, and parliamentary secrets could cause huge conflict within and among states or even a third world war. If an expert hacker makes small changes in the security information of a military headquarters or medicinal information of an army hospital, it would cause more serious consequences than what could be caused by war crimes or crimes of similar nature. At present, some TOC groups not only involved in smuggling of nuclear weapons but also have the capabilities to produce nuclear weapons independently of sovereign states, for example ISIS in Syria.

Though transnational organised crimes takes place in every country throughout the world and more shockingly some countries knowingly allows such activities with full support. For instance, Carlos Lehder, a Colombian drug lord, organised the political party called Latin Nationalist Movement (LNM) and received contributions from drug dealers to do electoral campaigns (Shelley 1995: 479-81; Lee 1990: 130-39).[23] Similarly, Italian Prime Minister Giulio Andreotti from Social Democratic Party caught on criminal charges two times in collaboration with mafia gangs, but escaped the responsibility by using parliamentary immunity (Cowell, Alan 1993: 10). The USA is not an exception for supporting directly or indirectly the activities of illegal arms trade and it was more evident in the former Soviet Union, South Korea, Iraq and some other parts of the world.[24] Among Western European nations Berlin is the hub for drug trafficking, smuggling of nuclear materials and trafficking in human beings but the whole Europe allows these illicit acts in order to avoid any threat to their political order. Italy is famous for drug trafficking as that of Colombia that penetrates even governmental administration (Shelley 1995: 469-470). The Cosa Nostra of Italy plays a crucial role in the political as well as economic life of Italy

[23] The Colombian mafia gangs selling drugs through illegal means for billions of dollars as a profit. The UN report estimates that around 64500 farming families (nearly three lakh people and around 69000 hectares to 112000 hectares of land) are involving and producing cocaine for Colombia and for Latin American countries. Out of this illicit business, each farming family in Colombia is getting at least 1200 dollars per month (Alsema 2015). Hence, the Rome Statute did not focus the concept of TOCs (even after the repeated requests of Tobago and Trinidad). The powerful countries mainly focus upon the TOCs as a crime of domestic nature, hence no jurisdiction available at the international level for such crimes.

[24] On political perspective, the USA supported South Korea after the end of the WW II merely to destroy the communist ideology in South Korea. Hence, the USA provides arms and ammunition to South Korea against the communist ideology state of North Korea. Even the international community knew that the war between North and South Koreas is not an actual war but it is the ideological war between Russia and USA.

(Argentine 1993: 22-23).[25] Chinese Triads and Japanese Yakuza play a significant role in the Asian mafia world.[26] During general elections TOC groups finance the political campaigns to determine the politicians to support their future illicit activities which not only a general practice in Soviet, Colombia and Italy but even in other countries.[27]

Day-by-day, the transnational criminal organizations developing in large-scale in different fields like money-laundering, human trafficking, and arms trade primarily because of corrupt public officials For instance, Indian businessman Vijay Mallya who borrowed thousand crores from government banks as with the help of corrupt bank officials over-valuing the collaterals. The amount became an unpaid debt and he fled country seeking refuge in the United Kingdom. He is a proclaimed offender by Indian courts. Pensions and savings of ordinary citizens are jeopardized when banks and Stock funds collapse because of illegal manipulation of the financial sectors by international organized crime groups (Shelley 1995: 470-471). The countries like the UK, Switzerland and Hong Kong facilitate the crime of money laundering in the name of bank secrecy policy.

Combating TOC groups is difficult task because sometimes these groups tries to corrupt the legal institutions otherwise they target attacks against the judicial personnel. For instance, in Columbia and Italy famous judges were assassinated; similarly, in Russia around 1000 vacancies created in judiciary due to intimidation of judges by the members of organized crime groups (Shelley 1995: 486). The

[25] The four major group are: the mafia or Cosa Nostra in Sicily, the Neapolitan Camorra, the Ndragheta based in Calabria and the Sacra Corona in Apulia. Here the Cosa Nostra having the greatest oldness of all these crime groups whereas the origins of the Camorra can be traced to more than a century ago (Argentine 1993: 21-25).

[26] Golden Triangle in the Southern frontiers of the former USSR (specifically across the borders of the Azerbaijan-Iran and Tadzhik-Afghan) are famous for the international trafficking in drugs; and illegal arms trade with many countries including Africa (Asuni 1992: 117-19; Shelley 1995: 466).

[27] India is a democratic country which is not possible to control corruption practices. The anti-corruption law in India is still in a baby level – which is not even approved by the Indian parliament since 1860. Initially, the corruption cases in India were handled by the Indian Penal Code 1860; later, the Prevention of Corruption Act 1988 was enacted to combat corruption/bribery in public sector businesses and government agencies in India. Other than these, there are so many laws related with Anti-corruption, for example: Prevention of Money Laundering Act 2002, etc. Under these laws, there are several legal authorities (like CVC, SVC, CBI, SACB, IB, FIU, SCCP, ITD, etc.) along with specific Anti-Corruption courts (such as Special Courts for CBI, SVC, Income Tax, etc.) was established. Even though there are several laws and authorities to control corruption and illegal financing for illicit organized crimes exist but still corruption is successfully continuing with the support of local politicians.

international community should join together to take necessary joint operations through IOs like UN or by Regional Organizations like NATO, NAM, etc.

Transnational organised crimes are not of a recent origin. Offences like trafficking in narcotic drugs and psychotropic substances are purely transnational crimes under customary international law and have a long history. States have been authorised to exercise extra-territorial application of their laws with an obligation to extradite or prosecute the perpetrators, since its commission involves multiple jurisdictions (Boister 1998: 27-30). In 1989, some developing countries like Trinidad and Tobago, Nigeria, and Madagascar proposed to control transnational organised crimes through the establishment of international anti-drug trafficking agency to investigate and punish the perpetrators, but without any great success. Trafficking in weapons and environmental offences were proposed at the Rome Conference as heinous and orchestrated crimes that has wide-reaching impacts on small countries. Trinidad and Tobago proposed drug trafficking; Madagascar proposed trafficking in small arms and dumping of nuclear waste in foreign countries or from foreign countries; and Nigeria expressed an opinion that money laundering is a serious crime worth including in the ICC Statute. Nevertheless, none of these offences were seriously discussed or included into the final text of the ICC Statute (Kittichaisaree 2001: 229).[28]

There are numerous international treaties and conventions declare transnational organised crimes as crimes under international law and attempt to regulate such crimes.[29] For instance, Convention on Narcotic Drugs 1961 and its protocol 1972,

[28] Though piracy, slavery and slave trade are universally recognised as serious crimes under customary international criminal law, yet they have not been included under the Rome Statute. Similarly, crime against peace was recognised as a serious crime in both the Charters of Nuremberg and Tokyo tribunals, but has not been included in the Rome Statute. Similarly, none of the transnational organised crimes have been included in the Rome Statute.

[29] Domestically, the Republic of India adopted various legislations to prevent bribery and corruption and to prevent the root cause of transnational organised crimes, which include: The Prevention of Corruption Act 1947, The Prevention of Corruption Act 1988, The Benami Transactions (Prohibition) Act 1988 which prohibits benami transactions. Similarly, The Prevention of Money Laundering Act 2002 came to ban on corruption within the state. Likewise, South Korea recently adopted the Improper Solicitation and Graft Act of Korea 2016 and came into effect on 28th September 2016 (which is commonly known as the 'Kim Young-ran Act'); it is one of the strict anti-corruption laws introduced by the South Korea. These laws are constructed based on the United Nations Convention against Corruption 2003 (UNGA Res. 58/4 of 31st October 2003). Before the existence of UNCAC 2003, the initiative has been taken through the Resolution 55/61 of 4th December 2000 – which established an *ad hoc* committee for the negotiation of an effective international legal instrument against corruption; and requested the Secretary-General to convene an inter-governmental open-ended expert group to examine and prepare draft terms of reference for the negotiation of such an instrument.

Convention on Psychotropic Substances 1971, and United Nations Convention against Illicit in Narcotic Drugs and Psychotropic Substances 1988 deal with drug trafficking; Similarly, the UN Convention against Transnational Organized Crime 1998, and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime 2001 deal with many organised crimes in general. Further, the UN Convention against Corruption 2000 deals with money laundering. After the cold war, the UN founded a separate legal office to regulate the illicit criminal activities which was named as the UN Office of Drug and Crime (UNDOC). It acts as a global leader to fight against drugs and international crime. UNODC came out from the merger of UN Drug Control Programme and the Centre for International Crime Prevention; which operates in all around the world of every region.

Such regimes have created a system among the signatories either to prosecute or extradite the alleged offenders. These regimes also establish a framework for mutual legal assistance and judicial cooperation; but leave the question of enforcement, prosecution, and punishment to individual nations. Reliance on domestic legal systems of individual nations has created safe havens, for drug producers, traffickers, and money launderers, such as Afghanistan, Myanmar, South Pacific and some Caribbean countries. Criminal organisations take advantage of the discrepancies in different legal systems.

The current international criminal legal systems and international conventions have various loop-holes for the authors of TOCs. In many instances, heinous perpetrators easily walk-away from justice for their serious perpetrations. Article 18, 19 and 21 of the Convention against TOC and articles 7 and 9 of the Vienna Convention states that the mutual legal assistance and judicial co-operation to settle their conflicts/disputes by peaceful means. Article 6(9) of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances states that the perpetrators who are all involving in migrant smuggling, trafficking in persons, arms smuggling either they must be prosecuted by application of local domestic jurisdiction or extradite such criminals to the third state. Even in the 21st century there are too many safe havens for drug producers, drug traffickers, money launderers and other suspects. Hence, there is a need for centralised powers to investigate, prosecute and punish transnational organised crimes through an international agency that

complements the activities of national authorities (Schloenhardt 2004: 3).

Though the establishment of the ICC along with other criminal tribunals has created an opportunity to overcome many of the problems of the past in regulating international crimes, yet majority of transnationally organised crimes, such as money laundering, drug trafficking, human trafficking, arms smuggling, cybercrimes, and environmental crimes fall outside the jurisdiction of international criminal law. Academic debates have already begun that whether existing crimes shall be interpreted to include the newer crimes; or should they be added as an addition to the existing list of serious crimes under international law. Some scholars argue that Article 7 of the ICC Statute deals with crimes against humanity, which may be interpreted to include serious cases of human trafficking, more specifically, trafficking in women and children that will certainly fall within the jurisdiction of the ICC (Piotrowicz 2003: 25).

For instance, Article 7(1)(c) deals with 'enslavement'; Article 7(1)(d) deals with 'deportation or forcible transfer of population' and Article 7(1)(g) deals with '[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity'. This might bring the crime of human trafficking within the ambit of ICC jurisdiction. However, the requirement of 'widespread or systematic attack' under Article 7 needs to be fulfilled to bring a crime within the jurisdiction of ICC. 'Uncoordinated and random incidents are regarded as insufficient to amount to a widespread or systematic attack' (Cassese 2003: 65-66; Robinson 1999: 47-48). Hence, only the most severe, brutal and orchestrated instances of trafficking could ever meet the high thresholds of Article 7 or the acts committed should have some association with state policy of not acting against traffickers. However, no state will consider common patterns of trafficking are grave enough to allow intervention by the ICC prosecutor (Schloenhardt 2004: 7).

TOC groups are expanding their territories and operating not only from the state but they operate regionally as well as globally with political and economic support of some sovereign states like Colombia/Italy; which threatens the social well-being of the international community along with the political and economic insecurity of the sovereign nations. Law change the society similarly society also change the laws. Considering the growing threat of transnationally organized crimes and criminal

organizations to destroy international peace and security, the Rome statute shall be amended to include certain transnational organised crimes.[30] Many international legal scholars feel that rather than interpreting the existing mandate of the ICC, the TOCs shall be brought within the jurisdiction of the court by adding additional crimes through amendments to the Rome Statute (Piotrowicz 2003: 25 and Schloenhardt 2004: 7-8). As rightly observed by Schloenhardt 'transnational organized crime is a problem in need of a solution; the newly created International Criminal Court is a solution in need of problems' (Schloenhardt 2004: 12).

None of these developments under international criminal law—like outburst of newer crimes, new forms of perpetrators, or institutional growth—are predicted or predetermined by any state or non-state actors to have an effective control over the same. It is automatic and unavoidable in the course of its evolutionary process. In such context, the traditional remedies and responsibilities like physical punishment of individual perpetrators alone are no more sufficient to cause justice to victims. Command responsibility, corporate responsibility, organisational responsibility, civil liability for monetary compensation to victims, and R2P obligation on states and international community to protect civilians, are need of the hour to be included under international criminal law. Some of these issues are analysed in detail under Chapter VI of this study.

[30] Some states (specifically Trinidad and Tobago) have proposed to include drug trafficking within the Rome Statute as serious international crime; but other states (specifically European states) felt that this crime as normal crime, hence it was not treated as serious crime within the Rome Statue. However, at present drug trafficking poses a greatest social threat and could compete even with other serious international crimes.

CHAPTER VI

ACCOUNTABILITY UNDER INTERNATIONAL CRIMINAL LAW

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Prosecution and punishment of wrongful conduct under criminal law involves a two-step process, at first, to determine the person behind the conduct; and at second, to determine the quantum of sanctions to be imposed. Former indicates *responsibility for the conduct* and later indicates *liability of the person*.[1] However, the sanctions may be of either criminal or civil. Criminal sanctions are crime centric to deter the possibility of its future occurrence, which include punishment through fine, imprisonment or execution; whereas civil sanctions are victim centric to make good to the sufferers and survivors, which include reparation, restitution, reconciliation or other civil remedies.[2] In the contemporary scenario both civil and criminal remedies are part of every criminal legal system, either domestic or international.

In early times, natural persons were the sole perpetrators of serious crimes under international law; but at present, legal persons like corporations and organisations have become the major contributors of serious crimes.[3] Despite that, only natural persons can be made subject to physical punishments; whereas, legal persons are abstract entities that can be made subject to monetary compensation alone.[4] Therefore, the concept of civil remedies evolved as an integral part of criminal legal systems. Through the concept of civil remedies the legal persons like states, organisations and corporations could be held accountable above and beyond the

[1] The concept of liability and responsibility come into play only if one affects or violates the rights of others; or if one breaches or violates the duties owed towards others. So, the responsibility or liability is nothing more than a consequence of failure to perform a duty. Here, rights and powers imply duties and obligations.

[2] The monetary compensation may be restitution, reparation, damages and indemnification. Professor Snyder argued that where the liability is imposed voluntary motion, causal relation, and harm are always present. The absolute and strict liability is imposed on the basis of these three elements. Hence, responsibility is the basis of liability; voluntary motion causing harm is responsibility (Snyder 1962: 204).

[3] The legal/juridical persons (such as sovereign states, corporations, and organizations) and the natural persons (including civilians, insurgents and belligerents) are accountable under the concept of civil liability for their criminal acts. If the natural persons involve in the criminal activities within sovereign states, organizations, corporations then they are all criminally held responsible. If the natural persons have legally proved their innocence (or such serious crimes happened beyond their command/control) then they may not be criminally accountable.

[4] The punishment may be deterrent, preventive, reformative and retributive. Other than these there is a theory called expiatory theory (i.e. if the offender realizes his mistake then he must be forgiven) but this theory did not get much importance in criminal law.

criminal sanctions imposed on the individual perpetrator. The present chapter deals with three kinds of remedies for serious crimes: first part analyses criminal responsibility under international criminal law; second part deals with the possibility of imposing civil liability under international criminal law; and part three analyses the preventive and protective responsibility of states and the international community towards individuals.

1. CRIMINAL RESPONSIBILITY UNDER ICL

Determining responsibility for wrongful conduct is the primary function of criminal law; but traditionally it was complicated under international law. States were held accountable for serious crimes committed by natural persons, on the ground that, such abstract entities were the lone subjects of international law not the private individuals (Werle and Bung 2005: 23). However, the idea of individual criminal responsibility was conceived and brought into exists only after the end of First Word War through the adoption of the Treaty of Versailles in 1919.[5] Article 228 of the Treaty 'recognises the right of the Allied and Associated Powers to bring before military tribunals person accused of having committed acts in violation of laws and customs of war'.[6] Since then, individuals are directly held accountable for serious crimes under international law.

After the Second World War, International Military Tribunals had been established, one at the Nuremberg and the other at the Tokyo, to prosecute and punish individuals for perpetration of serious crimes during war. Article 6 of the Charter of the Nuremberg tribunal provides that crimes against peace, war crimes, crimes against humanity 'or any of them, are crimes coming within the jurisdiction of the tribunal for which there shall be *individual responsibility*' (emphasis added).[7] A similar provision

[5] Specifically, Article 227-230 of the Treaty of Versailles 1919 gave significance to individual criminal responsibility. Further these Articles talk about penalties over the offenders' criminal responsibility.

[6] Though there is an evidence of individual criminal responsibility over serious crimes since the punishment of Peter Hagenbach (1474) in Breisach for heinous atrocities but the ICL did not develop. Peter Hagenbach trial was the first documented evidentiary trial conducted against individual. After the Versailles Treaty (1919) the ICL got an international importance thereafter the WW II lead the ICL ahead among the global community.

[7] Article 1 of the Nuremberg Charter defines that in pursuance of the Agreement signed on the 8th day of August 1945 by the Government of the USA, the Provisional Government of the French Republic, the Government of the UK and Northern Ireland and the Government of the USSR, there shall be established an International Military Tribunal (hereinafter called 'the Tribunal') for the just and prompt trial and punishment of the major war criminals of the European Axis. Similarly, Article 6 of the

could also be found under Article 5 of the Charter of the Tokyo tribunal. In *Prosecutor v. Goring* the Nuremberg tribunal elaborates the importance individual criminal responsibility, as opposed to state responsibility, for serious crimes as follows:

> Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced.
>
> […] the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under International Law (*Prosecutor v. Goring* 1946: 447).

Along with individual responsibility, international criminal law has gradually recognised the responsibilities of organisations and corporations as well. The criminal responsibilities of some of these entities could briefly be discussed as follows.

1.1. State Responsibility

Traditionally responsibility under international law was imposed only on states for committing wrongful acts, breach of peace, or for violating the principle of the law of nations. All most all peace treaties between states are predominantly to impose state responsibility by one over the other. Most of the time it was the defeated nation who was considered to be at fault and state responsibility was imposed as a punishment for the wrong committed. The Treaty of Kadesh, which is popularly known as Egyptian–Hittite Peace Treaty, concluded around 1259 BC is the first known peace treaty in human history; but there is no clear cut opinion about the victorious power at the Battle of Kadesh. Similarly, the Treaty of Westphalia was a peace treaty concluded in 1648 to end the thirty years of religious war in Europe. Under the treaty there is ample evidence to show that the Roman Empire had imposed state responsibility on other states. For instance, Article XIII of the Treaty of Munster maintains that 'the Elector

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Charter states that the domestic legality does not prevent its criminal prosecution under ICL and no immunity for officials if they committed serious international crimes (which include crimes against peace, war crimes and crimes against humanity).

of Bavaria renounces entirely for himself and his Heirs and Successors the Debt of Thirteen Millions, as also his Pretensions in Upper Austria'. It was certainly a state responsibility imposed on Bavaria after the religious war.

Treaty of Paris, 1815 is another major milestone in the history of international law. The Treaty was a peace deal struck at the Congress of Vienna after defeating Napoleon Bonaparte in the Battle of Waterloo. As a peace treaty it had imposed punitive responsibilities on France for the convulsions of Bonaparte. For instance, the country's frontiers were reduced to 1790 levels; monetary penalty was imposed under Article IV which provides that '[t]he pecuniary part of the indemnity to be furnished by France to the Allied Powers, is fixed at the sum of 700 millions of Francs'; and the country was kept under the occupation of one lakh-fifty thousand soldiers of the Allied powers for five years, whose costs shall be covered by France (Article V).

Treaty of Versailles 1919 is an important peace treaty that brought the First World War to an end. The Treaty imposes heavy penalty on Germany for its acts of aggression against the Allied powers. For instance, Article 231 of the Treaty provides that '[t]he Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies'. However, the Treaty also contains provisions for individual criminal responsibility for war crimes. After the establishment of League of Nations efforts were made to codify the rules of state responsibility for injuries to aliens. The League Conference 1930 attempted to provide structural outlines on the treatment of aliens and their properties, but failed to achieve a meaningful codification.[8]

The United Nations Organisation was established in 1945 after the Second World War. The UN General Assembly referred the issue of state responsibility as one among the fourteen areas referred to the International Law Commission (ILC) for codification in the year 1949. The ILC took nearly fifty years to develop the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, popularly known as Draft Articles on State Responsibility, and the Draft Articles were adopted

[8] That talked about the detention and physical ill-treatment of aliens; their right to fair trial in the state; and the responsibility of state for its failure to secure such rights.

by the UN General Assembly in 2001.[9] James Crawford noted that the Draft rules are general in character, encompassing all types of international obligations (Crawford 2002). Article 1 of the Draft begins with a statement that '[e]every internationally wrongful act of a state entails the international responsibility of that state'. The elements of responsibility include: (i) any act or omission attributable to state under international law; and (ii) that constitutes a breach of an international obligation of the state.[10]

A state may be held responsible for a serious breach of international obligations, such as, maintenance of international peace and security (not to commit the crime of aggression); safeguarding the right of self-determination of people (no colonial domination); safeguarding human beings (no slavery, genocide or apartheid); and safeguarding human environment (no massive pollution of atmosphere or of seas) (Gilbert 1990: 346-347). But if any wrongful act is committed on account of: *force majeure,*[11] distress,[12] state of necessity,[13] self-defense,[14] with implied or express consent of the affected state,[15] or as a counter measures[16] then no international responsibility arise.

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[9] The Draft Articles on State Responsibility was adopted by the UNGA Res. 56/83 (12th December 2001). The ICJ cited an earlier draft text of the Articles on State Responsibility in *Gabcikovo–Nagyamaros Project (Hungary v. Slovakia)*, ICJ Rep. 7 (1997).

[10] Article 2 of the Draft Articles on State Responsibility provides that 'there is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State'.

[11] Article 23 of the Draft Articles on State Responsibility provides that: (1). The wrongfulness of an act of a state not in conformity with an international obligation of that state is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the state, making it materially impossible in the circumstances to perform the obligation; and (2). Paragraph 1 does not apply if: (a). the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the state invoking it; or (b). the state has assumed the risk of that situation occurring.

