"International Criminal Court and the Global South: A Perspective"

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DECLARATION

I declare that the dissertation entitled **"The International Criminal Court and the Global South: A Perspective"**submitted by me for the award of the degree of **Master of Philosophy** of the Jawaharlal Nehru University is my own work. The dissertation has not been submitted for any other degree of this University or any other University.

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Dedicated to the Victims of Violence

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ABBREVIATIONS

ACHR	American Convention on