[12] Article 24 of the Draft Articles on State Responsibility provides that: (1). The wrongfulness of an act of a state not in conformity with an international obligation of that state is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care; and (2). Paragraph 1 does not apply if: (a). the situation of distress is due, either alone or in combination with other factors, to the conduct of the state invoking it; or (b). the act in question is likely to create a comparable or greater peril.

[13] Article 25 of the Draft Articles on State Responsibility provides that: (1). Necessity may not be invoked by a state as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that state unless the act: (a). is the only way for the state to safeguard an essential interest against a grave and imminent peril, and (b). does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole; and (2). In any case, necessity may not be invoked by a state as a ground for precluding wrongfulness if: (a). the international obligation in question excludes the possibility of invoking necessity, or (b). the state has contributed to the situation of necessity.

[14] Article 21 of the Draft Articles on State Responsibility provides that 'the wrongfulness of an act of a

The state is responsible for all actions of its officials and organs, even if the organ or official is formally independent;[17] or the organ or official acting ultra-virus.[18] However, whether a state could be held responsible for the acts of non-state actors like Al-Qaeda or other terrorist organisations? Or for the acts of multinational corporations? The answer could be found in the principle of *sic utero tuo ut alienum non laedas*, which means no state shall allow its territory to be used in such a manner to cause injury to the other. In *Corfu Channel case*, the International Court of Justice

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state is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations'.

[15] Article 20 of the Draft Articles on State Responsibility provides that '[v]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent'.

[16] Article 49-52 of the Draft Articles on State Responsibility covers the Implementation of International Responsibility of States. Article 49 deals with Objects and Limits of Countermeasures. It provides that: (1). An injured state may only take countermeasures against a state which is responsible for an internationally wrongful act in order to induce that state to comply with its obligations under Part Two; (2). Countermeasures are limited to the non-performance for the time being of international obligations of the state taking the measures towards the responsible state; and (3). Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question. Article 50 deals with Obligations Not Affected by Countermeasures. It provides that: (1). Countermeasures shall not affect: (a). the obligation to refrain from the threat or use of force as embodied in the UN Charter, (b). obligations for the protection of fundamental human rights, (c). obligations of a humanitarian character prohibiting reprisals, and (d). other obligations under peremptory norms of general international law; and (2). A state taking countermeasures is not relieved from fulfilling its obligations: (a). under any dispute settlement procedure applicable between it and the responsible state; (b). to respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Article 51 deals with Proportionality. It provides that the countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question. Article 52 deals with Conditions Relating to Resort to Countermeasures. It provides that: (1). Before taking countermeasures, an injured state shall: (a) call upon the responsible state, in accordance with Article 3, to fulfil its obligations under Part Two; (b). notify the responsible state of any decision to take countermeasures and offer to negotiate with that state; (2). Notwithstanding paragraph 1(b), the injured state may take such urgent countermeasures as are necessary to preserve its rights; (3). Countermeasures may not be taken, and if already taken must be suspended without undue delay if: (a). the internationally wrongful act has ceased, and (b) the dispute pending before a court or tribunal which has the authority to make decisions binding on the parties; and (4). Paragraph 3 does not apply if the responsible state fails to implement the dispute settlement procedures in good faith.

[17] Article 5 of the Draft Articles on State Responsibility provides that '[t]he conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance'.

[18] Article 7 of the Draft Articles on State Responsibility speaks about Excess of Authority or Contravention of Instructions. It provides that '[t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions'.

held that 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' (*Corfu Channel case* 1949: 22).

Even under the Draft Articles a state could be held responsible for the conduct of a person or group of persons acting under the direction or control of the state or exercising the elements of governmental authority.[19] Breach of an international obligation entails the following three consequences, namely: (i) duty to cease the wrongful conduct and non-repetition;[20] (ii) duty to make full reparation;[21] (iii) the rights for injured states to invoke responsibility;[22] and (iv) limited right for countermeasures under Articles 49 to 53.[23]

[19] Article 8 provides that: [t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct'. Similarly, Article 9 provides that '[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority'. Article 10 imposes responsibility on states even for insurrectional movements and provides that: (1). The conduct of an insurrectional movement which becomes the new government of a state shall be considered an act of that state under international law; (2). The conduct of a movement, insurrectional or other which succeeds in establishing a new state in part of the territory of a pre-existing state or in a territory under its administration shall be considered an act of the new state under international law; and (3). This Article is without prejudice to the attribution to a state of any conduct, however related to that of the movement concerned, which is to be considered an act of that state by virtue of Articles 4 to 9.

[20] Article 30 of the Draft Articles on State Responsibility deals with Cessation and Non-repetition. It provides that the state responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; and (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

[21] Article 31 of the Draft Articles on State Responsibility speaks about Reparation. It provides that: (1). The responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act; and (2). Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a state.

[22] Article 42 provides that a state is entitled as an injured state to invoke the responsibility of another state if the obligation breached is owed to: (a). that state individually; or (b). a group of states including that state, or the international community as a whole, and the breach of the obligation: (i). specifically affected that state; or (ii). is of such a character as radically to change the position of all the other states to which the obligation is owed with respect to the further performance of the obligation. Further, Article 48 provides that: (1). Any state other than an injured state is entitled to invoke the responsibility of another state in accordance with Paragraph 2 if: (a). the obligation breached is owed to a group of states including that state, and is established for the protection of a collective interest of the group, or (b). the obligation breached is owed to the international community as a whole; (2). Any state entitled to invoke responsibility under Paragraph 1 may claim from the responsible state: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with Article 30, and (b) performance of the obligation of reparation in accordance with the preceding Articles, in the interest of the injured state or of the beneficiaries of the obligation breached; and (3). The requirements for the invocation of responsibility by an injured state under Articles 43, 44 and 45 apply to an invocation of responsibility by a state entitled to do so under Paragraph 1.

[23] These Draft Articles on State Responsibility not in conflict with the Charter of the United Nations.

A state may involve in the commission of international crime in two ways, namely: (i) direct involvement in international crimes; and (ii) use of non-state actors to commit such crimes or fail to prevent them. Regarding the first category the state is directly responsible (Nollkaemper 2010: 332).[24] For instance, in *Prosecutor v. Furundzija* (1998) the tribunal held that:

> Under current international humanitarian law, in addition to individual criminal liability, state responsibility may ensue as a result of state officials engaging in torture or failing to prevent torture or to punish torturers. If carried out as an extensive practice of state officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly grave wrongful act generating state responsibility (*Prosecutor v. Furundzija* 1998: para. 142).

Gaeta argues that Genocide Convention,[25] ICTY,[26] ICTR,[27] and Rome Statute[28] also support state responsibility for international crimes along with individual responsibil-

[24] For example, in case of aggression, genocide, crimes against humanity, torture within the state, it or its officials encouraging those crimes.

[25] Article 4 of the Genocide Convention provides that the persons 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. Hence, Article 3 discusses about what are the acts shall be punishable (which includes genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide). Even Article 9 of the Convention views that the state responsibility which includes: the disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a state for genocide or for any of the other acts enumerated in Article 3, shall be submitted to the ICJ at the request of any of the parties to the dispute.

[26] Article 7(2) of the ICTY Statute related with state responsibility but other sub-sections of Article 7 clearly mentioned about the concept of individual criminal responsibility. Article 7 provides that: (1). A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime; (2). The 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; (3). The fact that any of the acts referred to in Articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof; and (4). The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the international tribunal determines that justice so requires.

[27] As similar as that of ICTY Statute, the ICTR Statute also mentions the state responsibility as well as individual responsibility under Article 6 of the Rwandan Charter. It provides that: (1). A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime; (2). The 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; (3). The fact that any of the acts referred to in Articles 2 to 4 of

ity (Gaeta 2007: 631-648). However, regarding the second category, the acts committed by non-state actors are not attributable to the state, but incurs responsibility if it actively supports, perhaps even relies on such actors to achieve the aims of state policy, or fail to prevent such non-attributable acts.

The *Tadic cas*e, *Nicaragua case*, and *Genocide case* are good examples to portray the level of control necessary by a state for the attribution of acts of its paramilitary forces, officials or non-state actors. In 1986, when the *Nicaragua case* came before the ICJ for adjudication of the issues relating to whether the United States is responsible for breach of humanitarian law committed by 'contras' on account of organising, financing, training and equipping them, the court propounded the *effective control* test to determine attribution in state responsibility. In this regard, the court held that '[for a] conduct to give rise to legal responsibility of [a State], it would in principle have to be proved that that State had *effective control* of the military or paramili-

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the present Statute was committed by a subordinate does not relieve his or her superior criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof; and (4). The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

[28] Article 25 of the Rome Statute clearly points out the individual criminal responsibility. It provides that: (1). The court shall have jurisdiction over natural persons pursuant to this Statute; (2). A person who commits a crime within the jurisdiction of the court shall be individually responsible and liable for punishment in accordance with this Statute; (3). In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the court if that person: (a). commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible, (b). orders, solicits or induces the commission of such a crime which in fact occurs or is attempted, (c). for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission, (d). in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i). be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the court, or (ii). be made in the knowledge of the intention of the group to commit the crime, (e). in respect of the crime of genocide, directly and publicly incites others to commit genocide, and (f). attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose; and (3 bis). in respect of the crime of aggression, the provisions of this Article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a state [As amended by Res. 6 of 11th June 2010 (adding Paragraph 3 bis)]; and (4). no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of states under international law. Similarly, Article 28 is also mentioned about the commander or superior responsibility which means that the provision implies the state responsibility.

tary operations in the course of which the alleged violations were committed' (emphasis added; *Nicaragua* c*ase* 1986: para. 115).[29] However, in 1999 when the *Tadic case*, came before the ICTY the Appeals Chamber found the reasoning of the ICJ unpersuasive and disregarded the *effective control* test with *overall control* test to determine attribution in state responsibility for any violation of international law by its organs. The Appeals Chamber observed that:

> [T]he situation of an organised group is different from that of a single private individual performing a specific act on behalf of a State. In the case of an organised group, the group normally engages in a series of activities. If it is under the overall control of a State, it must perforce engage the responsibility of that State for its activities, *whether or not each of them was specifically imposed, requested or directed by the State* (emphasis original; *Tadic case* 1999: para. 122).[30]

The *Nicaragua* requirement of 'acting under the specific instructions' could be reasonably applied to individuals, but not to the organised group, on the ground that the organised military group acts in a relatively autonomous way. Hence, to attribute responsibility to a state it is sufficient that the group is under the *overall control*, as opposed to *effective control*, of the state irrespective of whether each of its activities was done under specific instructions.

Again in 2007, when the *Genocide case* came before the ICJ for adjudication, the court gave its response to the ICTY ruling in *Tadic case*. In this case, the Bosnian Serb armed forces (VRS) had perpetrated genocide in Srebrenica and the issue was whether the acts of genocide carried out at Srebrenica by Bosnian Serb armed forces must be attributed to the Federal Republic of Yugoslavia (FRY), as claimed by Bosnia. After establishing that General Mladic and other officers, authors of the Srebrenica genocide, were not *de jure* organs of the FRY, nor could they be equated with such

[29] Further, the court held that '[a]ll the forms of United States participation mentioned above, and even the *general control* by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State' (emphasis added) (*Nicaragua* case 1986: para. 115).

[30] Further, the Appeals Chamber held that '[u]nder the rules of State responsibility…a State is internationally accountable for *ultra vires* acts or transactions of its organs...it incurs responsibility even for acts committed by its officials outside their remit or contrary to its behest. The rationale behind this provision is that...the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives' (footnotes omitted, *Tadic case* 1999: para. 121).

organs an account of possible 'complete dependence' on the FRY (*Genocide* case 2007: paras. 386-394). The court discussed the question whether those officers could nevertheless be regarded as *de facto* organs of the FRY.

For this purpose, the court applied the 'effective control' test enunciated in *Nicaragua*. In the opinion of the court, this test substantially coincided with the standards required in Article 8 of the ILC Draft Articles on State Responsibility and reflects customary international law. As per the said Article, the conduct of a person or group of persons shall be considered an act of state, if they acting 'on the instructions' or 'under the direction' or 'under the control' of that state in carrying out the conduct (*ibid*.: para. 398). As stated in the ILC commentary these three tests are not cumulative but disjunctive.

The court then considered the test propounded by ICTY Appeals Chamber in *Tadic* case and rejected it on two grounds: First, the ICTY, in touching upon questions of state responsibility, 'addressed an issue which was not indispensable for the exercise of its jurisdiction' (*Prosecutor v. Dusko Tadic* 1995). Therefore, the court was free not to take into account the rulings of the tribunal concerning 'issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it' (*ibid*.);[31] Second, according to the court, the 'overall control' test resorted to in *Tadic*, is 'unpersuasive' if used to establish whether a state is responsible for acts performed by armed forces and paramilitary

[31] In fact, the court implicitly took up to a large extent the point made by judge Shahabuddeen in his separate opinion in *Tadic case*. He viewed that the issue of whether the conflict was international was different from that of state responsibility. The ICTY was called upon to rule only on the former issue and therefore no need to go into the latter. In his words, 'the Appeals Chamber considered that *Nicaragua* was not correct and reviewed the general question of the responsibility of a state for the *delictual* acts of another. It appear to me, however, that question does not arise in this case. The question, a distinguishable one, is whether the FRY was using force through VRS against BH, not whether the FRY was responsible for any breach of international humanitarian law committed by the VRS. To appreciate the scope of the question actually presented, it is helpful to bear in mind that there is a difference between the mere use of force and any violation of international humanitarian law: it is possible to use force without violating international humanitarian law. Proof of use of force, without more, does not amount to proof of violation of international humanitarian law, although, if unlawful, it could of course give rise to state responsibility. Correspondingly, what needs to be proved in order to establish a violation of international humanitarian law goes beyond what needs to be proved in order to establish a use of force. This is important because, under Article 2, first paragraph, of the Fourth Geneva Convention, all that had to be proved, in this case, was that an 'armed conflict' had arisen between BH and the FRY acting through the VRS, not that the FRY committed breaches of international humanitarian law through the VRS' (*Tadic* case (separate opinion of Judge Shahabuddeen) 1999: paras. 17-18).

units that are not among its official organs. For the court, the reason why the test is 'unpersuasive' is twofold: (i) 'logic does not require the same test to be adopted in resolving the two issues, which are very different in nature', with the consequence that the degree of a state's involvement in an armed conflict may well differ from that required for state responsibility to arise; and (ii) the 'overall control' test overly broadens the scope of state responsibility because it goes beyond the three standards set out by the ILC in Article 8 of the Draft Articles on State Responsibility (*ibid*.).[32]

1.2. Individual Responsibility

The concept of Individual responsibility has been recognised since the end of the First World War. Article 227 of the Treaty of Versailles 'publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties'. Further, the provision obliges Germany to extradite its officials responsible for War Crimes on request of any Allied Powers in order to be judged by their military tribunals. Similarly, Article 228 of the Treaty 'recognises the right of the Allied and Associated Powers to bring before military tribunals *person accused* of having committed acts in violation of laws and customs of war' (emphasis added). However, they were prosecuted and punished through domestic courts; and eventually only eight persons, not including the former emperor, were sentenced (Nollkaemper 2010: 313-14).

After the Second World War international military tribunals were established, one in Nuremberg and another in Tokyo, to prosecute and punish individuals accused of having committed serious crimes during war. For instance, Article 1 of the Charter of the Nuremberg tribunal establishes 'an International Military Tribunal…for the just and prompt trial and punishment of the major *war criminals* of the European Axis' (emphasis added). The individualistic approach to responsibility for international crimes is based on the idea that collective action is the product of individual action and that if we are to change collective action, we have to approach it at the individual

[32] Some scholars have criticized the ICJ's *Genocide* decision, and upheld the 'overall control' test adopted in the *Tadic case*. They criticized the ICJ's assumption on Article 8 of the ILC Draft Articles on State Responsibility as customary international law, because '(1) [t]he court in *Nicaragua* enunciated the test…; (2) the ILC upheld the same test (based only on *Nicaragua case*); (3) hence the test is valid and reflects the customary international law' (Cassese 2007: 651). Further, it has been contested that 'the court should have proved that…[the] 'overall control' test was unsupported by state practice and *opinio juris*' (*ibid*.).

level (Kutz 2000: 67). The same trend has been followed in the statute of the ICTY, ICTR and ICC as well. Article 25 of the Rome Statute elaborately discusses the criminal responsibility of individuals.[33]

Scholars are of opinion that individual criminal responsibility is not a solution in totality, but only partial to bring justice against international crimes. Nollkaemper views that 'targeting responses to system criminality at individual authors of crimes are only a partial solution that does not always take away the need for addressing the larger entities of which individuals are a part' (Nollkaemper 2010: 321). Similarly, Brownlie opines that, 'individual authors of international crimes often are part of a context in which a variety of actors participate and that are properly dealt with at the level of the state or other entity, as such' (Brownlie 1983: 130). Hence, the principle of individual responsibility seems like a candle to consume the darkness and to bring the light but how much darkness the small candle will consume? Therefore, the individual responsibility is merely one of the ways to eliminate grave international crimes but not the only way.

Privileged and Unprivileged Combatants

During hostilities those who engage in conflicts may be classified as either privileged combatants or unprivileged combatants. Privileged combatants include soldiers; and unprivileged combatants include insurgents, belligerents, mercenaries, terrorist, spies, child soldiers, and civilians. A soldier or combatant is a person who takes direct part in the hostilities of an armed conflict. If a combatant follows rules and procedures of warfare, then he or she is considered a privileged combatant and upon capture he or she will qualify as prisoner of war under the Third Geneva Convention, 1949 (GC III).[34] When a soldier in the border area commits serious crimes against the people of

[33] This provision mainly referred in Omar al-Bashir's indictment. Especially, Article 25(3)(a) of the Rome Statute provides responsibility for a person who 'commits such a crime, whether as an individual, jointly with another person, regardless of whether that other person is criminally responsible', which also one of the ground in the indictment of Basher. The arrest warrant notes that he 'committed crimes through members of the state apparatus, the army and the Militia or Janjaweed', these crimes thus were a form of indirect perpetration.

[34] The following categories of combatants are considered as privileged combatants and they qualify for prisoner-of-war status under the third Geneva Convention, 1949: (1). Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces; (2). Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that they fulfil the following conditions: (i).

adjoining state without any lawful evidence, the accused state gets jurisdiction to prosecute those soldiers. If the accused state trying to 'shield' their soldiers then the principle of passive personality gives victims' state the jurisdiction to prosecute the criminals. Whenever the victims' state is not able to take any action (because of its economic condition, poverty, lack of criminal legal system, etc.) then the state as a member of the Rome Statute may request or bring the issue before the ICC.

Unprivileged combatants though take direct part in hostilities but do not follow rules and procedures of warfare. Hence, they do not get prisoner of war status.[35] The insurgents[36] and belligerents[37] are combatants fighting against their own government for independent statehood or for other reasons. Similarly, mercenaries are soldiers or individuals of hired persons either actively take part in hostilities or take part in security to general public for monetary gain without any substantial link to the conflict. Mercenaries are neither combatants nor civilians but recognised as a

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that of being commanded by a person responsible for his subordinates; (ii). that of having a fixed distinctive sign recognizable at a distance; (iii). that of carrying arms openly; and (iv). that of conducting their operations in accordance with the laws and customs of war; (3). Members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power; and (4). Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

[35] It is subject to certain exceptions: 'Nationals of a State which is not bound by the [Fourth Geneva] Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are' (Article 4 of the GC IV).

[36] The nature of insurgencies is ambiguous. Insurgent is a person of a rebel or revolutionary, fighting against a government or invading force, who attacks or involves in legal warfare. Insurgency is a rebel group who involves in legal warfare against its own government for some purpose (like fighting for liberation from the existing state). It is also a member of a section of a political party that revolts against the methods or policies of the party. The concept of individual criminal responsibility under international law will be applicable against them, when they commit atrocities. Both insurgency and belligerency are undefined concepts; they are extremely subjective as it may depend on the recognition of the sovereign state. Where insurgency ends belligerency begins. One who raises revolt against a constituted authority called as rebel and he is not recognized as a belligerent (Oxford English Dictionary 1989). An insurgency can be fought via counter-insurgency warfare, and may also be opposed by measures to protect the population, and by political and economic actions of various kinds aimed at undermining the insurgents' claims against the incumbent regime (Paret 1964).

[37] The term belligerent comes from the Latin term 'belligerantem' which literally means one who wages war. A belligerent is an individual, group, country, or other entity that acts in a hostile manner (such as engaging in combat, etc.). When the insurgent rebel group do not violate the principles of IHL and continue to involve legal civil warfare against its state then the international community or any sovereign independent state recognise the belligerent status. Once the group got a belligerent status; it can act like a state with a definite territory, a permanent population, government and the capacity to entire into relations with other states (Article 1 of Montevideo Convention). It can involve not only in civil conflicts but in war. For example, the concept of belligerency was recognised by the UN Security Council Resolution 678 which gave legal authority for the Gulf War.

different persons under IHL. Article 47(2) of the Additional Protocol I to the Geneva Conventions defines mercenaries.[38] But the protocol does not recognise security personnel as mercenaries but only those who fight and actively engage in hostilities. But they are not part the armed forces and never get combatants status.[39]

To the contrary, PMC personnel mainly engage in planning to support services and for the purpose other than direct participation in hostilities (like, weapons management, training military personnel, guarding prisoners, food supply and so on). If something goes wrong in any of these non-hostile activities, civilian-contractors cannot be held accountable as mercenaries under the Additional Protocol I. All PMC personnel are not mercenaries but only those who take active part in hostility without being part of armed forces of the party to the conflict. Once mercenaries get the status of combatants and prisoner of war - they are accountable for criminal prosecution if they commit series of atrocities which violates humanity.

If civilians directly engage in hostilities, they are considered 'unlawful' or 'unprivileged' combatants or belligerents - but the treaties of humanitarian law do not expressly contain these terms – and they may be prosecuted under the domestic law of the detaining state for such action' and they shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.[40] If there is any doubt as to whether the person benefits from 'combatant' status then they must be given POW status until such time as their status has been determined by a competent tribunal (Article 5 of the GC III). [41]

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[38] A mercenary is any person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain (and is promised by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party); (d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (e) is not a member of the armed forces of a party to the conflict; and (f) has not been sent by a state which is not a party to the conflict on official duty as a member of its armed forces.

[39] An unprivileged combatant is a person, such as a mercenary, who takes a direct part in the hostilities but who upon capture does not qualify for prisoner-of-war status under Article 47 of the Third Geneva Convention 1949 (GC III). According to Article 47 of the GC III, '[a] mercenary shall not have the right to be a combatant or a prisoner of war'.

[40] Article 51(3) of the Geneva Conventions Protocol I speaks about the Protection of the Civilian Population. It states that '[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities'.

[41] Article 5 of the GC III states that the present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons having committed a belligerent act and

However, perpetrators of heinous crimes will be liable for prosecution and punishment under international criminal law irrespective of their status. The status as privileged or unprivileged combatant will not exempt a person from the jurisdiction of international criminal tribunals for serious violations of laws and customs of war.

Command or Superior Responsibility

In 6th century BC, Sun Tzu in his book on *The Art of War* argued that it is a commander's duty to ensure that his subordinates conducted war in a civilized manner during an armed conflict. Similarly, the *Lieber Code* adopted during the American Civil War recognises that commander is personally responsible if he orders or encourages his soldiers to kill the disabled enemies.[42] The first individual to be prosecuted under the *Lieber Code* was a Swiss Confederate, Captain Warse, for failing to prevent torture and other cruel treatment that led to death of prisoners under his custody at the camp. *Lieber Code* had substantial influence on the codification of various laws of war by different states, including, the International Convention on the Law of War presented at the Brussels conference in 1875. That became a basis for the adoption of Hague Convention 1899 and 1907 (Hendin 2003: 84).

Hague Convention 1907 was the first major attempt to codify the principle of command responsibility on a multinational level (Murray 2002).[43] The concept was first applied by the German supreme court in the *Trial of Emil Muller* in 1921 and later in *Re Yamashita case* in 1946 (Bantekas 1999: 573-575).[44] In the *High Command*

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having fallen into the hands of the enemy belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

[42] The *Lieber Code* is also known as Instructions for the Government of Armies of the United States in the Field. It was an instruction (signed by US President Abraham Lincoln on 24th April 1863) to the Union Forces of the United States during the American Civil War that dictated how soldiers should conduct themselves in wartime. Its name reflects its author (the German-American legal scholar and political philosopher Franz Lieber).

[43] Command or superior responsibility is not a responsibility of a person but it is a responsibility of the collective power or an effective authority misused or abused by a single person who commits or permits to commit such crime(s).

[44] In *re Yamashita case*, 61 U.S. 1 (1946). Similarly, in the *High Command case*, the United States Military Tribunal argued that in order for a commander to be criminally liable for the actions of his subordinates there must be a personal dereliction which can only occur where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part based upon a wanton, immoral disregard of the action of his subordinates amounting to acquiescence (*United States of America v. Wilhelm von Leeb et al*. (*High Command Trial*), Case No. 12 later

case, the US Military Tribunal argued that to make a commander criminally liable for the actions of his subordinates there must be a personal dereliction i.e. where the act is directly traceable to him or where his failure to properly supervise his subordinates. That constitutes criminal negligence on the part of the commander based upon a wanton, immoral disregard of the action of his subordinates amounting to acquiescence (Hendin 2003: Para 94-102). Similarly, in the *Hostage case* (1980),[45] the US Military Tribunal seemed to limit the situations where a commander has a duty to know instances where he has already had some information regarding subordinates' unlawful actions (Bantekas 1999: 4-6).

In 1945 the US supreme court prosecuted Japanese General Tomoyuki Yamashita. He was charged with 'failing to discharge his duty as a commander to control the acts of members of his command by permitting them to commit war crimes' (Hendin 2003: Para 96). The same was the case with 1971 prosecution against United States Army Captain Ernest Medina in connection with the Vietnam War, with regard to 'My Lai Massacre'. A commanding officer being aware of human rights violations or the commission of war crimes will be held criminally responsible when he does not take any action to prevent such activities; but Medina was acquitted of all charges.[46] The concept of command or superior responsibility is also called as the Yamashita Standard or the Medina Standard.

According to D'Amato the concept of command responsibility has been developed through multilateral conventions and customary law as recognised by the Nuremberg and Far East Tribunals. He understands that the command responsibility has to satisfy two necessary elements: (i). that the commander knew or should have known of the commission of the war crime; and ii). that he was capable of inhibiting or preventing it (D'Amato 1986: 607). The Nuremberg[47] and Tokyo[48] tribunals, dis-

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as Case No. 72; 462-697 (Vol. IX. 1948), NMT Judgment of 27 October 1948; Hendin 2003: para 94-102).

[45] *United States v Iran* (known as *Hostage case*) (24 May 1980), ICJ Rep. 124.

[46] Though US officials commit crimes but they always escape from their responsibility in most of the cases. Even the *Medina case* 1971 is a good example for the United States' attitude of escapism. Because captain Ernest L. Medina was acquitted on 22nd September 1971 of all charges alleging his misconduct during the 'My Lai Massacre' on 16th March 1968 **(***United States v. Captain Ernest L. Medina* (known as My Lai massacre) 1981; Hendin, *ibid.* para 96).

[47] Article 8 of the Nuremberg Charter provides that the defendant acted pursuant to order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the tribunal determines that justice so requires.

cussed explicitly the requisite standard of *mens rea*, and were unanimous in finding that a lesser level of knowledge than actual knowledge may be sufficient. The concept was properly codified in Articles 86(2)[49] and 87(3) of Additional Protocol I of the Geneva Conventions.[50] Further, the Statutes of the ICTY,[51] the ICTR,[52] and the ICC also contain provisions for command or superior responsibility.[53] The ICC's chief

[48] Article 6 of the Tokyo Charter provides that neither the official position of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the tribunal determines that justice so requires.

[49] Article 86(2) of the Geneva Conventions Protocol I talks about Failure of Act. It provides that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility (if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach).

[50] Article 87(3) of the Geneva Conventions Protocol I speaks about Duty of Commanders. It provides that '[t]he High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof'.

[51] Article 7 of the ICTY Statute speaks about Individual Criminal Responsibility which includes Commanders or Superiors. It provides that: (1). A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime; (2). The 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; (3). The fact that any of the acts referred to in Articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof; and (4). The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the international tribunal determines that justice so requires.

[52] Article 6 of the ICTR Statute similar to the ICTY Statute speaks about Individual Criminal Responsibility (which includes the responsibility of commanders or superiors). It provides that: (1). A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime; (2). The 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; (3). The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof; and (4). The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the international tribunal determines that justice so requires

[53] ICTY cases includes: *The Prosecutor v. Delalic et al.* (which is popularly known as *Celebici case*) and *The Prosecutor v. Blaskic* (which is also known as the *Blaskic case*) and ICTR cases includes: *Bagosora appeal* and *Musema case* are related to the concept of command responsibility. ICC referred

prosecutor Luis Moreno-Ocampo told *The Sunday Telegraph* that he is willing to start an inquiry through the ICC, and possibly a trial, for war crimes committed in Iraq involving British Prime Minister Tony Blair and American President George W. Bush (Chamberlain 2007). As per the Rome Statute, the ICC has no jurisdiction over Bush, because the United States is not a state party to the treaty;[54] but Blair does fall under the ICC jurisdiction because Britain is a state party to the Rome Statute.

Nowak (2009) remarked on German television that former president George W. Bush had lost his head of state immunity and under international law the United States could now be mandated to start criminal proceedings against all those involved in the violation of the UN Convention Against Torture (Marinero 2009).[55] Both under US and international law Bush will be criminally responsible for adopting torture as interrogation tool. In 2007, the ICC issued arrest warrants for militia leader Ali Muhammad Ali-al-Rahman, Ali Kushayb and Ahmad Muhammad Haroun for crimes against humanity and war crimes on account of command responsibility; but Sudan is yet to comply with the arrest warrants. In 2008, Luis Moreno-Ocampo announced ten criminal charges against President Omar al-Bashir, accusing him of sponsoring war crimes, genocide and crimes against humanity. The ICC's prosecutors have charged Omar al-Bashir with genocide because he 'masterminded and implemented a plan to destroy in substantial part of three tribal groups in Darfur' based on their ethnicity (Walker 2008).

Several allegations have been filed against the Zimbabwean President on the basis of torture and murder of political opponents. It is suggested that Robert Mugabe

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several cases related with the concept of command or superior responsibility under Article 28 of the Rome Statute such as *Omar al-Basher case, Muammar Gaddafi case, the Prosecutor v. Bemba Gombo case*, etc. *The Prosecutor v. Zejnil Delalic et al.* (Decision of the Appeals Chamber), Case No. ICTY-IT-96-21-A (20 February 2001). *The Prosecutor v. Tihomir Blaskic* (Decision of the Appeals Chamber), Case No. ICTY-IT-95-14-A (9 July 2004). *Theoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor* (Decision of the Appeals Chamber), Case No. ICTR-98-41-A (14 December 2011). *The Prosecutor v. Alfred Musema* (Decision of the Trials Chamber), Case No. ICTR-96-13-T (27 January 2000). *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, (4 March 2009). *The Prosecutor v. Saif Al-Islam Gaddafi*, Case No. ICC-01/11-01/11, (27 June 2011). *The Prosecutor v. Jean-Pierre Bemba Gombo* (Accused in ICC custody with 18 years imprisonment), Case No. ICC-01/05-01/08, (21 June 2016).

[54] Apart from that the US has permanent membership and veto power in the UN Security Council under Article 23(1) and Article 27(3) of the UN Charter.

[55] Professor Manfred Nowak as a Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment calls for prosecution (Marinero 2009).

may be prosecuted by using the term doctrine of command responsibility.[56] The precedent for this was set by its referral to bring indictments relating to the crimes committed in Darfur (Ellis 2008). Otherwise, a Zimbabwean regime following Mugabe would have jurisdiction over his alleged crimes, in the absence of any amnesty law, numerous countries have universal jurisdiction over torture. At present, Article 28 of the Rome Statute[57] is an effective provision to prosecute the commanders as well as superiors, whenever they fail to prevent the war. *Bemba case* is good example for the concept of command responsibility.[58] The responsibility of commander may differ depending on their command level (such as General, Lieutenant General, Major General) are responsible for their violations.

Some important cases referred to international courts and tribunals relating to command responsibility include: In *re Yemashita case* (Decision of the US supreme court)[59] discussing the concept of command responsibility; *Bemba Trial* on Command Responsibility (A Trial before the ICC);[60] *The Prosecutor v. Pavle Struger* (A Trial

[56] Zimbabwe has not subscribed to the ICC's jurisdiction. Hence the UN Security Council may authorize the ICC's jurisdiction upon Zimbabwe. London Telegraph (2008), "Mugabe Unlikely to Pay for His Crimes", The Sunday Morning Herald, published on 4th April 2008, [Online: web] Accessed 17 November 2016, URL: *http://smh.com.au/news/world/mugabe-unlikely-to-pay-for-his-crimes/2008/04/03/1206851105833.html*.

[57] Hendin views the principle of command responsibility in three different ways (which is impliedly mentioned in Article 28 of the Rome Statute): (1). There must be a relationship of the superior to the subordinate; (2). There must be a relationship between the act committed by the subordinate and the knowledge that the superior either had or should have had of the same; and (3). There had been a failure on the part of the superior to prevent, halt or punish (Hendin 2003: 84).

[58] Jean-Pierre Bemba Gombo is currently the sole person charged by the ICC in the Central African Republic (CAR) situation. Bemba was the president and commander-in-chief of the '*Mouvement de Liberation du Congo*' (MLC) and is the former vice-president of the Democratic Republic of the Congo (DRC). On 15 June 2009 the ICC Pre-Trial Chamber (PTC) II confirmed the charges of crimes against humanity (rape and murder) and war crimes (rape, murder and pillaging) against Bemba, sending his case to trial. The trial began on 22 November 2010 and is ongoing. Here, the point is Bemba involved the chain of continues command. The witnesses alleged that the orders or commands issued directly by the supreme commander Bemba. Further, witnesses alleged that the Chief of General Staff did not play an important role in decision making and issuing orders, all the effective command and control vested with Bemba. Moreover, the witnesses alleged that Bemba had full knowledge of the crimes and he never taken any steps to prevent such crimes in the place of Bangui. Therefore, he is personally held responsible under the concept of command responsibility as per Article 28 of the Rome Statute (*The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, (21 June 2016)).

[59] In *Tomoyuki Yamashita trial*, a Japanese general convicted for commanding troops responsible for atrocities in the Philippines (*Yamashita* case, 61 U.S. 1 (1946)).

[60] The *Trial of Jean-Pierre Bemba* – accused of failing to control his troops in the Central African Republic – is the ICC's first-ever command responsibility case – but the commanders being held responsible for crimes committed by others is nothing new in international law (*The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, (21 June 2016)).

before the ICTY);[61] *The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* (A Judgement of the Trial Chamber of the ICTY);[62] *Theoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor* (The Appeals Chamber of the ICTR);[63] *The Prosecutor v. Musema* (A Trial before the Trial Chamber I of the

[61] The accused Pavele Strugar, a retired Lieutenant General of the Yugoslav Peoples' Army (JNA), is charged in the indictment with crimes allegedly committed on 6th December 1991, in the course of a military campaign of the JNA in the area of Dubrovnik in Croatia. It is alleged that in the course of unlawful artillery shelling by the JNA on the historic Old Town of Dubrovnik, two people were killed, two were seriously wounded and many buildings of historic and cultural significance were damaged. These allegations support six charges in the indictment of violations of the laws or customs of war under Article 3 of the Statute of the Tribunal (namely murder, cruel treatment, attacks on civilians, devastation not justified by military necessity, attacks on civilian objects, and destruction of institutions dedicated to religion, and the arts and sciences). It is alleged that the accused is guilty of each of these six counts on two distinct bases: first, he personally ordered the shelling of the Old Town, and also personally aided and abetted the shelling, pursuant to Article 7(1) of the Statute; and second, as a superior responsible for the criminal conduct of the forces under his command, pursuant to Article 7(3) of the Statute. The Accused's liability is alleged to arise out of the position he then held as commander of the Second Operational Group. In this case the ICTY held that, Strugar sentenced to eight years imprisonment for his serious crimes (*The Prosecutor v. Pavle Strugar* (Decision of the Appeals Chamber), Case No. ICTY-IT-01-42-A (17 July 2008)).

[62] The case is also known as *Celebici case*. In 1992, the Bosnian Muslims and Croats took control of the villages containing pre-dominantly Bosnian Serbs within and around the Konjic municipality in central Bosnia. The persons detained during the operations were held in a former JNA Facility in the village of Celebici (popularly called the Celebici prison-camp), where detainees were killed, tortured, sexually assaulted, beaten and otherwise subjected to cruel and inhuman treatment by the four accused. Out of those four accused, one acquitted (Zejnil Delalic) because of not guilty. And the Trial Chamber found that Mr. Delalic did not have command and control over the Celebici prison-camp. Remaining three accused (Zdravko Mucic, Hazim Delic and Esad Landzo) got the sentence of 7 years, 20 years and 15 years, respectively (*The Prosecutor v. Zejnil Delalic et al.*, Case No. ICTY-IT-96-21-A (20 February 2001).

[63] Decision of the Trial Chamber: The Trial Chamber found Mr. Nsengiyumva guilty of genocide, crimes against humanity, and serious violations of Article 3 to the Geneva Conventions and Additional Protocol II. It also found that he aided and abetted killings in the Bisesero area of Kibuye prefecture in the second half of 1994 by sending militiamen to participate in them. For the crimes committed in Gisenyi town (including the killing of Alphonse Kabiligi, at Mudende University, and at Nyundo Parish), the Trial Chamber found that he could also be held responsible as a superior and took this into account while sentencing. Therefore, he was sentenced to life imprisonment. Similarly, the Trial Chamber found Mr. Bagosora guilty of genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II for ordering the murder of Augustin Maharangari and the crimes committed in 1994 at Kigali area roadblocks. Further, it found Bagosora responsible as a superior for the killings of Prime Minister Agathe Uwilingiyimana, Joseph Kavaruganda, Frederic Nzamurambaho, Landoald Ndasingwa, Faustin Rucogoza, 10 Belgian peace keepers, and Alphonse Kabiligi, as well as killings committed at Christus, Kibagabaga Mosque, Kabeza, Saint Josephite Centre, Karama Hill, Kibagabaga Catholic Church, Gikondo Parish, Gisenyi town, Mudende University, and Nyundo Parish. It found that he also responsible as a superior for the rapes committed at the Kigali area roadblocks, the sexual assault of the Prime Minister, the torture of Alphonse Kabiligi, the rapes and stripping of female refugees at the Saint Josephite Centre, the rapes at Gikondo Parish, and the 'sheparding' of refugees to Gikondo Parish where they were killed. Hence, Bagosora was also sentenced to life imprisonment.

Decision of the Appeal Chamber: Mr. Nsengiyumva submits that the Trial Judgement is void for violating Article 22 of the Statute because the judgement have failed to carry any reasoned opinion and when the Trial Chamber issued judgement the mandate of one of the Judges had terminated. But the Appeals Chamber dismisses Nsengiyumva's First Ground of Appeal. In his Twelfth Ground of Appeal,

ICTR).[64] Other than these cases, *Gotovina case, Perisic appeal, Kristic case,* etc. are also related with the concept of command responsibility.[65]

Responsibility includes command or superior responsibility and civilian command or civilian superior responsibility.[66] In some cases commanders were convicted and in others acquitted. For example, in *Gotovina case* all commanders and superior officials escaped their responsibility.[67] In this context, who is responsible for the in-

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he submits that the Trial Chamber committed numerous errors of law and fact which violated his right to a fair trial and caused him prejudice. Based on the Second, Fourth, and Sixth through Tenth Grounds of Appeal, he contends that the Trial Chamber erred in failing to appreciate the primacy of the indictment as a charging document, in finding that he was put on notice by post-indictment communications, and in failing to find that his ability to prepare his defence was materially impaired by the lack of notice. The Appeal Chamber imposes a sentence of 15 years imprisonment upon Nsengiyumva and the decision deviated from earlier life imprisonment of 35 years. Similarly, Mr. Bagosora was also presents Six Grounds of appeal containing numerous sub-grounds challenging his conviction and sentence (such as the alleged errors relating to Bagosora's superior position and effective control (Ground 1); his fair trial rights were violated by the Trial Chamber's failure to enforce as subpoena for the appearance and testimony before the Tribunal and alleged errors in applying the law of superior responsibility (Ground 2); etc) (*Theoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor*, Case No. ICTR-98-41-A (14 December 2011)).

[64] Musema was arrested in Switzerland for serious international crimes committed in Rwanda in 1994. He charged with genocide and crimes against humanity both are serious human rights violations of Article 3 common to the Geneva Conventions and their Additional Protocol II. Trial Chamber I of the ICTR proved his guilty of genocide and crime against humanity. Under Paragraph 85, the Chamber considers the offences of which Musema is guilty are extremely serious and described genocide as the 'crime of crimes'. Under Paragraph 87, the Chamber concludes that the aggravating factors outweigh the mitigating factors, especially as Musema personally led attackers to attack large numbers of Tutsi refugees and raped a young Tutsi woman. He knowingly and consciously participated in the commission of crimes and never showed remorse for his personal role in the commission of the atrocities. Therefore, the ICTR's Trial Chamber I held that the accused gets a single sentence of life imprisonment for all the counts on which he has been found guilty (*The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T (27 January 2000)).

[65] *The Prosecutor v. Ante Gotovina and Mladen Markac* (Decision of the Appeals Chamber), Case No. ICTY-IT-06-90-A (16 November 2012); *The Prosecutor v. Momcilo Perisic* (Decision of the Appeals Chamber), Case No. ICTY-IT-04-81-A (28 February 2013); *The Prosecutor v. Radislav Krstic* (Decision of the Appeals Chamber), Case No. ICTY-IT-98-33-A (19 April 2004); etc.

[66] Rwandan genocide is an excellent evidence for civilian superior responsibility, because during the internal war in Rwanda some of the Hutu community 'civilians' were appointed as 'superiors'. Those civilian superiors did not get any salary from the Hutu government but they get the salary of looted cows, food stuffs, etc. from the Tutsi community. In '*Gacaca*' evidenced that the civilian superiors are also held responsible for their criminal activities. Gacaca is a local body in Rwanda acts like a gram panchayat or it acts like a people court. Gacaca as a mobile court; trials are conducted in front of the victims or general public in a open place; decides whether the particular Hutu civilian superior exercise his power or force against Tutsi community or not; and the spot decision is final (whether the particular Hutu accused is acquit or convict).

[67] In *Gotovina case*, Ante Gotovina as a commander of the Split Military District of the Croatian Army (HV) from 9 October 1992 to March 1996; and overall operational commander of the southern portion of the Krajina region during the military offensive known as 'Operation Storm'. Ivan Cermak as an Assistant Minister of Defence in the Croatian Government from 1991-1993; from 5 August 1995, Commander of the Knin Garrison, which encompassed the municipalities of Civljane, Ervenik, Kijevo, Kistanje, Knin, Nadvoda and Orlic; and held the rank of Colonel General. And Mladen Markac as a Commander of the Special Police of the Ministry of the Interior of the Republic of Croatia from 18

human treatment of inmates in Guantanamo Bay? Those inmates are neither war combatants nor prisoners of war under third Geneva Convention; whether superiors or superintendents of the Guantanamo Bay or the President of the US could be held accountable under Article 28 of the Rome Statute?

Generally, the courts and tribunals decide the responsibility of the perpetrators based on the hierarchical relationship of the superiors, commanders and subordinates (the link may be direct or indirect). The effective command and control is complicated in its practice, which includes: (i). whenever an effective authority is abused by commander; (ii). when military ability is abused to prevent offences and the courts and tribunals have to punish the principal offenders of such superiors or commanders; and (iii). sometimes, the material ability may be expressed by issuing orders.

In *Gotovina case*, the accused failed to make serious effort to investigate and to prevent future crimes. The *Celibici issue* (1998) decided that, 'a superior may only be criminally responsible for failing to take such measures that are within his powers because international law cannot oblige a superior responsibility' (Mettraux 2005: 303). Generally, the persons are liable for the wrong committed by them but in some exceptional circumstances persons are responsible for the wrongs committed by others.[68] In *Bemba case* (2008), Bemba was a military commander of the Congo. The serious crimes were done by subordinates with his presence. Therefore, he himself was held personally responsible for such commission of heinous crimes. The superior or military commander had the duty to protect and prevent the civilians as well as war at any point of time within his effective command, effective authority or effective control. But Bemba failed to control such crimes which occurred within his effective command.[69]

February 1994, which gave him overall authority and responsibility for the operation and functioning of the Special Police; and Assistant Minister of Interior; following Operation Storm, held the rank of Colonel General. These three commanders as well as superiors were acquitted from their prosecution. Actually they were prosecuted under crimes against humanity, where Gotovina was sentenced to 24 years imprisonment by the Trial Chamber in 2011 but Appeal Chamber acquitted him on 16 November 2012. But Ivan Cermak was acquitted by the Trial Chamber itself on 15 April 2011. And Mladen Markac who was also sentenced to 18 years imprisonment by the Trial Chamber but the Appeal Chamber acquitted him in 2012 (*The Prosecutor v. Ante Gotovina and Mladen Markac*, Case No. ICTY-IT-06-90-A (6 November 2012)).

[68] The above mentioned practice is common in vicarious liability under the torts law (especially in master and servant, principal and agent relationships but such liability arise only in the course of employment).

[69] As per the international humanitarian laws and the opinion of international courts and tribunals, the illegal effective command and superior order of effective control are not at all a defence. Those

As per international humanitarian laws, as well as the opinion of international courts and tribunals 'illegal effective command and superior orders' is not a defence. D'Amato explains about the command responsibility with an example that, 'suppose 'A' as a military commander, issues an order to his subordinate 'B' that is clearly illegal under the laws of war (i.e. to execute prisoners of war or to kill civilians in the absence of military necessity). If 'B' as a subordinate carries out the order, then 'B' is criminally liable under the Nuremberg precedents and humanitarian law as the perpetrator of a criminal act. Should 'B' attempt to defend his action on the ground that he was following orders, the tribunal will respond that the order was illegal and hence should not have been obeyed' (D'Amato 1986: 604). If 'A's order is illegal and if 'B' refuses to follow such order, though 'B' violates his commander's order, 'B' is not responsible under humanitarian law, but 'A' is responsible even if his order was not executed.

Joint Criminal Responsibility

Joint Criminal Responsibility (JCR) or Joint Criminal Enterprise (JCE) is a new concept inter-linked with individual responsibility. The doctrine combines the elements of conspiracy, complicity and participation in a criminal organization. Some scholars argue that this form of individual responsibility is impliedly woven within Article 25 of the Rome Statute.[70] Osiel argues that the ICTY's preference for JCE might be in-

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commanders and superiors are responsible personally without claiming the sovereign immunity.

[70] Article 25 of the Rome Statute speaks about Individual Criminal Responsibility. It provides that: (1). The court shall have jurisdiction over natural persons pursuant to this Statute; (2). A person who commits a crime within the jurisdiction of the court shall be individually responsible and liable for punishment in accordance with this Statute; (3). In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the court if that person: (a). commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible, (b). orders, solicits or induces the commission of such a crime which in fact occurs or is attempted, (c). for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission, and (d). in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i). be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the court, or (ii). be made in the knowledge of the intention of the group to commit the crime, (e). in respect of the crime of genocide, directly and publicly incites others to commit genocide, (f). attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose;

fluenced by the prosecutor's desire to achieve the conviction of as many suspects as possible (Osiel 2005: 1752-1758). Charles Taylor's indictment before the Special Court for Sierra Leone shows clear evidence for the systemic nature of international crimes.[71] The accused committed serious crimes in Liberia, without physical participation, but still he was seen as a 'co-perpetrator'. As head of the state he was a party to common plan and design to commit serious crimes; it is reasonably a foreseeable consequence of the common plan.

Similarly, Slobodan Milosevic was accused of participating in three large criminal enterprises. The Trial Chamber found at the conclusion of the prosecution case that a reasonable trier of facts would be satisfied beyond reasonable doubt that Milosevic was a participant in JCE that included the Bosnian Serb leadership, and that he shared with its participants the aim and intention to destroy a part of the Bosnian Muslims as a group (Milosevic Judgement 2004: 288).[72] Notably, 'the accused was the dominant political figure in Serbia and he had profound influence over the Bosnian Serb political and military authorities' (*ibid*.: 257). In the aftermath of WW II, in the *Rwamakuba case* the ICTR Appeals Chamber held that, 'liability for participation in a criminal plan is as wide as the plan itself, even if the plan amounts to a nation-wide government – organized of cruelty and injustice' (*Rwamakuba case* 2004: 25).[73] Though the doctrine seems like a superior responsibility but remains grounded on the principles of individual responsibility. With its somewhat more liberal evidentiary standards is particularly suitable to tackle mass atrocities (Gattini 2009: 121).

Collective Responsibility

Collective responsibility is an effective tool to control mass atrocities against humanity. It is to hold larger group responsible for crimes committed by some considerable section of its members (Mannheim 1955: 44). But many scholars criticise the concept as unacceptable. Hans Kelsen is of opinion that 'Collective

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and (4). No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of states under international law.

[71] *The Prosecutor v. Charles Ghankay Taylor* (Decision of the Appeals Chamber), Case No. SCSL-03-01-A (26 September 2013).

[72] *The Prosecutor v. Slobodan Milosevic* (Decision of the Trial Chamber), Case No. IT-02-54-T, 288 (16 June 2004).

[73] *Andre Rwamakuba v. Prosecutor* (Decision of the Appeals Chamber), Case No. ICTR-98-44-AR724 25 (22 October 2004).

Responsibility would be primitive and immoral in view of its effects on innocent members of collectivism' (Kelsen 1942). Scharff and Williams note that 'the first function of justice is to expose the individual responsible for atrocities and to avoid assigning guilt to an entire people' (Williams and Scharf 2003: 161-170). Antonio Cassese wrote that 'the collective responsibility is no longer acceptable' (Cassese 2003: 136). Even Nollkaemper writes that resorting to collective responsibility would thus be a step back to the primitive collective responsibility from which the international legal order has just liberated itself (Nollkaemper 2010: 323).

However, possible defence for collective responsibility includes: (i) in many instances of international crimes dealing with individuals fail to remove the cause of atrocities. In some cases, a substantial part of the group indeed was involved in the crime, as was the case in Rwanda during the genocide in the early 1990s[74] and in Nazi Germany in the early 1940s;[75] (ii) collective sanctions do not necessarily have effects for all members of the collectivity and their responsibility is negligible. Darcy notes that 'for citizens who are the constituent members of a state, the impact upon them of any consequences of responsibility is usually negligible' (Darcy 2007: XVII). The Ethiopia-Eritrea claims commission recognized the effects of reparation for the population of the responsible state as a relevant factor to take into account in determining levels of reparation but rejected the claims for substantial moral damages (*Eritrea v. Ethiopia* 2009: para. 21 and 61).[76]

The collective responsibility is not to introduce or reintroduce the notion of collective guilt in international law. Under individual criminal responsibility the idea of guilt is inherent, whereas in collective responsibility it is not. Walzer notes that the distribution of costs over a population that may result from state responsibility for in-

[74] Alvarez noting that 'when one per cent of a country's population is under arrest for such offences, amid credible charges the millions were involved in atrocities, an attempt to dissemble on the scope of likely complicity is likely to fail' (Alvarez 1999: 467-468).

[75] Gattini noting that 'it is true that under the Nazi dictatorship and during the war the vast majority of Germans personally committed no crime, but it is somehow too self-indulgent, not to say self-absolving, to maintain that for that reason they could not collectively be held morally nor legally responsible' (Gattini 2009: 108).

[76] Paragraph 21 provides that 'huge awards of compensation by their nature would require large diversion of national resources from the paying country – and its citizens needing health care, education and other public services to the recipient country. In this regard, the prevailing practice of States in the years since the Treaty of Versailles has been to give very significant weight to the needs of the affected population in determining amounts sought as post-war reparations' *Eritrea-Ethiopia Claims Commission (Final Award),* Permanent Court of Arbitration, part XXVI-XVIII, Reports of International Arbitral Awards, para. 21: 631-770 (17 August 2009).

ternational crimes is not the distribution of guilt (Walzer 1977: 297). According to Backer an individual responsibility usually prevails over collective responsibility; the individual is sacrificed so that the group can continue (Backer 2003: 509).

Andre Nollkaemper concludes that the law of individual responsibility and the law of collective responsibility are largely complementary. The major challenge is to combine both approaches within an integrated analytical framework, in which the disadvantages of one approach offset the advantages of the other and vice-versa (Nollkaemper 2010: 352). Further, he views that the power of international criminal justice to better respond to the situations of mass atrocities that have inspired its evolution will largely depend on its ability to transcend individuality and to integrate individual and collective responsibility in a complementary framework that matches the dynamics that cause international crimes to happen in the first place (*ibid*.).

1.3. Responsibility of Organisations

In the era of increasing number of international and regional organisations it is very much possible that, like states, organisations could be responsible for serious international crimes. Many organisations like the United Nations, NATO, Warsaw Pact, etc. engage in the activities of maintenance of peace and security.[77] Participation of such organisations in conflict situations might lead to commission of wrongful acts. In this regard the International Law Commission adopted a Draft Articles on the Responsibility of International Organisations. Article 1 of the Draft Articles provides that the 'draft articles apply to the international responsibility of an international organization for an internationally wrongful act'. The provision expressly imposes an organisational responsibility above and beyond individual responsibility or state responsibility for internationally wrongful act. Further, Article 31 provides that '[t]he responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act' and the '[i]njury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organisation'.

[77] Under Chapter VIII, the UN Charter gives way to establish various regional arrangements for the purpose to maintain international peace and security.

Within the UN body, the Security Council has primary duty to eliminate the international crimes and to ensure international peace and security.[78] If organizations like NATO, Warsaw Pact or any other international or regional organisations take unauthorised action against innocent countries, what could be their organisational responsibility? The law of individual responsibility would to some extent address this problem and indirectly holds the organization criminally responsible. This approach was used by the Nuremberg tribunal as an indirect approach to individual responsibility. The organization could be held responsible for wrongful acts of their superior officers. It seems like a master and servant relationship in the issue of international responsibility.

1.4. Responsibility of Corporations

Criminal Responsibility for Corporate Officials

Lord Thurlow Edward (1731-1806) once observed that '[c]orporations have neither bodies to be punished, nor souls to be condemned, they therefore do as they like' (Knowles 2009: 810). Edward was of opinion that corporations have always escaped criminal responsibility for mass atrocities. Corporation as an entity cannot be punished physically but only its officials can be punished. With the concept of distinctive corporate personality, the owners of corporations escape their accountability along with the use of money and muscle power. Only the officials in a lower cadre or subordinate employees of the corporations could be held criminally responsible for the master-plan of higher officials executed by employees without their knowledge. So a corporate crime is an attempt to establish connections between the distant fields of corporate on the one hand and the criminal law on the other.

The two ancient legal practices over the punishment of corporations: *deodand* which means punishment for animals and inanimate objects that produced harm; and *frankpledge* which means punishment for all members of a group when one member eluded punishment for his crime. The reasons offered for punishing corporations as criminals are instrumental and expressive (Alschuler 1991: 312-13). The expressive reasons match those that of *deodand*; and instrumental reasons match those that of *frankpledge*. The expressive approach appears to dominate popular writing, but

[78] Under Article 24 of the UN Charter, the Security Council has primary responsibility to maintain international peace and security.

attributing blame to a corporation is no more sensible than attributing blame to a dagger, a fountain pen, a Chevrolet, or any other instrumentality of crime (Alschuler 2009: 44-45). However, recognising instrumental punishment suggests a revision of the current standard of corporate liability.

The international community attempted several times to bring corporations and its officials before international criminal tribunals for their serious atrocities. In some cases, the international military tribunals have already discussed the issues of corporate civil liability and punished corporate officials. Nuremberg tribunals had given punishment equally to both Nazi military commanders as well as company commanders. Actually, the Nuremberg military tribunal not only prosecuted and punished just military and corporate commanders but also other officials [79] subordinates, employees, civilians and so on. For instance, on 9th December 1946 – the US conducted the *doctors' trial* before the IMT (Nuremberg); there were 23 Nazi physicians of the Action T4 were prosecuted and punished for mass atrocities committed on 20th August 1947 or assisted directly or indirectly (Lippman 1993: 395-441).[80] Along with *doctors' trial* eleven more trials were also conducted; and among those, three were exclusively dealt with corporate criminal responsibility.[81] But none

[79] Other officials include: Nazi physicians, Nazi racial purity jurists, etc. who were not actually took part in the WW II but behind the door they played a crucial and cruel role to increase the death-toll of Jews during the warfare.

[80] *The United States of America v. Karl Brandt et al.* (1947) is popularly known as doctors' trial. This trial was discussed before the US Military Tribunal, Nuremberg and the judgment came into force on 19th July 1947.

[81] Other than the *doctors' trial*, the US conducted eleven more trials (the Nuremberg tribunal seized those matters from 9th December 1946 to 13th April 1949). The eleven trials of the subsequent Nuremberg proceedings include: (1). *Milch Trial* (1947) – Field Marshal Erhard Milch of the Luftwaffe was prosecuted; (2). *Judges Trial* (1947) – 16 German Nazi racial purity jurists were prosecuted; (3). *Pohl Trial* (1947) – 17 SS Officers were prosecuted for war crimes of the Nazi regime along with Oswald Pohl; (4). *Flick Trial* (1947) – Friedrich Flick and his 5 company directors were prosecuted and for the first time the corporate criminal responsibility was discussed and company commanders were prosecuted before the Nuremberg tribunal. (5). *IG Farben Trial* (1948) – Directors of IG Farben group of companies were punished for the (production and distribution) supply of Zyklon B poisonous gas to the Nazi concentration camp; (6). *Hostages Trial* (1948) – 12 German Generals of the Balkan campaign were punished by the tribunal; (7). *RuSHA Trial* (1948) – 14 resettlement officials of the Nazi regime were punished for racial cleansing of Jews; (8). *Einsatzgruppen Trial* (1948) – 24 officials of the Einsatzgruppen paramilitary forces were prosecuted by the tribunal; (9). *Krupp Trial* (1948) –12 directors of the Krupp group were prosecuted by the tribunal because they actively took part in the Nazis' aggressive war; (10). *High Command Trial* (1948) – 14 Nazi High Command Generals were prosecuted, two of them were acquitted in all counts, one General committed suicide and remaining 11 were sentenced from 3 years to life imprisonment for their counts; and finally, (11). *Ministries Trial* (1949) – 21 officials of Reich Ministries were prosecuted; among them, two of them were acquitted but remaining officials were punished ranging from 3 years to 25 years imprisonment (Original Document of the Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law

of the corporate companies made accountable only the corporate officials were prosecuted and punished. The three cases include: the Flick Trial,[82] the IG Farben Trial[83] and the Krupp Trial.[84]

Flick Trial (1947): This was the first trial on the leading industrialists of Nazi Germany. This was also the first case against the owner and directors of the companies for financial contributions to support and encourage the Nazi forces against Jews and Allied forces. The defendants Friedrich Flick and other five high-ranking directors of Flick group of companies, known as Flick *Kommanditgesellschaft*/Flick KG, were charged for slave labour and plundering as well as for being members of 'the circle of Friends of Himmlar'. The circle was a group of influential German industrialists and bankers for the purpose of giving financial contribution/support to the Nazis. Its members donated annually about 1 million Reichsmark to a 'Special Account S' in favour of Heinrich Himmler, who was a senior member of the Nazi party (NSDAP) and who was also a protection squadron of Nazi Germany. The tribunal found Flick and other directors as guilty of slave labors, plundering resources and labours, and economic support to encourage Nazi regime against Allied nations. Among six accused three were acquitted and three were punished. [85] Friedrich Flick's offences proved with proper evidence; and got imprisonment of seven years; Otto Steinbrinck was punished for five years

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No. 10, Volume Series – 1 to 15, October 1946 – April 1949, [Online: web] Accessed 15 April 2017, URL: http://www.loc.gov/rr/frd/Military-Law/NTs-War-Criminals.html.

[82] *The United States of America v. Friedrich, et al.* (1947) where the proceedings started from 20th April 1947 to 22nd December 1947; and the judgment had been given by the US Military Tribunal, Nuremberg on 22nd December 1947, [Online: web] Accessed 2 February 2017, URL: *https://www.loc.gov/rr/frd/Militry_Law/pdf/Law-Reports-Vol-9.pdf.*

[83] *The United States of America v. Carl Krauch, et al.* (1948) (popularly known as *IG Farben case)* where the proceedings started from 27th August 1947 to 30th July 1948; and the judgment had been given by the US Military Tribunal, Nuremberg on 30th July 1948, [Online: web] Accessed 2 February 2017, URL: *https://www.loc.gov/rr/frd/Militry_Law/pdf/Law-Reports-Vol-10.pdf.*

[84] *The United States of America v. Alfred Krupp, et al.* (1948) where the proceeding started from 8th December 1947 to 31st July 1948; and the judgment had been given by the US Military Tribunal, Nuremberg on 31st July 1948, [Online: web] Accessed 2 February 2017, URL: *https://www.loc.gov/rr/frd/Militry_Law/pdf/Law-Reports-Vol-10.pdf*.

[85] The defendants Odilo Burkart, Konard Kaletsch and Hermann Terberger were acquitted from all charges in the *Flick Trial* because of their proved innocence. And they were discharged from the custody.

imprisonment; and Bernhard Weiss was convicted with imprisonment for two and one-half (2%) years (*Flick Trial* 1947: 1187-23).[86]

IG Farben Trial (1948): In this case the allegations include slave labour, plundering and supply of explosives to Nazi Germany for aggressive war. The issue was filed on 3rd May 1947 and the defendants in the case had all been directors of IG Farben, a large German group of chemical firms. The company also played a major role during WW I, when their development of Haber-Bosch process for nitrogen fixation compensated for Germany being out from Chilean nitrate trade and allowed IG Farben to produce synthetic nitrate and process nitrogen for use in agricultural fertilizer.[87] In WW II, Degesch (nearly 43% owned by IG Farben) was the trademark holder of Zyklon B (the poison gas) used at some Nazi extermination camps (Hayes 2001: 279). IG Farben also developed processes for synthesizing gasoline and rubber from coal and thereby contributed much for Germany to wage war despite being cut off from all major oil fields. The trial was started from 27th August 1947 to 30th July 1948. Among twenty-four defendants, ten were acquitted for lack of evidence or proved innocence; charges against one were dropped on medical reason; and the remaining thirteen were convicted (*IG Farben Trial 1948*).

Krupp Trial (1948): This was the third trial against Nazi German industrialists along with *Flick et al.* and *IG Farben trials*. There were twelve former directors of the Krupp group was accused of having enabled the armament of the German armed forces and thus having actively participated in the Nazis' perpetration for an

[86] The case shows that financing for Nazi regime or Nazi forces or Axis powers were treated as a criminal offense and those who were involved in it were criminally accountable before the Nuremberg Military Tribunal. Here the argument is, even the American and other Allied nations' corporations have financially supported the Allied forces but no corporate officials were prosecuted or punished before any tribunals. Here the argument of the US might be the corporations those who supported for Allied powers cannot be punished because they supported financially to stop or to control the WW II but not to encourage or increase the atrocities during the war. This sort of justification is popularly called as 'victor's justice'. If suppose, Axis forces would won the WW II all the Allied forces' officials might be treated as criminals and those who financially supported corporations and its directors might also be convicted. Therefore, the research cannot conclude with blind eye i.e. Nazi regime alone done serious crimes against international community but the Allied forces did not do it; then such conclusion become one sided. Even USA brutally attacked Hiroshima and Nagasaki of Japan as well as Berlin of Germany in the end of WW II. It is just a blame game with each other and nothing else.

[87] Nitrate is an important component for the fabrication of explosives such as gunpowder, dynamite and TNT.

aggressive war, and also for having used slave labourers in their companies.[88] The CEO of the Krupp companies Alfred Krupp von Bohlen und Halbach and his son Gustav Krupp were the main defendants. Among twelve one was acquitted from all charges but the remaining others received prison sentences between three years to twelve years. The maximum punishment was given to the owner and CEO of Krupp group of companies; who was ordered to sell all his possessions.[89] Later, Alfred Krupp was pardoned after three years of sentence and forfeited properties were also restored (*Krupp Trial* 1948).

These three cases were milestone in the development of the concept of corporate criminal responsibility under ICL along with other nine more trials discussed by the Nuremberg military tribunal. The tribunal exercised jurisdiction not only on the military commanders but also on companies and directors of the companies who were actively took part by supplying of armaments or financial contribution to encourage mass atrocities during war.

The Zyklon B Trial (1946): Before commencement of Flick, IG Farben and Krupp Trials by the IMT Nuremberg, the British Military Court in Hamburg took a criminal action against the German industrialists and their company commanders. This was a predominant role model to other leading cases related to corporate criminal responsibility over industrialists, CEOs, directors, company commanders, technicians, salesmen and other employees, for knowingly took part in killing of Jews, Allied Nations' commanders and other innocent civilians.

The trial was conducted against Bruno Tesch, owner of a firm that produces the Zyklon B poisonous gas, and two others of company commander Weinbacher as well as gassing technician Drosihn. The primary allegations against these three were having supplied poisonous gas used for killing of interned Allied combatants in concentration camps, knowing that it was so to be used. But the defence claimed that the accused persons did not know the reason for the use of poisonous gas at camps or

[88] The Krupp holding did flourish under the Nazi regime. According to conservative estimates, the Krupp group of enterprises used nearly 100,000 persons as forced labors; in which 23,000 persons were prisoner of war.

[89] Alfred Krupp never agreed any guilt and he denied all the guilty. He stated in 1947 (which appeared in Golo Mann's Manuscript 1988) that 'the economy needed a steady or growing development. Because of their revelries between many political parties in Germany and the general disorder there was no opportunity for prosperity.....we thought that Hitler would give us such a healthy environment. Indeed he did do that.….we Krupps never cared much about (political) ideas. We only wanted a system that worked well and allowed us to work unhindered. Politics is not our businesses'.

elsewhere; for Drosihn it was also pleaded that the supply of gas was beyond his control. The British Military Court acquitted Drosihn's since the 'supply of gas was beyond his control'. But Tesch and Weinbacher knew the purpose of Zyklon B's usage at the concentration camps and hence, they were found guilty. On 8th March 1946, both of them were convicted and sentenced to death; and on 16th May 1946 they were hanged in the Hamelin in the prison for war crimes. (*The Zyklon B case* 1946: 93-103).[90]

Criminal Responsibility for Business Leaders

Even though several corporate criminals were prosecuted and punished by the Nuremberg and Tokyo tribunals for their involvement in mass atrocities during WW II, but due to change in social structure the corporate criminal responsibility gradually got diluted. Even the Rome Statute of the ICC neglected the responsibility of corporate commanders and directors. During the draft process of the Rome statute France proposed corporate criminal liability for serious international crimes without any success. Some of the cases that dealt with criminal responsibility of business leaders could be considered as follows.

Public Prosecutor v. Frans Cornelis Andrianus van Anraat (2005):[91] In this case, the defendant was a major supplier of chemicals to Saddam Hussein's government of Iraq. Specifically, after 1984 he became the sole supplier of chemical weapons and mustard gas which were used against Iranian Military and Iranian nationals in the Iran-Iraq war and against innocent Kurdish population in northern Iraq. He had knowledge of serious atrocities and implicitly encouraged crimes during Iran-Iraq war and partly responsible for genocide over Kurdish population. The defendant was charged with genocide and war crimes; and was arrested by the Dutch officials on 7th December 2004. The statement to the defendant was read-out in the

[90] There are some criminal cases related with corporate crimes which are international in character but the domestic courts genuinely prosecuted and punished the corporate offenders (for instance, *Van Anraat issue*).

[91] *Public Prosecutor v. Van Anraat* (2007), Case No. 2200050906-2, Judgement of 9th May 2007 – Court of Appeal of the Hauge; *Public Prosecutor v. Van Anraat* (2009), Case No. 07/10742, Judgement of 30th June 2009 – Appeal to the Supreme Court of the Netherlands; *Van Anraat v. State of the Netherlands* (2010), Application No. 65389/09, Admissibility on 6th July 2010 – Decision on Admissibility of the European Court of Human Rights; *Public Prosecutor v. Van Anraat* (2010), Case No. 09/751003-04, Judgement of 16th December 2010 – On Request of the Public Prosecutor before the District Court of the Hague, [Online: web] Accessed 18 April 2017, URL: *www.internationalcrimesdatabase.org/case/178/Van-Anraat/.*

court that that did you not know the Iraq intended to use the raw materials he provided for chemical weapons. The defence lawyer argued that there was no convincing evidence linking the material that the defendant had supplied to chemical weapons used by Iraq but he already stopped his shipment to Iraq specifically after the Halabja attack (BBC News on This Day 1988).[92] Though the defendant escaped the responsibility for genocide due to lack of evidence but war crimes was proved and maximum sentence of 15 years was imposed. In 2007, the appeal court sentenced him to seventeen years and who was the only Dutchman ever to appear on the FBI's most wanted list.

On 30th June 2009, the supreme court of the Netherlands upheld the 2005 conviction of defendant for complicity in war crimes. Defendant's application before the European Court of Human Rights was also rejected. In this case, the defendant not only got an individual criminal responsibility but the court also granted compensation to the state for physical damages caused by him implicitly or explicitly. On 16th December 2010, the district court of The Hague decided that the defendant was to pay 3,493 Euros as damages to the state. Similarly, on 13th April 2011, the district court in The Hague decided to pose questions to the international institution on application of Iranian and Iraqi law concerning the limitation of time in respect of civilian claims. Moreover, the prosecutor requested the judges of the court to confiscate over 1 million Euros in profits made by the defendant from selling chemicals to Saddam Hussein. Though the case, did not referred or prosecuted by the international criminal tribunals/courts – but prosecuted and punished by the domestic courts for the author of war crimes in the Iran-Iraq conflict – but the national courts referred international law, Iranian law, Iraqi law along with Dutch law.

***The Public Prosecutor v. Guus Kouwenhoven case* (2010):** In this case, Kouwenhoven was held accountable for war crimes and selling arms to former President Charles Taylor regime in Liberia. Though district court of The Hague sentenced him to eight-year prison, the supreme court of Netherlands acquitted him based on the contradictory evidences and insufficient proof. During employment in the corporation if natural person acts on behalf of and with the explicit consent of the

[92] The Halabja Chemical Attack is also known as the Halabja Massacre or Bloody Friday; it was a brutal attack and massacre of the Kurdish population in the final days of the Iran-Iraq War in the Kurdish city of Halabja in Southern Kurdistan (*BBC on This Day* 1988).

legal person then the corporation is held criminally responsible. Not every employee acting on behalf of the company can criminally implicate his employer; but only those who exercise control within the corporation. The power of control, interest and awareness are the essential components which considers a legal person as a rational agent that can be held responsible for its decisions (acts and omissions) and these are the ingredients of the *raison d'être* requirement (Wilt 2013: 47-49).

Sometime, the corporations may involve in international crimes knowingly or unknowingly; the corporate agents in their individual capacity are prosecuted by national courts for international crimes. Further, business leaders and corporations have been subjected for civil liability through civil litigation; for example, the Alien Tort Claims Statute (ATS) in the United States. The ATS does not concern criminal law but it is a legal instrument which enables plaintiffs to sue persons who acted outside US territory for breaches of international law before US district courts reflected in *Filartiga v. Pena-Irala issue*.[93]

However, in the issue of Kiobel the court closed door to any litigations against corporations under ATS.[94] The court of Appeals concluded that corporate liability is not a rule of customary international law that we may apply under the ATS. Accordingly, the corporations only liable for their conduct in Nigeria and the ATS claims must be dismissed due to lack of subject matter jurisdiction. Therefore, the supreme court of US which is expected to deliver its final verdict in the first half of 2013 and this implies that the issue of subject matter jurisdiction over legal entities under ATS remains uncertain. But in the wake of the Nuremberg tribunal, military courts of the Allied forces in Germany delivered some high profile judgments of *Flick Trial*, *IG Farben Trial* and *Krupp Trial* on the criminal involvement of Germany's industrialists in Nazi atrocities (Lippman 1995: 173). Though the ICC neglected corporate criminal responsibility in its Statute, scholars like Harmen van der Wilt and Andrew Clapham are of opinion that the ICC can be prosecute and punish company commanders, corporate criminals and other business leaders under the Rome statute within the purview of Article 25 and 28 of the statute.

[93] *Filartiga v. Pena-Irala*, 876 ILDC 681 (US 1980), 30 June 1980.

[94] In this issue, Mrs. Kiobel and 13 other individuals brought civil claims against Shell alleging that Shell had sought the assistance of the Nigerian government to repress the Ogoni people who had united to counter the environmental effects of oil exploitation in the region.

Criminal Responsibility of PMC Personnels

The private military companies (PMCs) and private security companies (PSCs) are modern non-state actors. They operate all around the world and these private corporate entities carry-out public works.[95] On the one hand, the Private Military Companies (PMCs) reduce international crime rate by way of active participation in hostilities. For example, EO,[96] MPRI, Blackwater, [97] Northbridge Services Group,[98] Triple Canopy, [99] Prosegur, [100] Aegis Defence Service, [101] G4S, [102] etc. involves in guarding and taking direct part in hostilities. On the other hand, during war time ere is

[95] Here, the PMCs differ from PSCs. PMCs are always used in conflict areas whereas PSCs work in all places other than the areas of conflicting zone. Around the globe, the concept of PMCs/PSCs is an emerging profitable industry to provide private security to the general public. For instance, ACADEMI, Northbridge Services Group, Triple Canopy, Prosegur, Aegis Defence Service, G4S, etc. involves in providing strict security system. On the one hand, these companies reduce heinous international crimes; and on the other, they involve in gross human rights violations. In case of gross human rights violations, how these private entities are held criminally responsible under international law? Is there any legal provision to control the PMCs/PSCs misuse? So far, its role and criminal responsibility is unknown in international law.

[96] EO was a company founded by Eeben Barlow and he is a retired Lieutenant Colonel in the South African Special Forces and the former Europe Director of the South African Civil Cooperation Bureau in the 1980s.

[97] ACADEMI is an American private military company founded in 1997 by former Navy SEAL officer Erik Prince as Blackwater, renamed as XE Services in 2009 and now known as ACADEMI since 2011 after the company was acquired by a group of private investors.

[98] Northbridge Services Group is registered in the Dominican Republic, but with offices in Kentucky, Ukraine and the U.K. It is a service group of private military contractors that claims to provide highly confidential and effective security related services designed to address the needs of governments, multinational corporations, non-governmental organizations, the corporate sector and prominent individuals.

[99] Triple Canopy is a private security, risk management and defense contracting company based in Virginia. This was established by the former soldiers of the U.S. Special Forces Firm in 2003 at Chicago. It provides mission support, security and training services to government agencies and multinational corporations worldwide.

[100] Prosegur was established in 1976. At present, it is the Spain's biggest multinational private security firm with 150,000 staff spread out over Europe, Asia, Oceania and Latin America. Its service areas comprise manned guarding, home security, fire defense, security technology and consulting.

[101] Aegis Defence Services is a British private military company. It was established in 2002 by former Sandline International director and British soldier Tim Spicer. The firm has foreign offices in Iraq, Kenya, Nepal, Afghanistan, Bahrain and USA. It also had a hand in the establishment of the British Association of Private Security Companies. The company is involved with NGO, aerospace, government and diplomatic sectors as well as with oil, gas and mining industries.

[102] G4S was started by the British multinational security giant in 2004 when London-based company Securicor amalgamated with Danish business Group 4 Falck. It describes itself as 'the world's leading global security and outsourcing group; specializing in outsourcing of business processes in sectors where security and safety risks are considered a strategic threat'. Currently, G4S employs more than 620,000 people, which makes it the third biggest employer in the private sector globally. The company offers a range of services, including the supply of security personnel, monitoring equipment, response units and secure prisoner transportation. G4S also works with governments overseas to deliver security.

a possibility that the PMCs breach domestic as well as international humanitarian laws,[103] and have been accused of engaging in a number of human rights violations including the abuse and torture of detainees, shootings and killings of innocent civilians, destruction of property, sexual harassment and rape, human trafficking in the recruitment of third-country nationals, weapons proliferation, and participation in renditions (Ageli 2016: 28-37).[104] For instance, EO in Angola (1993), MPRI in Former Yugoslavia (1990) and Blackwater in Iraq (2000) committed heinous crimes, including war crimes, crimes against humanity and genocide during hostilities (*ibid*.: 47).[105]

If a state arrests or captures PMCs' personnel which law will be applicable against them? (Kalidhass 2014: 4-5). PMC personal will not be treated as combatants and they will not get Prisoners of War (PoW) status. Even the four Geneva Conventions are not applicable to them. However, the common understanding of Article 28 of the Rome Statute speaks about the responsibility of commanders and other superiors. The question here is: does it include the company commanders and company superiors? Whether the company commander and military commander are one and the same or different from each other? Can the company commander be prosecuted for his serious crimes under Article 28 of the Rome Statute? On the one hand, it is argued that the military commanders are responsible under Article 28 of the Rome Statute only when they exercise effective command or control. But the

[103] G4S is the biggest security provider in the world involved in military operations which caused mass atrocities in South Africa, Israel-Palestine, Iraq, Afghanistan, Guantanamo Bay, etc. For instance, G4S operations in private prison in Bloemfontein (working around 16000 securities) threaten the humanity. It provides security in conflicting zones. For example, it provides security to Israel in the occupied territories in Palestine, its involvement in the controversial American detention centre Guantanamo Bay and its activities in Afghanistan and Iraq. Similarly, Guards in the UK and Australia have been accused of racism, abuse and maltreatment of people in their care, some of whom died as a result of inappropriate use of force. In 2013, the Wits Justice Project revealed that G4S wardens were allegedly electroshocking inmates routinely, forcibly injecting them with antipsychotic drugs and holding them in isolation cells for up to four years. The department of correctional services announced an investigation into the allegations in November 2013, but their report is yet to be released. So far, the G4S has not dismissed or suspended any of its staff (available at: *http://www.news24.com/Archives/City-Press/Private-security-industry-under-fire-20150429*).

[104] The allegations of private contractors' involvement in serious human rights violations (including participation by contractors in the torture at Abu Ghraib and shooting deaths of civilians) officials in the previous Bush administration and the current Obama administration have made virtually no effort to hold contractors accountable or compensate victims. Private contractors have committed crimes with impunity.

[105] The crimes of EO in Angola and Blackwater in Iraq constituted as war crimes within Article 8(2)(e) of the Rome Statute. Similarly, the crime of MPRI in Former Yugoslavia constituted as genocide within Article 6 of the Rome Statute.

company commanders or company superiors do not have such right to command or control. On the other hand, it is argued the main object of the Rome Statute is to protect the human values and hence the perpetrator shall be held accountable, irrespective of the status as military commander or corporate commander.

However, sometimes organizations and states hire the private military and security companies for guarding and security purposes. If serious crimes were committed while carrying out their duties then: who is responsible for such criminal acts? Whether state or organization or particular PMC/PSC or the security employees or jointly liable? If the organization or state or PMC/PSC instructed security employees to do certain acts, and they have done it (without their knowledge or beyond their control) then the organization personally held responsible for such atrocities. In case, the security employees do certain criminal atrocities against innocent civilian with full knowledge and control then they are criminally held responsible. The victims get reparation either the organization or from state or from the PMC/PSC or from concerned security employee for their fault. Sometimes they held jointly liable (organization and PMC/PSC or state and PMC/PSC) for their wrongful acts. However, the state or organizations or PMC/PSC are personally responsible for their employees.

In *Bhopal Gas Leakage case*, the district court, the high court and the supreme court of India had given similar decisions, that is, reparation for affected victims, and their families. But the company's managing director Anderson escaped from his responsibility. Can Anderson be treated as 'company commander? And can he be prosecuted under the principle of 'company commander responsibility'? Actually, he did not command anybody to do such leakage of gas at Bhopal factory and it also occurred due to accident. But the factory was held responsible for victims as per the principle of absolute liability. Since there is no proper law to regulate the private security systems; it is essential to determine their legal status under international law. Specifically, international criminal law needs to be codified to regulate the new emerging industry i.e. PMCs/PSCs. The ICC need to amend certain provisions in its Statue to secure public good and to protect state sovereignty from PMCs and PSCs. Amnesty is striving to raise awareness about US's use of private military and security companies and to advocate for an end to their impunity. At the same time, some scholars argue that Article 25 and 28 of the Rome Statute of the ICC already cover the above said responsibility issues.

2. CIVIL LIABILITY UNDER ICL

Civil liability is a liability of abstract entities like state, organisations, corporations, NGOs and so on. [106] Generally, these entities may engage in the commission of heinous crimes but only through natural persons who are its employees or officials. Since the entities cannot be punished physically, they have civil liability towards affected victims. Primary concern of criminal responsibility is to give physical punishment for criminal offences whereas civil liability is to grant monetary compensation to the victims for the offence of civil or criminal nature.[107] When criminal tribunals prosecute and punish the perpetrators for serious violations of IHL, it does not mean that there is no civil liability for the violations (Mongelard 2006: 665-672). For instance, Thomas Lubanga used child soldiers in Congo conflict. For that, the court ordered to provide interim measures to construct and bring a state into a normal situation; similarly on 21st October 2016, the Trial Chamber II of the ICC approved Trust Fund for Victims (TFV).[108]

The Monetary compensation may be either interim or final. The interim compensation helps the victims for medical expenses, food, clothing, shelters, etc. and the final remedy helps them to recover from their agony and provides a relief from their sufferings. Various domestic and international legal systems recognise civil remedy for criminal offences. For instance, Article 75 of the Rome Statute confirms the possibility of reparations to the victims; and Article 85 of the Rome Statute grants compensation to the unlawful arrest and detention of accused persons. Similarly, the Indian supreme court ordered compensation for unlawful arrest and detention in *Nilabati Behera v. State of Orissa* under Article 32 of the Indian Constitution read with Article 9(5) of the ICCPR. Civil liability of corporations and states for the violations of IHL norms and environmental principles could briefly be discussed as follows.

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[106] The issue of corporate liability is for their participation in hostilities and for their violation of IHL. Here the word 'corporate/corporation' (including MNCs/TNCs, PMCs/PSCs, and company/firm) indicates any legal person exercising a commercial activity and these words are used interchangeably.

[107] Whereas criminal responsibility may be fine, forfeiture of property, normal/life imprisonment, and in extreme cases even the death penalty (Section 53 of the IPC, 1860). At the international level states, corporations, organisations, and other entities involve in criminal activities which violate the sovereignty of the state and the rights of general public. Here the legal entities cannot get physical punishment but they have civil liability for atrocities of their officials. When such criminal acts executed/committed negligently or intentionally by officials (of the entities) are criminally responsible.

[108] But even today the victims are waiting for the final reparation amount (along with collective reparations in-relation to the issue).

2.1. Modes of Civil Liability

If any illegal actions or omissions are continuing then the state has a duty to cease and also has duty to make reparation, restitution, compensation or satisfaction. Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination (Article 43 of the Draft Articles on State Responsibility). Restitution is nothing but re-establishing the situation which existed before the wrongful act was committed, provided the extent of that restitution: (a) is not materially impossible; and (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation (Article 35 of the Draft Articles on State Responsibility).

The state responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established (Article 36 of the Draft Articles on State Responsibility). The state responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible state (Article 37 of the Draft Articles on State Responsibility). For instance, in the *Corfu Channel case* the International Court of Justice unanimously decided that:

> [B]y reason of the acts of the British Navy in Albanian waters in the course of the Operation of November 12th and 13th, 1946, the United Kingdom violated the sovereignty of the People's Republic of Albania, and that this *declaration by the Court constitutes in itself appropriate satisfaction* (emphasis added; *Corfu Channel case* 1949: 36).

The victims get the remedies but it depends on the forum that tries the case. For instance, victims generally get remedy of reparation when a crime is dealt by the forums like the United Nations, International Court of Justice, World Trade Organization, International Tribunal for the Law of the Sea, or International Criminal Court (Reis 2011: 146-147). When a sovereign state relies on universal jurisdiction to try a crime then it can only provide punishment to the perpetrators but cannot provide reparation to the victims. Nevertheless, diplomatic and trade relations could be used to compel

for reparation while exercising jurisdiction based on the principle of universality, if the state not obeys the decision of the other state.

2.2. Liability for Political Crimes

Though the *Corfu Channel case* and the *Reparation case* do not directly come under the subject of international criminal law nor dealt by any international criminal tribunals; rather it deals with civil liability for the political crimes and provide basis for the concept of reparation to the victims as a remedy under international law. A brief analysis of these cases along with others could be discussed as follows:

Corfu Channel case (1949): The case arose from the incident that occurred on 22nd October 1946 in the Corfu Strait: two British destroyers, Saumarez and Volage, struck mines in Albanian waters outside the Bay of Saranda and suffered serious damage. Forty-five British officers and sailors lost their lives, and forty-two others were wounded. The UK referred the matter before the ICJ on 9th April 1947 but Albania raised objection about the jurisdiction. On 25th March 1948, the court declared that it possessed jurisdiction. On the same day the two Parties concluded a Special Agreement asking the court to give judgment on the following questions: (i) Is Albania responsible for the explosions, and is there a duty to pay compensation?; and (ii) Has the United Kingdom violated international law by the acts of its Navy in Albanian waters, first on the day on which the explosions occurred and, secondly, on 12th and 13th November 1946, when it undertook a sweep of the Strait?

In its judgment the court declared that Albania is responsible under international law for the explosions which occurred on 22nd October 1946 in Albanian waters, and for the damage and loss of human life that resulted there from. The court awarded the United Kingdom £843,947 as compensation. This amount remained unpaid for decades, and British efforts to see it paid led to another ICJ case to resolve competing Albanian and Italian claims to more than two tons of Nazi gold. In 1996, Albania and the United Kingdom settled the judgment along with Albania's outstanding claim to the gold. In regard to the second question, it declared that the United Kingdom did not violate Albanian sovereignty on 22nd October; but it violated the sovereignty on 12th and 13th November, and that this declaration, in itself, constituted appropriate satisfaction.

Reparation case (1949): After the WW II, Count Folke Bernadotte was unanimously chosen as UN mediator in the Arab–Israeli conflict of 1947–1948. He was

assassinated in Jerusalem in 1948 by the militant Zionist group Lehi while pursuing his official duties.[109] Hence, the UNGA brought the issue before the ICJ for advisory opinion to get justice and to claim reparation for the affected victims and their families from the state where the serious crime occurred. The court held that the state is held criminally responsible for the acts done by its nationals against the international organisation or its officials during the course of employment; hence, the UN was allowed to claim reparation from the state.

The question concerning reparation for injuries suffered in the service of the United Nations was referred to the court based on following terms: (1) In the event of an agent of the UN in the performance of his duties suffering injury in circumstances involving the responsibility of a state, has the UN, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused *(a)* to the UN, (b) to the victim or to persons entitled through him?; and (2) In the event of an affirmative reply on point I(b), how is action by the UN to be reconciled with such rights as may be possessed by the state of which the victim is a national? The court unanimously answered question I(a) in the affirmative. On question I(b) the court held that the Organisation has the capacity to bring an international claim whether or not the responsible state is a Member of the UN. Finally, on point II, the court held that when the United Nations as an organization is bringing a claim for reparation for damage caused to its agent, it can only do so by basing its claim upon a breach of obligations due to itself; respect for this rule will usually prevent a conflict between the action of the UN and such rights as the agent's national state may possess; moreover, this reconciliation must depend upon considerations applicable to each particular case, and upon agreements to be made between the Organization and individual states.[110]

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[109] On 20 May 1948, Folke Bernadotte was appointed 'United Nations Mediator in Palestine', in accordance with UN Res. 186 of 14th May 1948. This was necessitated by the immediate violence that followed the UN Partition Plan for Palestine and the subsequent unilateral Israeli Declaration of Independence. In this capacity, he succeeded in achieving an initial truce during the 1948 Arab–Israeli War and laid the groundwork for the UN Relief and Works Agency for Palestine Refugees in the Near East (Sachar 1998).

[110] In its Advisory Opinion, the court begins by reciting the circumstances of the procedure. The Request for Opinion was communicated to all states entitled to appear before the court; they were further informed that the court was prepared to receive information from them. Thus, written statements were sent by the following states: India, China, USA, UK and Northern Ireland and France.

Pinochet case (2002): An 80-year-old Chilean torture survivor, who was forced into exile by General Augusto Pinochet's regime, has been awarded £20,000 in compensation by the Inter-American Court of Human Rights. The landmark judgment sets a precedent for victims of the military dictatorship still living abroad and requires Chile to complete a criminal investigation into what happened to Leopoldo García Lucero in the basement of a Santiago police station 40 years ago.

García Lucero, who now lives in London with his family, was a member of the Socialist party and worked at Santiago's racecourse. He was close to Salvador Allende, the president who was removed in the 1973 military coup. Five days after the uprising, García Lucero was seized by police officers who took him to a police station. His left arm was broken in several places after being smashed with a rifle; he now walks with a stick and has never regained full feeling in his hand. Most of his teeth were knocked out and he suffered cognitive problems due to being beaten on the head. After three days blindfolded and tied up in the police station, García Lucero was removed to the national stadium, where hundreds of opponents of the junta had been herded. At night he heard the rifle fire of executions. For nearly two years he was detained and mistreated, before being deported in 1975.

In 2002, García Lucero filed a claim for compensation with the Inter-American commission. In its decision, the Inter-American Court ordered Chile to finalise a criminal investigation 'within a reasonable time' into the injuries suffered by García Lucero between his arrest in 1973 and his expulsion in 1975. Chile has also been told to pay him £20,000 in compensation for 'excessive delay' in opening an investigation into his case and his inability to date to access reparations within the country. The court also called on Chile to provide adequate funding to cover the costs of his medical and psychological treatment in the UK. It pointed out that more than 16 years had passed between Chile first knowing of García Lucero's complaint in 1993 and starting to investigate in 2011. As many as 200,000 Chileans are estimated to have been forced into exile during the Pinochet dictatorship between 1973 and 1990. García Lucero said that no amount of money could ever compensate the suffering, but glad that the judgment recognises that Chile could have done more for victims. This will help prevent similar events from happening in the future.

In addition, oral statements were presented before the court by a representative of the UN Secretary-General, assisted by counsels, and by the representatives of the Belgian, French and UK Governments.

Downing of MH17 (2014): Malaysia Airlines Flight 17 (MH17/MAS17) was a scheduled passenger flight from Amsterdam to Kuala Lumpur that was shot down on 17 July 2014 while flying over eastern Ukraine, killing all 283 passengers and 15 crew on board. Contact with the aircraft was lost about 50 km from the Ukraine–Russia border and wreckage of the aircraft landed near Torez in Ukraine, 40 km from the border. The crash occurred in an area controlled by the Donbass People's Militia during the Battle in Shakhtarsk Raion, part of the ongoing war in Donbass. In October 2015, the Dutch Safety Board (DSB) concluded that the airliner was downed by a Buk surface-to-air missile launched from pro-Russian separatist-controlled territory in Ukraine. This issue involves both criminal and civil liability of the actors. If suppose the act occurred in normal situation then the criminal responsibility over the issue comes under domestic law of Dutch, Ukrainian or Malaysian laws. But here the issue involved in an armed conflict; therefore, application of international jurisdiction needs to be analysed. Under Article 5 of the Rome Statute the crimes within the jurisdiction of the ICC includes genocide, crimes against humanity, and war crimes.

However, neither the downing lacks the genocidal intent nor the systematic attack against the civilian population mentioned under Article 7 of the Statute. Can the issue apply Article 8 of the Statute? Yes it can; because the downing might be reasonably viewed as a war crime. The armed conflict is going on in the region (conflict between Russia and Ukraine) and the downing was also related to this war crime; therefore, both material as well as subjective elements of war crime could be satisfied. The issue fulfilled the criteria; at first, the attack could be identified as murder of innocent passengers and they did not taking part in hostilities, and as damaging civilian objects; the attackers failed to distinguish between military objectives and civilian objectives reflects in Article 8(2)(a)(i&iv) of the Rome Statute. And another argument is that the perpetrators were aware or should have been aware that the flight MH17 had a protected civilian status mentioned under Article 30 of the Rome Statute. But the ICC does not have jurisdiction over the downing; therefore, it requires that the UNSC needs to refer the case under Article 13 of the Statute because Ukraine accept the jurisdiction of the court but as per Article 12 of the statute either Ukraine or Malaysia needs to become a party to the Statute.

Other than these, the issue cannot be referred before the ICC because already the investigation is started by the sovereign state of Netherlands in Ukraine in-relation to the downing of the flight MH17. So, Article 17 of the Rome Statute speaks about the

jurisdictional admissibility based on the principle of complementarity; that is, the cases can be brought before the ICC only where the state is not genuinely able and willing to investigate and prosecute.[111] Therefore, the jurisdiction of the ICC is inadmissible in this issue because of the domestic involvement of the Netherlands. Apart from the jurisdictional issues, the issues arise about the modes of civil liability on which a prosecution could be based: who is really accountable for the issue of downing of MH17? whether the separatists in Ukraine or the members of the Ukrainian or Russian armed forces? But the answer is, one who actually fired the missile can be held liable for directly perpetrating a war crime under Article 25(3)(a) of the Statute.[112]

As per Article 15(3)(c) of the Statute, if you assume the situation that the Russian forces provided weapons to the separatists in Ukraine and the separatists downed MH17; the members of the Russian forces might be liable as aiders and abetters (Cassese 2013: 193).[113] But it is very difficult to prove that the Russian forces provided the weapons otherwise it merely considered as an act of Ukrainian separatists. In future, if the crime of downing of MH17 is proved by the international or any other forum the individuals are criminally responsible but at the same time they have an obligation to offer reparation to the victims.[114] As per international law, the victims may claim compensation based on the Montreal Convention under Article 1, which

[111] Article 17(1)(a) of the Rome Statute discusses issues of admissibility: (1). Having regard to Paragraph 10 of the Preamble and Article 1, the court shall determine that a case is inadmissible where: (a) the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution.

[112] Other persons may also be held liable like the 'joint criminal enterprise' or 'co-perpetration' (i.e. the shared intention jointly to commit the crime — Article 25(3)(a) and Article 30 of the Rome Statute) or 'superior responsibility' (i.e. whenever the superiors failed to prevent the commission of the crime by a subordinate — Article 28(a)(ii) of the Rome Statute) or 'accomplice liability' (i.e. whenever they assisted and aided the actual perpetrator — Article 25(3)(c) of the Rome Statute).

[113] Because the acts of the Russian forces had a substantial effect on the downing, and if the forces knew of the principal perpetrators' crime (Cassese 2013: 193). Providing weapons might be seen as a substantial act of aiding and abetting as per Article 25(3)(c) of the Rome Statute.

[114] The civil liability of organised actors are liable for reparation to the affected victims. In particular the state of Ukraine, the Russian Federation, the People's Republics Donetsk/Luhansk, and Malaysia Airlines one way or the other is held responsible to provide compensation to the victims. Because the issue involved factual uncertainty (as to the causes of the crash) and the political sensitivity; victims have so far focused their civil claims on Malaysian Airlines. Malaysian Airlines already paid some compensation to the victims; but the issue is, to what extent the legal duties of the Malaysian Airlines incur?; and specifically, what amount of reparation the victims are entitled to claim?

speaks about the claims from the departing state and the state of destination of MH17; both Netherlands as well as Malaysia are parties to the Convention.[115]

2.3. Liability for Environmental Crimes

In environmental crimes, not only the affected victims get monetary compensation but the affected environment also gets compensation to reconstruct the damaged environment. The liability for environmental damages often discussed through precautionary principle, polluter pays principle and the public trust doctrine.

1. The precautionary principle analyses the question of preventive measures to safeguard the environment from unsustainable developmental process. It urges that the developmental activity must be stopped and prevented if it causes heinous and irreversible environmental degradation. In *Vellore Citizens Welfare Forum v. Union of India* (1996), around 900 tanneries in five districts of the state of Tamil Nadu were discharging enormous amount of untreated effluent consisting of about 170 different types of chemicals into agricultural fields, waterways and open land. Due to this, nearly thirty-five thousand hectares of land became partially or totally unfit for cultivation and even the water became unfit for consumption and irrigation purposes. The Indian supreme court directed the industries to set-up effluent treatment plants based on precautionary principle. The principle further developed in *A.P. Pollution Control Board v. M.V. Nayudu* (1999), the apex court held that the principle extended to in-

[115] As per Article 17 of the Montreal Convention, the victims can successfully claim: '[t]he carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking'. But it does not mention about: which liability rules apply? whether the domestic law or the rules of private international law or the laws of nationality of the victims apply? — The nexus for the applicable law in this respect mentioned in Article 29 of the Montreal Convention (*Zicherman v. Korean Air*, 516 U.S. 217 (1996) and *Kruger v. United Air Lines, Inc.*, 481 F. Supp. 2d 1005, 1009 (N.D. Cal. 2007) — these two cases discussed in a greater detail). In this issue, most of the passengers are from Dutch; therefore, it logically relies on the Dutch liability law. Article 6(108) of the Dutch Civil Code provides that in case of death, compensation for material loss of income, and funeral costs will be given. The passengers of other nationals subject to a more favourable compensation but at the same time another argument is that the passengers of the same crash should not be discriminated *inter se*. Apart from targeting Malaysia Airlines; as per Article 6(162) of the Dutch Civil Code, the KLM Airlines also liable to the victims because KLM had sub-contracted its flight to Malaysia to Malaysian airlines; many passengers had flight number KL4103 on their boarding pass. In addition, even the Dutch air traffic controllers at Schiphol airport also held liable because they gave clearance to fly over rebel-held Ukrainian territory. It is not self-evident; hence the victims have to establish negligence on the part of the airport officials (Vandekerckhove and Ryngaert, 2015).

clude the cost not only of avoiding environmental pollution, but also remedying the damage.[116]

2. The polluter pays principle is based on the concept that the polluter must pay to clean and bring-back original environment. In short, it seeks repairs the ecological damage through the polluting party.[117] Here the polluter is responsible for environmental damage caused and bears the expenses for environment restoration and compensation for victims of damage.

In *Indian Council for Enviro-Legal Action & Ors v. Union of India* (1996), the apex court accepted the polluter pays principle. In this issue, the chemical industries in Udaipur District (Bichhri) produced hazardous chemicals like oleum, etc. They did not have the requisite clearances, licences, etc.; similarly, they did not have proper equipment for the treatment of discharged toxic effluents. Toxic sludge and untreated waste waters resulted in the percolation of toxic substances into the bowels of the Earth because of that the wells and streams became dirty and dark; so, the water got polluted. Due to this, the irrigation affected (soil became unfit for cultivation) and the water became unfit for human and cattle consumption.[118] The court decided that the industries alone were responsible for the damage to the soil and underground water in the district. Further it said that, 'the Polluter Pays Principle as interpreted by this court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation'.[119] The court also accepted the principle of absolute liability (which was

[116] The Supreme Court of India referred the Stockholm Declaration and the U.N. General Assembly Resolution on World Charter for Nature 1982. Similarly, Principle 15 and 16 of the Rio Declaration referred, which provides that 'the nature and extent of cost and the circumstances in which the principle will apply may differ from case to case'.

[117] The first major reference to the Polluter Pays Principle (PPP) appeared in the Organization for Economic Co-operation and Development (OECD) Guiding Principles Concerning International Economic Aspects of Environmental Policies 1972. The OECD Guiding Principles defines the PPP as an instrument for '…allocating costs of pollution prevention and control measures'.

[118] The report was prepared by the National Environmental Engineering Research Institute (NEERI). It suggested the application of the Polluter Pays Principle in as much as 'the incident involved deliberate release of untreated acidic process waste water and negligent handling of waste sludge knowing fully well the implication of such acts'. And it estimated the restoration cost of 40 crores to bring-back the original condition of the environment.

[119] The remediation of damaged environment is part of the process of sustainable development.

decided in *Oleum Gas Leak case* 1986) and agreed to provide compensation to the victims for damages.[120]

3. The public trust doctrine[121] was first discussed in *M.C. Mehta v. Kamal Nath* (1997). In this case, the free flow of river water deliberately diverted and Span Motels encroached the forest-land and constructed resorts in the valley (in which a politician had a direct interest) that resulted flood in area. The state government allotment to motel in a protected forest-land was in-contrary to law and became regularised. Hence, in this case the court used the public trust doctrine to restore the environment to its original condition. The court cancelled the lease for Span Motels and the state government was directed to restore it to its original condition. Further the court directed the Motel to pay compensation for damages for 'restitution of the environment and ecology of the area' (exemplary damages of Rs.10 lakhs were imposed).[122]

In India, the doctrine is used to prevent over exploitation of the ecology and in case of violation, civil liability is available for both victims as well as the environment. It acts as a legal tool to protect the environment for succeeding generations and keeps state as a trustee. Under the Public Liability Insurance Act 1991, compensation is available to the affected victims as civil liability. In which, the victims get interim relief based on 'no-fault' absolute liability and the Act stipulates the maximum compensation for injury or death to Rs. 25,000 and limits compensation in respect of damage to private property to Rs. 6000.

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[120] In *Vellore Citizens Welfare Forum* case, the apex court recognised the principles of sustainable development, the precautionary principle and the polluter pays principle as part of our environmental jurisprudence. Once these principles accepted as part of customary international law then there is no difficulty in accepting it as part of domestic law.

[121] Joseph L. Sax views that the modern public trust doctrine imposes three restrictions: (i). The property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; (ii). The property may not be sold, even for a fair cash equivalent; and (iii). The property must be maintained for particular types of uses. These restrictions noted by the American courts; the Indian courts also accepted the public trust doctrine along with the said restrictions. Roman law recognised the public trust doctrine that the common properties like forests, rivers, seashore, and the air held by the government in trust for free and unrestricted use of the public. These natural resources are either owned by no one (*res nullious*) or by everyone (*res communious*). English law also recognised the public trust doctrine like Roman law but it persevered certain special rights for general public such as navigation, fishing and commerce.

[122] The Supreme Court of India found that the motel is guilty of an offence under the Water (Prevention and Control of Pollution) Act 1974.

2.4. Liability for Corporate Crimes

Corporate civil liability exists but is difficult to enforce (Mongelard 2006: 691). During the Second World War only the corporate officials were criminally held responsible but corporations remained unaffected. They either survived or escheated by the victorious states and they never gave any compensation or reparation to the affected victims. For instance, several companies in Nazi Germany and in Japan used forced labours in coal-mines and other factories. The two major war crime tribunals only granted physical punishment to the perpetrators (like Friedrich Flick, Arndt Krupp, Carl Krauch and others) but did not grant any compensation to the victims.

After several years of the occurrence, countries realised their past violations and agreed to apologise and offer compensation to the victims. The notable incidents are: the Japanese construction companies (like Kajima, Nishimatsu, etc.) agreed to provide reparation for the victims for their past acts. In 2015, Mitsubishi Motors Corporation made an apology to both US as well as Japanese prisoners of war for its illegal activities in the Second World War and agreed to offer $56 million as compensation for forced Chinese labours in its corporation during WW II (McCurry 2016; Ripley 2015; and Ramzy 2016). Therefore, the effective enforcement of corporate civil accountability for violations of IHL will take time undoubtedly but not so long.

Trial Smelter Arbitration (1941):[123] The issue of Trail Smelter was a trans-boundary pollution case between Canada and the United States. The principle of *sic utero tuo at alienem non laedas* (that is, 'no state has the right to use or permit the use of its territory in such a manner as to cause injury... to the territory of another'), which was reiterated in the *Trial Smelter Arbitration* (1941).[124] British Columbia operated the Consolidated Mining and Smelting Company (hereafter, COMINCO) and has processed lead and zinc since 1896. Chimneys released huge smoke from the smelter caused damage to forests and crops in the surrounding area and also across the border

[123] *Trial Smelter Arbitration* (*United States v. Canada*), 3 R.I.A.A. 1905. Decision of 16th April 1938: (1939) 33 AJIL 182. Decision of 11th March 1941: (1941) 35 AJIL 684.

[124] Later on, the same principle was adopted in various cases in an elaborate manner, for instance, in *Corfu Channel case* the court held that 'every state [has] obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states' (*Corfu Channel case* 1949: 4). Other cases in which the environmental protection dealt and the principle of *sic utero tuo at alenum non laedas* in an elaborated way, include: the *Lake Lanoux Arbitration* (1957) UNRIAA, 281; *Nuclear Test case* (1974) ICJ Reports, 253; *Legality of Threat or Use of Nuclear Weapons case* (1996) ICJ Reports; *Gasicikovo-Nagymaros case* (1997) ICJ Reports.

of US-Canada. The smoke from the smelter distressed residents, resulting in complaints to COMINCO and demands for compensation.[125]

Based on the complaint, the US Department of Agriculture investigated and included both 'visible damage' in terms of burned leaves and declining soil productivity and 'invisible damage', which consisted of stunted growth and lower food value for the crops. In 1925, COMINCO accepted responsibility for its violations and offered compensation to the affected farmers.[126] The dispute between the smelter operators and affected landowners could not be resolved, resulting in the case being sent to an arbitration tribunal (Wirth, John D. 1996: 34-51).[127] The final settlement for damages was awarded in April 1938 and was considered a victory for COMINCO. It discussed two major issues: that is, the economic compensation to the victims and the regulation for transboundary air pollution to the foreign nation (Allum 1986: 13-26).

The tribunal's final decision in 1941 granted an additional $78,000 to the farmers and also imposed COMINCO's duty of regulating the smoke output (Allum 1996: 49-51). In later part of time, the International Law Commission (ILC) adopted a series of Draft Articles on Prevention of Transboundary Harm and Hazardous Activities. Canada agreed to compensate for COMINCO's past pollution rather than forcing COMINCO to prevent future harm to US soil. Though the possession or ownership of the corporations might be government or private but its serious atrocities against the

[125] The local farmers complained about the effects of the toxic smoke on their crops; which eventually led to arbitration with COMINCO between 1917 and 1924; and resulted to the assessment of $600,000 fine levied against the defendant.

[126] COMINCO also proposed installing fume-controlling technologies to limit future damage and reduce the emissions of sulphur dioxide but raised smoke stacks to four hundred feet making the situation worse than previous. The company initially agreed to pay $350,000 compensation to the local farmers for all damages or even offered to purchase the land outright but it was rejected by the local farmers (but some people have accepted). But the company was denied this method of compensation because of Washington state's prohibition of property ownership by foreigners. The unsatisfactory result of the IJC decision led to the establishment of a three-person Arbitral Tribunal to resolve the dispute in 1935. This was the first time the IJC ruled on a transboundary air pollution case.

[127] The US State Department rejected the decision and submitted for arbitration. The US agreed to accept the initial compensation awarded by the IJC from Canada for damages done by the smelter prior to 1932. In 1935, a Convention was signed in Ottawa, Canada that legitimized the Tribunal and it consists of 11 Articles in which the Tribunal would operate. Article 3 outlines four questions the Tribunal was to answer: (i). whether damage caused by the Trail Smelter in the state of Washington has occurred since the 1st January 1932, and, if so, what indemnity should be paid? (ii). in the event of the answer to the first part of the preceding question being is positive; to what extent should there be compensation? (iii). in light of the answer to the preceding question, what measures or regime, if any, should be adopted or maintained by the Trail Smelter?; and (iv). what indemnity or compensation, if any, should be paid because of any decision(s) rendered by the Tribunal pursuant to the next two preceding questions?

environment were criminally responsible for compensation. Even though the *Trial Smelter arbitration* does not come under the ICL but it is an effective tool to understand the principles of ICL. In this case, the abstract entities of corporations were held responsible for serious atrocities causing sever damages to the environment.

Similar incidents occurred all around the world in different period of time for different reasons, either man-made or natural disaster. The affected victims are living creatures majorly human beings; for instance, Bhopal Gas Leakage (1984), Chernobyl disaster (1986), Fukushima Daiichi nuclear disaster (2011), etc. These incidents totally changed the environment and it took many years to reform the same or similar ecosystem but in-between thousands of people lost their lives or become partial disabled.

Bhopal Gas Leak case (1984): This was a worst air pollution tragedy caused by negligence in the human history and it happened in Bhopal on 3rd December 1984. The Union Carbide factory was a Multinational Corporation leaked the lethal gas, methyl isocyanate, from the storage tanks caused severe health issues which leads to cause death. More than 2500 people died as per official report and around two-lakh people were disabled, either temporarily or permanently.[128] It severally polluted drinking water, soils, pond and other water bodies. At the time of the disaster, both civil and criminal cases were filed in the district court of Bhopal against UCC and CEO of the UCC Warren Anderson (*New York Times* 2009). In 2010, the Bhopal court delivered judgment that seven ex-employees along with the UCIL chairman were convicted for causing death of Bhopal tragedy by negligence and sentenced two years imprisonment and a fine of two-thousand dollars each.[129] But unfortunately no one was punished because all the convicted persons died before the judgment but victims claim compensation even today from the corporation.

In this case, the civil liability was granted by different courts in different period of time differently. For instance, in May 1986 government of India filed a $3 billion compensation suit on behalf of the Bhopal victims in US federal court but issue was

[128] It affected foetus, pregnant woman, newly born babies, young and old people alike; and also killed thousands of animals and innumerable micro-organisms.

[129] The maximum punishment allowed by Indian law for the act of negligence is two years of imprisonment and minimal amount of compensation. This judgment is delayed nearly 26 years and all the perpetrators died even before the delivery of judgement; then what purpose the judgment will serve after the death of culprits? The justice delayed is justice denied, here not only the perpetrators are criminals but even the court became a part of it by delivering delayed justice.

quickly sent-back to the Indian courts on the grounds of forum non-convenience and held that more appropriate forum would be a court in India.[130] In 1989, without any consultation with the affected survivors the UCC agreed a settlement offer with Indian government for just $100 million, less than half of what the company's liability insurance would cover. Before the exchange of payment, the UCC posed some conditions that the corporation to be absolved from all civil liabilities and criminal cases (which was pending against the company and its officials); and Indian government has to defend the corporation in the event of any future lawsuits. The UCC refused the Indian government request $470 million (i.e., 15% of the original settlement amount). The offenders escaped from criminal responsibility and the affected victims continue without any compensation.

Till today the corporations have only moral code of conduct and there is no stringent rule to regulate corporate crimes. For instance, IMF Conditionalities, WB Bank Guidelines, ILO Guidelines, UN Draft Code of Conduct on Transnational Corporations 1990, Guidelines on Treatment of FDI 1992, OECD Guidelines for Multinational Enterprises 2000, Global Compact 2000, UN Anti-Corruption Convention 2003, IISD Model International Agreement on Investment for Sustainable Development 2005, etc. impose various duties upon the corporations to protect the environment and secure human rights. Under these instruments the corporations do not have any legal accountability but only moral obligation to respect human rights and environment. Further, existing international legal instruments to make corporations liable on human rights and environment issues are of voluntary nature.[131] Therefore, the ICL need to codify the corporate offences and their accountability. Similarly, the ICC has to enlarge its jurisdiction to environmental crimes and held the business leaders and directors of the company accountable for their mass atrocities.

[130] The American judge John F. Keenan sent the case back to India stating that the Indian courts having jurisdiction over the Union Carbide Corporation.

[131] There are some soft law standards (such as declarations and guidelines) exist which may emerge as hard law in later stage. Further, some customary principles exists in the protection of human rights (such as protection against torture, genocide, war crimes, crimes against humanity, etc); and in the protection of environment (such as polluter pays principle, precautionary principle, public trust doctrine, principle of sustainable development, etc.). Apart from these, the MNCs are also liable to respect the national laws of human rights and environment.

3. PREVENTIVE AND PROTECTIVE RESPONSIBILITIES

Apart from criminal responsibilities and civil liabilities for heinous crimes, there is another important remedy available to the victims, namely the responsibility to protect. The responsibility to protect includes: (i) responsibility of sovereign states to protect; and (ii) responsibility of international community to protect. In early days no states was concerned about the conflicts in other states, whether intra-state or inter-state, and consequent human rights violations unless and until that affects its own citizens. Later on, as a result of increasing human rights violations[132] the global community realised the importance of R2P and considered protecting humanity from heinous atrocities (Evans 2009: 7-9).[133] In nineteenth century, for the first time the European states introduced the principle of humanitarian intervention against Ottoman Empire for the protection of Christian minorities and thereby protected the humanity form heinous crimes. Subsequently it was adopted under Article 51 for self-defence as an exception for Article 2(7) of the UN Charter.[134]

Many years the concept of R2P and the external intervention have not been agreed by several states. The reason might be that it may give way for the powerful states to rule the weaker states by way of intervention. Later, increasing number of human rights violations in former Yugoslavia (1993), Rwanda (1994), Somalia (1993), Kosovo (1999), Darfur (2003), etc. urged the states to realise the necessity for external military intervention to stop such violations. The concept of responsibility to protect (hereafter R2P) is based on the principle of sovereignty as responsibility to protect humanity from mass atrocities (ICISS Reports 2001).[135] It is a global political commitment which was endorsed by all member states of the United Nations at the

[132] For instance, Ottoman Empire were attacking the Christian population, during the second WW Nazi regime were attacking innocent Jews, and other several serious crimes like war crimes, genocide and crimes against humanity occurred in Cambodia, former Yugoslavia, Rwanda, Darfur, Sri Lanka and several other places. These incidents, taught the lesson to the international community that the importance of the concept of R2P to protect international humanity as a whole is the business of all of us.

[133] The concept of humanitarian intervention came from the doctrine of right to intervene which reflected in Bernard Kouchner's influential work *droit d'ingerence* (1987).

[134] Article 2(7) of the UN Charter provides that '[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII'.

[135] In 2001, the Canadian Government for the first time discussed the concept of R2P at the International Commission on Intervention and State Sovereignty (hereafter ICISS).

World Summit (2005) to prevent genocide, war crimes, ethnic cleansing and crime against humanity (Global Centre for the R2P).

The R2P is based on three core responsibilities: i). the state has the responsibility to protect its population from grave atrocities (namely, genocide, war crimes, crime against humanity and ethnic cleansing); ii). the international community has the responsibility to encourage and assist individual states in meeting that responsibility; and iii). if a state is manifestly failing to protect its populations then the international community must prepared to take an appropriate collective action, in a timely and decisive manner and in accordance with the UN Charter (UN World Summit Outcome Document, 2005). Initially, the principle of R2P is established exclusively to deal with internally/internationally displaced persons but over a period of time this concept evolved to protect the neglected victims from the authors of mass atrocities.[136] Hence, the perspective of the R2P to deal with internally/internationally displaced persons is different from the R2P under ICL.

3.1. Responsibility of Individual States

The concept of sovereignty could be viewed in two ways: (i) traditionally the states used to enjoy sovereign right and ignore their responsibility; and (ii) in past the states enjoyed internal supremacy and free from external interference but at present external interference become legally permissible in case of war crimes, genocide and crime against humanity (for e.g., NATO intervention in Congo). Though the concept of sovereignty as responsibility articulated from sixteenth century but got an international importance only after the World Summit Outcome Document on R2P (2005) (Glanville 2010: 233-234). Initially Max Huber talked impliedly about the concept of sovereignty as responsibility. Later in the *Island of Palmas Arbitration*, held that 'territorial sovereignty…has corollary duty: the obligation to protect within

[136] The concept of R2P came to develop the ICL. The R2P imposes an obligation upon the sovereign states as well as international community to protect the victims against the authors of serious international crimes.

the territory' (*Island of Palmas case* 1928: 838-839).[137] Subsequently sovereignty as responsibility adopted in the ICISS report (2001). [138]

So, the R2P was developed from the concept 'sovereignty as responsibility' (Deng and others 1996). The UN Secretary General Kofi Annan in his report 'In Larger Freedom' stated that 'no legal principle – not even sovereignty – should ever be allowed to shield genocide, crimes against humanity and mass human Suffering' (Kofi Annan 2005: 129). In the report he referred both the ICISS document as well as High-Level Panel Reports and affirmed that it is '[an] emerging norm that there is a collective responsibility to protect' (*ibid*.: 135). The political and moral purpose of sovereignty is not a license to kill but a responsibility to protect the humanity from grave atrocities (Nolte 2005: 392). Therefore, the sovereignty of states is not only having rights on the one hand but also having obligations equally on the other. The theory of sovereignty as responsibility of every state is having two primary functions: (i) sovereignty is a responsibility to control one's own territory from external threats like terrorism, and to co-operate with third state to fight against terrorism; and (ii) sovereignty is an obligation of good governance (which includes its own population in case of mass atrocities in the state or even natural disasters) (*ibid*.: 391).

The sovereignty as responsibility serves to legitimize the principle of humanitarian intervention (R2P Doc 2001: 47-53). In such a way the principle of sovereignty as responsibility was legally justified and exercised. Therefore, the understanding of sovereignty as responsibility not only plays an important role in the humanitarian intervention under IHL but also plays major role under ICL in the protection of human rights (against terrorism and other serious crimes). Sovereignty as responsibility invites countries not to recognize the sovereignty of a particular nation unless it properly exercises its responsibilities (Nolte 2005: 391). For instance, in Kosovo crisis the UNSC determined that the human rights violations constitute a threat to the peace and breach of peace and authorized to take remedial measures. But the former Yugoslavia had failed to follow its sovereignty as responsibility. To

[137] These concepts were reflected in *the Netherlands v. the United States* (1928) (popularly known as the *Island of Palmas case* (1928)), UN Report of the International Arbitration Awards, 829, [Online: web] Available 1 December 2016, URL: http//www.*legal.un.org/riaa/cases/vol-11/829-871.pdf*.

[138] The concept of sovereignty as responsibility has evolved after the Kosovo genocide and through ICISS.

protect the Yugoslavian victims, the UNSC has established the ICTY and punished the perpetrators of mass atrocities in Yugoslavia.

However, intervention by ICC and other criminal tribunals were seen as a biased effort against the developing countries alone; since no trial has been initiated against Europeans or Americans. Specifically African leaders are targeted by these forums. Hence many African states (including South Africa, Burundi, Gambia) withdrew from the ICC because of bias against African states (Guzman and other 2016: 333-337). The former AU commissioner (Jean Ping) believes that the ICC is not just unfairly targeting Africa but it is designed to do precisely that; he summed-up with final remarks: ICC always targeting Africa, why not Myanmar.... why not Iraq? (Kariuki 2015).[139] Further, the international lawyer Charles Acholeka Taku stated that, 'though the ICC has jurisdiction over persons accused of international crimes following its statutes, it has been blamed for targeting only Africa while turning a blind eye on perpetrators in other regions of the world where it also has jurisdiction' (Taku 2014). On 31st March 2017 New African Magazine published an article: 'Is the ICC a tool to Recolonize Africa?' It broadly noted that 'the ICC has emerged as a defacto European Court, funded by Europe, directed by Europe, and focused almost exclusively on the African continent, and thereby serving Western political and economic interests in Africa' (*New Africa Magazine* - 31st March 2017).

Whereas the prosecutor of the ICC Moreno-Ocampo identified two major reasons for targeting Africa and ignoring criminals from other continent: (i) ICC issued an international arrest warrant and 14 accused persons were prosecuted were all from African continent. Because of these perpetrators nearly 5 million African victims displaced (internally or internationally), thousands of women were raped, forcefully thousands of African children transformed as killers and rapists, more than forty-thousand Africans were killed (excluding Rwandan genocide there eight lakh victims were brutally killed and ICTR established to prosecute and punish the Rwandan genociders). The ICC has an international obligation to protect the neglected victims and punish the perpetrators and preserve international peace and security within African continent; and (2). For the question of why the ICC is not prosecuting Iraq

[139] By refuting Ping's argument, some of them logically arguing that Myanmar is not a party to the ICC; and the court already started a procedural phase 2 investigation in Iraq; hence the term targeting Africa by the ICC is just a rumor not true.

criminals, American leaders, etc. he argues that Iraq, USA, Sri Lanka, Lebanon, and Israel are not party to the Rome statute. Therefore, ICC's jurisdiction cannot act against the non-member states.[140]

Law itself is flexible in nature. For instance, USA attacked Iraq and involved in an unauthorised military intervention. Similarly the NATO forces were sent to Kosovo conflict without the authorization of UNSC. Both the incidents were legally justified and these forces used as a remedial measures.[141] Nolte argues that 'any State enable to justify its intervention if its government thinks that another State is not fulfilling the responsibilities under its sovereignty' (Nolte 2005: 392). The World Summit Outcome Document (2005) legitimately limits the R2P jurisdiction for four major crimes: genocide, war crimes, ethnic cleansing and crime against humanity.[142] The ultimate goal of R2P and sovereignty as responsibility is to maintain peace and security by punishing the perpetrators of serious crimes and to prevent future occurrence. The primary responsibility of ICL is to protect the neglected victims and prosecute the authors of mass atrocities.

[140] Here, the research work raises the question that though the sovereign state of Sudan is not a party to the Rome Statute, how the ICC issued an international arrest warrant against Sudanese President Omar al-Bashir? Therefore, the international institutions including international courts and tribunals have to be understand that the rule ought to be applied among all the sovereign states equally (irrespective of North/South and weaker/powerful states).

[141] In emergency situation, the NATO or any other forces can be allowed and justified legally. If suppose any internal conflict occurs in USA and the state is not able to control, in such situation, if Iraq forces entered either for peace making or peace keeping or peace building or even for peace enforcement in the state without the consent of the USA. Can USA will agree? Whether the UNGA/UNSC will agree the legal justification of Iraq's action against USA? Similarly, China always says that the Chinese forces in Tibet is just for peace keeping but Tibet always counter-attacking that Chinese forces threatens peace in Tibet. In this situation, what will be the stand of UNSC? It might stand with China because of veto and double veto. The international community (especially developing states) has to think that, if states blatantly criticizing the acts/remedial measures other than the UNSC forces – how could be the major problem will settle with less humanity loss? The global community shall not even think about the kind of Rwandan genocide (1994) or Sri Lankan war crimes (2009) in future. These two incidents become shameful acts not only for the international community but for every state in the 21st century. The forces can be allowed to protect the humanity but not to affect the sovereignty completely.

[142] The International Peace Institute and the African Union also discussed the R2P and these heinous crimes (Ping Jean 2008 – High-Level Meeting of Experts on 'The Responsibility to Protect in Africa' on 23rd October 2008). Article 4(h) of the Constitutive Act of the AU (2001), shall function in accordance with following principle that, 'the right of the union intervene in a member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: War Crimes, Genocide and Crimes Against Humanity'.

3.2. Responsibility of International Community

R2P is only of recent origin, more specifically, after the tragedies in Rwanda and the Balkans in 1990s. In the Millennium Report 2000, the UN Secretary General Kofi Annan, recalling the UNSC's greatest failure of making peace in former Yugoslavia and Rwanda and million dollar question forwarded to the states that 'if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violation of human rights that offend every precept of our common humanity?' As a result, the International Commission on Intervention and State Sovereignty report introduced the concept of R2P and notion of right to intervene in the domestic affairs of a failed state. The ICISS report found that 'sovereignty not only gave a state the right to 'control' its affairs, it also conferred on the state primary 'responsibility' for protecting the people within its borders'. It proposed that 'when a State fails to protect its people – either through lack of ability or a lack of willingness – the responsibility shifts to the international community' (ICISS Report 2001: 17-18).[143]

The R2P is balancing both right as well as duty to protect. The ICISS Report explains that 'the R2P means not just the responsibility to react but the responsibility to prevent and the responsibility to rebuild as well' (ICISS Report of the R2P 2001: 17). Based on the request of the international community (either by UNGA or UNSC or any other entities/states) the international courts and tribunals responsible to react against the perpetrators of brutal atrocities against the humanity. Therefore, the normative approach of R2P is always look upon the close bondage between the interference, assistance and rebuild without affecting or with minimal interference into sovereignty. The role of R2P could be found in two ways: (1). the R2P plays a vital role in international humanitarian law, during armed conflict the sovereign states have to follow the rules and procedure of warfare (mentioned in the Geneva Conventions); and (2). when the states fail to follow, then the R2P become active under ICL to provide justice to the victims against the perpetrators of mass atrocities.

[143] Paragraph 2(29) of the ICISS Report on Responsibility to Protect states that the purpose of intervention is to protect the humanitarian values, hence it should focus 'not on the right to intervene but on the responsibility to protect'. Though the term right to intervention as well as R2P seem to be 'old wine in a new bottle' but the perspectives on legality and legitimacy over the two concepts have much difference because earlier one directly attacks the sovereignty of another state but the later one is responsibility of the international community.

When the state ignored or inability to protect its population from mass atrocities then the responsibility to protect happens in three ways:[144] (1). through diplomatic relations/diplomatic pressure; or (2). through military intervention; and (3) through criminal prosecutions by international courts/tribunals (either by providing monetary sanctions or by physical punishment).

1. R2P Through Diplomatic Pressure or Diplomatic Relations: In 2007-2008 a significant effort was made by the UN Secretary General Kofi Annan (with the massive support of the UN and AU) to settle the Kenyan genocidal crisis through diplomatic mediation.[145] Similarly, Burundi genocidal crisis was also resolved through mixture of both diplomatic as well as military action. The former Australian Senator Gareth Evans explained that in 'Burundi a Rwanda-style genocide that could have erupted at almost any time over the last decade and a half has been prevented by a mixture of sustained preventive diplomacy, peacekeeping and economic and government capacity-building support' (Evans 2009: 12). The diplomatic mode of R2P happens mostly before the crisis and in exceptional cases after the occurrence of the atrocity.

2. R2P Through Military Intervention: It had happened in Darfur crisis (2003), where the UNSC peacekeeping forces conducted a coercive military operation to brought-back the normal situation in the region and to resolve the heinous atrocities (i.e., crimes against humanity).[146] Thereafter, in the post-election violence against the population of Ivory Coast/Cote d'Ivoire (2010-2011), the UNSC conducted coercive military operation to protect the people's life and property (UNSC Res. 1975 (2011).[147] Similar actions were also taken in South Sudan (UNSC Res. 1996 (2011)),

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[144] Here, the mass atrocity includes not only human atrocities but also the natural disasters. Myanmar was seeking R2P through military intervention of the UNSC for the natural disaster of cyclone. The state contended that due to cyclone people have lost their life and shelter; hence the situation has to be considered as crimes against humanity (Cyclone Nargis 2008). This was referred from the article on Times Online (2008), "Aid Trickles into Burma", [Online: web] Accessed 12 February 2017, URL: *http://www.timesonline.co.uk/tol/news/world/asia/article3911696ece*.

[145] International Coalition for the R2P (2017), "The Crisis in Kenya", [Online: web] Accessed 11 March 2017, URL: *http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya*.

[146] After recalling the Resolutions of 1502 (2003), 1547 (2004), 1556 (2004); and 1564 (2004), thereby the Security Council threatened the imposition of economic sanctions against Sudan if failed to comply with its obligations on Darfur region; and an international inquiry was emerged to investigate human rights violations in the region (UN Press Release 18th September 2004).

[147] The UNSC unanimously passed a Resolution 1975 (2011) UNOCI (i.e. UN Operation in Cote d'Ivoire). The Resolution cited 'the primary responsibility of each State to protect civilians' if it fails the concerned international community (UNSC) to take 'all necessary means to protect life and

Yemen (UNSC Res. 2014(2011)), Central African Republic (UNSC Res. 2121(2013)), Syria (UNSC Res. 2139(2014) and Res. 2258(2015)) and so-on. At the same time, in 2008 after Russia's invasion of Georgia, demanded immediate military intervention to protect South Ossetians but Security Council ignored the intervention (Allison 2008: 1145-1152; Evans 2009: 9-12). These issues are man-made disaster and the R2P was claimed by the states and the humanitarian intervention was involved by the UNSC forces.

But for the first time, Burma/Myanmar requested for R2P demanding military intervention during the 'Cyclone Nargis' impact. The state of Burma/Myanmar agreed that it was not able to protect its population from the natural disaster and demanded that this acts must be treated as damage against humanity because people were lost their life and property (Tun 2008).[148] But the UNSC clarified that the argument of Myanmar to claim R2P for Cyclone Nargis was not a clear-cut R2P issue and the states like China, Russia, Indonesia and South Africa were believed that the R2P could be invoked to bypass the Security Council and Opposed the same (Burma/Myanmar Briefing No. 2 of 2008). The sovereign state of Myanmar failed to find a solution for Nargis Cyclone through UNSC (UN World Summit 2005: paragraphs 138 and 139).[149]

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property'. The Ivory Coast President Ouathara's forces arrested ex-President Gbagbo who implicitly encouraged mass atrocities. Thereafter he was transferred to ICC for criminal charges of crime against humanity who is also an indirect co-perpetrator of other inhumane acts.

[148] On 14th May 2008, the government of Myanmar/Burma put the death-toll above 43000 people due to Nargis Cyclone; hence Burma demanded coercive military operation from UNSC to conduct rescue operation because the international community has the responsibility to protect the affected victims over such natural disaster irrespective of member or non-member states of the UN.

[149] Paragraphs 138-139 of the World Summit Outcome Document states that the heads of state and head of government agreed to the following text on the responsibility to protect (the Outcome Document of the High-level Plenary Meeting of the General Assembly 2005). In which, Paragraph 138 states that each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help states to exercise this responsibility and support the UN in establishing an early warning capability.

Similarly, Paragraph 139 states that the international community, through the UN, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate. The action under Chapter VII should be taken only when the peaceful means become inadequate and national authorities manifestly fail to protect their populations from genocide, war

3. R2P Through the International Criminal Prosecution: After the occurrence of mass atrocity the international criminal courts and tribunals having the primary responsibility to protect the victims by prosecution and punishment of perpetrators. In early days, the officials escaped from criminal responsibility for their commission of serious crimes in the name of functional and personal immunity. But when the ICL emerged as a separate regime 'no impunity' changed into 'no immunity' to the violators of human rights; and by committing serious international crimes, no one can escape from their criminal responsibility in the name of 'official capacity'[150] or the concept of 'following order'.[151]

When the sovereign state unable or unwilling to prosecute and punish or surrender the perpetrators of serious crimes then the UNSC may refer the matter before the ICC for prosecution or the prosecutor himself may initiate the proceedings (Article 5 and 13 of the Statute). For instance, Peter Von Hagenbach of Germany (1474), Herman Goering of Germany (1945), Eichmann of Germany (1962),[152] Jean Paul Akayesu of Rwanda (1995), Alfred Musema of Rwanda (1996), Augusto

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crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to help states build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assist those which are under stress before crises and conflicts break out.

[150] Article 27 of the Rome statute clarifies that no exemption from criminal responsibility over serious crimes and the principle of equality applicable to all persons equally irrespective of their official capacity. It states that: (1). This Statute shall apply equally to all persons without 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 of itself, constitute a ground for reduction of sentence; and (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.

[151] The 'following order' argument was posed even in the *Trial of Peter Hagenbach* (1474). Though his claim of 'following order' rule was rejected by the first war crimes tribunal but after the WW II the concept of 'following order' was played a significant role in the Nuremberg and Tokyo tribunals for deciding the punishment of the accused persons. Even in the *issue of Adolf Eichmann* (1962), the perpetrator of crimes against Jews claimed immunity based on 'following order' rule but the court refused his contention and issued a death penalty – and executed the sentence on 1st June 1962 (Bassiouni 2012: 28-29).

[152] Eichmann was arrested by the Israeli intelligence agency (Mossad) in Argentina in 1960 without the permission of Argentina (that affected the Argentinian sovereignty). Therefore, Israeli government apologized for its act of Eichmann arrest. Finally, the Israeli court proved his culpability and found guilty of war crimes and crimes against Jewish people (during the WW II who was acted on the side of Nazi regime). By applying the universal jurisdiction, based on the facts and circumstances proved his guilty and the Israeli court convicted him for death sentence; later, the order was executed on 1st June 1962.

Pinochet of Chile (1998), Charles Taylor of Liberia (2003), Thomas Lubanga Dyilo of Congo (2006), Stojan Zupljanin of Bosnian Serb (2008), Laurent Gbagbo of Cote d'Ivoire (2011), and many other heinous perpetrators were also punished by different international criminal forums or the national forums with the international in character.[153] So the responsibility of international courts and tribunals is to punish the perpetrators of serious crimes; and protect the neglected victims from such atrocities.

UN Security Council: At present, the UNSC have sovereignty has responsibility (on behalf of the international community) to authorize remedial measures through humanitarian intervention. In this respect the UN member states waived their territorial sovereignty towards the Security Council. The international community could misuses its responsibility to protect in two ways: (1). In the name of collective self-defence the regional organisations intervenes in the domestic jurisdiction of any states in the name of humanitarian intervention (mostly through Article 51 and under Chapter VIII of the UN Charter); and (2). Similarly the UNSC fails to intervene or intervenes very selectively to protect the interest of permanent members or their allies with the help of veto power.

1. The obscurity in Article 2(4)[154] and in Article 2(7) of the UN Charter, which gives exception to Article 51[155] and by which the individual member states use their own forces in the name of individual self-defence and the Great Powers started to use force through their regional forces in the name of collective self-defence against the inter-state and the intra-state disputes (as humanitarian intervention). Because Article 51 of the Charter clearly permits an attacked state and its allies to take or respond

[153] In most of these issues, one way or the other the defeated nations' leader/officials or the weaker developing states' officials only were prosecuted and punished; and not from the developed countries or victorious states. Because of that some of the developing countries feel that the international courts and tribunals are just targeting the leaders from the developing world and viewed as a new form of colonialism. Some of the international scholars as well as German Nazi leaders/officials stated that the Allied powers dominated and targeted the Nazi officials through Nuremberg and Tokyo tribunals (and secured victor's justice) (Horowitz 1950; and Brook 2001).

[154] Art. 2(4) of the UN Charter provides that, all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations.

[155] Art. 51 of the UN Charter provides that, nothing in the present charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Therefore, while seeking the right of individual or collective self-defence under this provision the presence of actual or imminent threat from the aggressor is necessary.

with force against the aggressor, but under the international system, there is no way to establish conclusively which state is the aggressor and which state is the aggrieved. Wars continue to occur between parties both of which are using force allegedly in 'self-defence'. Thus, the fighting between China and India, Pakistan and India and even between North and South Korea began with both sides insisting that they were defending themselves against an armed attack by the other and alleging that as humanitarian intervention (Franck 1970: 811; Henkin 1971: 544-548). As a result, in so far as the facts about the initiation of a dispute have not been satisfactorily ascertainable, the operation of Article 51 is dangerously unlimited. Further, if the collective self-defence has taken by the regional organization and led by any one of the Great Powers, then the Security Council perpetuates rather than prevent the use of force because the veto ensures that result. Here, the temptation remains before Article 2(4) and Article 2(7) is, to attack first and lie about it afterwards.

Therefore, the changing circumstances of international violations, of the way nations perceive their self-interest, of strategy and tactics, have combined to take advantage of the latent ambiguities and complexities in Article 2(4) and Article 2(7), enlarging the exceptions to the point of virtually repealing the rule itself. Hence, the above said exceptions to Article 2(4) and Article 2(7) and their application in practice have played an important role in the growth of international violence over these past sixty years.

2. Due to the ineffective operations of the Security Council to prevent the mass violations of human rights in intra-state as well as in the inter-state disputes, the Members of the 'Third World Countries' started to contributed much military forces to the UN Peacekeeping Operations, instead of making contribution to the Security Council's collective military mandate, as a result, there is an increasing number of UN Peacekeeping Operations with diversified field around the world[156] in which some of them authorized and controlled by the Security Council and most of them controlled entirely by the Regional Organizations (like NATO, Warsaw Treaty Or-

[156] Since 1948 there were 63 UN Peacekeeping Operations have been created under the UN Mandate. And in which 13 were established in the forty years between 1948 and 1988, and remaining 50 have all been set up since 1988-2007. Since 1948, well over 750,000 military, police and civilian personnel from nearly 130 Countries have served in Peacekeeping Operations at various times. The top contributors of military and civilian personnel to current missions were Pakistan (10173), Bangladesh (9675), India (9471), Nepal (3628), Jordan (3564), Uruguay (2583), Indonesia, Ghana, Nigeria, Brazil, etc.

ganization, SEATO, CENTO, etc.), or by the individual member states of the United Nations.

In such a situation, when the Peacekeeping Operations are controlled entirely by the regional organization or by individual member states of the United Nations, the individual members financial and/or military contribution to the regional or to the individual effort, could exercise considerable influence in the manner in which the operation is conducted and perhaps in its eventual outcome. And it leads to lopsided operational priorities, often weaker, inefficient performance or non-performance of Peacekeeping Operations in intra-state as well as in inter-state disputes. Consequently, the principle of impartiality occurs in such Operations. For instance, Ethiopia demanded the removal of the military head of the UNMEE (United Nations Mission in Ethiopia and Eritrea, July 2000), accusing him of 'political bias' and 'deliberately trying to humiliate' Ethiopia.[157] Further, the UN impartiality in the former Yugoslavia is a major issue (Mani 1993: 501). Finally, these things bring threat to the maintenance of international peace and security.

3. Similarly, the Security Council established two international criminal tribunals in response to violation of international humanitarian law.[158] For instance, it established the ICTY (1993)[159] to prosecute persons responsible for serious violations of international humanitarian law in the territory of former Yugoslavia (especially in Bosnia-Herzegovina) since 1991. And it also established ICTR (1994)[160] to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in Rwanda during 1994, as well as Rwandan citizens responsi-

[157] BBC News Online, 3rd May 2002 reported that Ethiopia accused the UN for violating an agreement by transporting foreign journalists from Eritrea into a disputed area without prior permission of Ethiopia. The UN apologized for the 'serious mistake, but Ethiopia was unwilling to accept that was a 'simple case of a serious mistake''. See: *http://news.bbc.co.uk/2/hi/africa/19655779.stm.* (Quoted in Mani 1993: fn. 35, 501).

[158] Formally, the Yugoslavia and Rwanda Tribunals are subsidiary organs of the Council under Article 29 of the UN Charter, even though they were established as enforcement measures under Chapter VII. See the Secretary-General's explanation of the basis for the Yugoslavia Tribunal in UN Doc. S/25704, Annex (1993).

[159] It was established by Resolution 827 of 25th May 1993. It has 16 permanent judges, 27 *ad litem* judges, of whom it can permit to use up to nine at any given time, and a staff of 1238 from 84 Countries. See *Basic Facts: About the United Nations,* 35.

[160] It was established by Resolution 955 of 8th November 1994. It has three Trial Chambers made up of three judges each, and an Appeals Chamber made up of seven judges – five of whom sit on any given case. It also has a pool of 18 *ad litem* judges, of whom it can use up to four at any given time, and a staff of 872 (*Ibid.* 35 and 36).

ble for such violations committed in the territory of neighbouring states between 1 January and 31 December 1994.

From these tribunals and resolutions, it is clear that in both cases, the action of the Security Council is merely proactive rather than preventive. In reality, the primary responsibility in the maintenance of international peace and security is rest with the Security Council and it is mentioned under Article 24(1) of the UN Charter.[161] Here, the term 'primary' in the sense 'prior in time' but as of now the Security Council has not acted so, because of Cold War between the USA and the USSR before 1990s; and because of financial and military deficit of the UN after 1990s.

4. Apart from this, after USA gained the sole 'Super Power' status among the Members of the United Nations, the events of today unequivocally show that, the Security Council has become dangerously obsolete, representing the whims, preference, greed and political fundamentalism of one hyper-power. As events show that the United States began to use the United Nations Organization to its bidding (Mani 1993: 489-490). It brings series threat to the maintenance of international peace and security.Therefore the international community has to come out from these unlawful and selective biased interventions; and make intervention in an unbiased manner; further the actions of the UNSC should be more preventive rather proactive against any threat to the peace, breach of peace and acts of aggression; and secure international peace and provide security against war crimes, genocide and crime against humanity.

Under ICL the concept of responsibility could be understood in two ways: (1). the perpetrators of the heinous atrocities are held accountable (either by monetary compensation or by physical punishment),[162] and (2). the international community has the responsibility to protect the victims from serious crimes. State has the primary

[161] Art. 24(1) of the UN Charter provides that, in order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. Further, we can observe its primary responsibility in the maintenance of international peace and security through Art. 12(1) of the UN Charter, which provides that while the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendations with regard to that dispute or situation unless the Security Council so requests.

[162] One who commits a crime of grave nature (which threatens the international community as a whole) generally prefers physical punishment to the perpetrators and monetary compensation to the victims. So, the authors of serious international crimes cannot escape/scot-free from physical punishment. If the court grants only compensation to the victims not the physical punishment to the perpetrators may increase heinous international crimes. Hence the international criminal forums have to focus more upon the punitive rather than the compensatory to prevent future atrocities.

responsibility to protect the citizens of foreign as well as domestic and secure human values. Similarly, the organizations and corporations have primary responsibility to save succeeding generation from serious international crimes committed by its authorities in the course of employment. On the other side, the breach of an international obligation entails three kinds of legal consequences and creates new obligations for the breaching state: duties of cessation, non-repetition, and a duty to make full reparation.[163]

[163] Article 30 of the Draft Articles on State Responsibility deals with Cessation and Non-repetition. It provides that the state responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; and (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

CHAPTER VII

CONCLUSION

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It is often projected that 'state sovereignty' is the primary hurdle for the effective functioning of international criminal legal system; and any attempt to enforce international criminal law necessarily negates the principles of sovereign autonomy, sovereign equality, and sovereign immunity. But to the contrary, origin and development of state system as well as the subsequent evolution of international community indicates that sovereignty and authority over criminal administration are not mutually exclusive; rather, interdependent. There exists an indissoluble normative bond between them and none outlives the other. Whether it was a precolonial, colonial or postcolonial period, any entity—either states or corporations—that exercised sovereignty over a territory invariably had the authority to administer criminal justice; and it is also true *vice-versa*. As observed by the PCIJ in the *Island of Palmas case*, an entity that administers criminal justice is presumed to hold sovereignty over the territory. Thus, there cannot be any inherent enmity between 'sovereignty' and 'criminal law' but can only be bonding *sine qua non.*

When the bonding is a *sine qua non* the entity that exercises sovereignty can share its authority over criminal administration with no one else. Accordingly, the possibility of international institutions exercising jurisdiction over serious crimes is non-existent; and any such attempt will necessarily derogate the sovereignty of states. Nevertheless, this does not avert the likelihood of joint exercise of jurisdiction by states over common enemies. The *Peter van Haginbach Trial* of 1474 was the best example, where twenty-six member states of Holy Roman Empire came together to prosecute Haginbach for his horrifying crimes in the German city of Breisach. Any individual attempt by a state to prosecute such common enemies inevitably impinges upon the sovereignty of others. As a result, international criminal law has evolved out of necessity to preserve sovereignty of states while prosecuting common enemies. Hence, the existence of international criminal legal system is not an indication of loss of state sovereignty; rather a pool of sovereignty for joint exercise of jurisdiction.

The crimes like piracy, slavery, slave trade, genocide, war crimes, or crimes against humanity counter the common interests of humanity and hence collectively discarded by states for centuries now. It is an indication of solidarity among states. Those who perpetrate such crimes are considered *hostis humani generis* or enemies of

mankind against whom every state has jurisdiction to prosecute and punish. No state shall harbour such criminals and states have an obligation either to prosecute or extradite for prosecution in accordance with *aut dedere aut judicare* principle. When states are unwilling or unable to prosecute the perpetrators of heinous crimes, it is the responsibility of the international community to protect the neglected victims by ensuring justice. In the process of avoiding impunity such crimes have become the subjects of international criminal law above and beyond domestic legal system. However, prosecuting the perpetrators of serious crimes under ICL—as opposed to domestic laws—preserves the essential components of sovereignty, namely autonomy, equality and immunity of states.

Gradually, prohibition of those crimes have become the peremptory norm of general international law (*jus cogens*) imposing *obligatio erga omnes* upon state and non-state actors. A crime attains the status of universality when it contravenes the principle of *jus gentium*, a universal natural order or a common perception of righteousness among states. Most of the traditional crimes like piracy, slavery or genocide have become the subjects of ICL only when it was not righteous for the common perception of states. In recent times it is vigorously argued that the jurisdictional ambit of ICL should be expanded to include newer crimes like, torture, enforced disappearance, terrorism, and transnational organised crimes. However, the right question to ask is not about whether the ambit of ICL should or should not be expanded; rather, it is about whether it *can* or *cannot* be expanded.

Finding the common perception of states over the righteousness of newer crimes is a difficult task in the contemporary scenario. The reasons could be that, large number of states, numerous voices within states, very recent recognition of such acts as crime, states themselves the potential perpetrators, and so on. Hence, answer to the question could be found only through the analysis of structural principles of ICL—which includes the principles of solidarity (*hostis humani generis*, *aut dedere aut judicare*, and responsibility to protect); the principle of sovereignty (autonomy, equality and immunity); and the principle of universality (*jus gentium*, *jus congens*, and *obligatio erga omnes*). Any crime that contravenes all of the above structural principles shall fall under the jurisdiction of ICL.

Jurisdiction under international criminal law need not necessarily be exercised by international tribunals alone. Even domestic courts exercise jurisdiction under ICL. As recognised under Article 1 of the Rome Statute of the ICC, the purpose of

international criminal tribunals is not substitution but "complimentary to national criminal jurisdictions". The standard jurisdictional principles like active personality (nationality of the perpetrator), passive personality (nationality of the victim), and territoriality (the place of occurrence) provides jurisdictional nexus to domestic courts to prosecute and punish the perpetrators of heinous crimes under international law. In addition, the recent origin of protective principle under international law authorises domestic courts to exercise jurisdiction over conducts that threaten the essential interests of the state (like national security, territorial integrity, political independence or other governmental functions), irrespective of where and by whom the act is committed. Even in the absence of any jurisdictional nexus the principle of universal jurisdiction authorises domestic courts to bring the perpetrators to justice.

Jurisdiction of domestic courts under international law is a two stage process, namely: (i) *prescriptive jurisdiction* through legislative act incorporating international law into domestic legal system; and (ii) *enforcement jurisdiction* through judicial act of domestic courts. In the absence of the former, authority of domestic courts under international law extends only to a limited extent. However, jurisdictional authority of international tribunals primarily relies on three major principles namely, principle of complementarity, principle of communitarianism, and principle of surrender. For instance, the international criminal tribunals like ICTY or ICTR was established during 1990s only to exercise concurrent jurisdiction with domestic courts and not exclusive jurisdiction (Article 9 of the ICTY Statute and Article 8 of the ICTR Statute). Similarly, ICC Statute recognises the complementarity of the court, rather than a substitution for domestic courts (Article 1 of the Rome Statute). These tribunals have been established by the United Nations; and derive their authority from the international community of states, who have surrendered their sovereign authority towards the pool of commonality.

Consequently, it is often argued that the ambit of international criminal law shall not be expanded than what is intended and consented by states through their auto-limitation of sovereignty. Nevertheless, international criminal law has undergone an exponential growth in terms of juristic opinions, judicial decisions, institutional growth, subjects covered, and culpability of conducts. Such a development is not predetermined or planned to have an effective control over the same. Most of the newer crimes take cue from or a modified form of conventional crimes. For instance piracy has grown into a form of terrorism; torture and enforced disappearance are the

manifestations of genocide on ideological grounds, as opposed to national, ethnic, religious or racial identity; human trafficking and smuggling of body parts are the modern form of slavery; and other transnational organised crimes may well fall under the category of crimes against humanity. While applying the test of inclusion under international law most of these crimes contravene all most all of the structural principles of ICL.

The institutional growth of international criminal law has under gone a commendable growth. For instance, before the Second World War most of the crimes were prosecuted and punished only through domestic courts applying domestic laws; later, the Nuremberg and Tokyo tribunals were established as coalition court of Allied powers to prosecute the perpetrators of serious crimes during WW II; the ICTY and ICTR were established by the United Nations, during 1990s, as international criminal tribunals exercising jurisdiction over specific situations; however, the International Criminal Court was established in 2002 as a permanent institutional mechanism to administer ICL having jurisdiction over entire globe; further, with the establishment of hybrid tribunals since the millennium, international criminal law gained direct access and application before domestic courts.

Neither crimes nor institutions alone have under-gone changes under ICL; rather, developments occurred even in available remedies against the perpetration of serious crimes. Conventionally, criminal responsibility was the lone remedy available for victims in search of justice but at present civil liability to claim monetary compensation is also being recognised under international criminal law. In early times, natural persons were the sole perpetrators of serious crimes under international law and individual criminal responsibility could be imposed upon them; but at present, legal persons like corporations and organisations have become the major contributors of serious crimes. Such non-natural entities cannot be subject to physical punishment, hence civil remedy of monetary compensation has evolved as an integral part of international criminal legal system. The civil liability of legal entities is above and beyond the criminal responsibility of officials, employees and employers who perpetrated the serious crimes.

However, neither criminal responsibility nor civil liability alone can counter the growing perpetration of serious crimes; both must coexist to ensure justice to victims. Criminal responsibility concentrates merely on societal aspects and deterrence against future occurrence ignoring rehabilitation and rejuvenation of victims. Similarly, mere

monetary compensation may become counterproductive that rich people will pay and perpetrate using civil liability as a licence to commit serious crimes. Both forms of remedies collectively provide completeness to the international criminal legal system.

In addition to criminal responsibilities and civil liabilities for heinous crimes there is another form of responsibility lies on states and international community, namely, the responsibility to protect. The responsibility of states and international community to protect civilians from the danger of serious crimes lies in three stages, namely: (i) *prevention* of the occurrence of serious crimes; (ii) *protection* of civilians or minimise the casualty during conflict; and (iii) *prosecution* of the offenders, whether natural or legal, to ensure justice to the victims either through physical punishment or monetary compensation.

Primarily the responsibility to protect from serious crimes lies on states towards its people. When a state is unable, unwilling or fails to take the responsibility of protecting its people, it is the responsibility of the international community to preserve the common interest of the humanity. The UNGA tries to prevent the heinous atrocities through diplomatic pressure (administrative mode of settlement). The UNSC through its peace-keeping, peace-making, peace-building forces (like UNMIK of Kosovo 1999, MONUSCO of Congo 1999, MINUSMA of Mali 2013, etc.), where international community exercise protective functions though economic and political sanctions during conflict (executive mode of settlement). The ICTY in 1993, the ICTR in 1994 as well as other subsequent international criminal tribunals prosecute the perpetrators in post-conflict situation in the interest of justice (judicial mode of settlement).

The study concludes with the following observations:

1. The concept of sovereignty evolved out of the necessity to ensure peace and harmony among humans in the "state of nature"—where the life of men was claimed to be solitary, poor, nasty, brutish and short—by defining crimes and imposing punishments. Thus the *raison d'etre* of sovereignty is to monitor crime and punishment.
2. The concept of sovereignty gave rise to the system of "family of nations", with the powerful Europeans undertaking the "civilising mission" in the non-European world through the system of colonialism. Later, it resulted in the devolution of sovereignty in the non-European world.

3. Meanwhile, serious crimes like genocide, war crimes, and crime against humanity necessitated European states to pool sovereignty in international organisations in pursuance of maintenance of international peace and security. This has revolutionised sovereignty in contemporary times. In other words, international criminal law is a critical factor in the evolution and devolution of sovereignty.
4. The emergence of ICL has contributed much to the development of general international law with establishment of numerous institutions like Nuremberg and Tokyo tribunals, ICTY and ICTR tribunals, ICC and hybrid tribunals; and has introduced newer subjects for international law by recognising criminal responsibility and civil liability of individuals, corporations, and organisations.
5. Despite establishing numerous criminal tribunals new forms of crimes are emerging on a regular basis. This should not wither away the hope pleased on the international criminal legal system without which the existence of humanity will be under serious threat. In the least, ICL performs the role of a speed breaker in the proliferation of serious crimes.
6. Crimes evolve with the evolution of society and likewise the law should also evolve. Genocide, war crimes and crimes against humanity were earlier lone contestants for the status of international crimes; newer crimes like torture, enforced disappearance, terrorism, and transnational organised crimes have since been added. But the international community is yet to reach consensus on the status of such crimes as serious crimes under international law.
7. Be that as it may, the International Law Commission (ILC) should codify jurisdictional as well as structural principles of international criminal law. This will strengthen both international and domestic legal systems. The tasks include identifying serious crimes; avoiding jurisdictional conflicts; preventing abuse of jurisdiction by powerful states against developing countries; and ending impunity for the leaders of powerful countries.

ANNEXURE

ANNEXURE I

(**only selected provisions of the ICC Statute*)

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 1998

Article 1: The Court

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2 Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 3 Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State").
2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.
3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Article 4 Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

Article 5 Crimes within the Jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
    (a) The crime of genocide;
    (b) Crimes against humanity;
    (c) War crimes;
    (d) The crime of aggression.
2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6 Genocide

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

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Article 7 Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
    (a) Murder;
    (b) Extermination;
    (c) Enslavement;
    (d) Deportation or forcible transfer of population;
    (e) Imprisonment or other severe deprivation of physical liberty in violation of

fundamental rules of international law;

(f) Torture;

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

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

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

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

2. For the purpose of paragraph 1:

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

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

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

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

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

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

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

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

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

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

Article 8 War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, “war crimes” means:
   (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
   i) Wilful killing;
   ii) Torture or inhuman treatment, including biological experiments;
   iii) Wilfully causing great suffering, or serious injury to body or health;

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

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

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

vii) Unlawful deportation or transfer or unlawful confinement;

viii) Taking of hostages.

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

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

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

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

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

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

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

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

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

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

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

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

xii) Declaring that no quarter will be given;

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

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

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

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

xvii) Employing poison or poisoned weapons;

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

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

xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and

methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

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

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

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

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

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

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

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

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

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

iii) Taking of hostages;

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

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

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

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

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

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

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

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

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

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

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

ix) Killing or wounding treacherously a combatant adversary;

x) Declaring that no quarter will be given;

xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which

are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

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

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

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

Article 8 bis[1] Crime of aggression

1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

   Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

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

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

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

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

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

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

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

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

Article 12 Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
   (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
   (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13 Exercise of jurisdiction

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

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

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

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

Article 15 Prosecutor

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.
6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 15 bis[2] Exercise of jurisdiction over the crime of aggression
(State referral, proprio motu)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.
5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.
6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain

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

whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article16.
9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Article 15 ter[3] Exercise of jurisdiction over the crime of aggression
(Security Council referral)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

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

Article 16 Deferral of investigation or prosecution

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

Article 17 Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
   (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
   (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
   (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
   (d) The case is not of sufficient gravity to justify further action by the Court.
2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
   (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
   (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
   (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the

circumstances, is inconsistent with an intent to bring the person concerned to justice.

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

Article 20 Ne bis in idem

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

Article 21 Applicable law

1. The Court shall apply:
   (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
   (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
   (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that

those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Article 22 *Nullum crimen sine lege*

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23 *Nulla poena sine lege*

A person convicted by the Court may be punished only in accordance with this Statute.

Article 25 Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
   (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 28 Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 30 Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
   (a) In relation to conduct, that person means to engage in the conduct;
   (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Article 75 - Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.
3. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.
4. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
5. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
6. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.
7. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 85 - Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
2. When a person has by a nal decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court nds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a nal decision of acquittal or a termination of the proceedings for that reason.

Article 120: Reservations

No reservations may be made to this Statute.

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REFERENCES

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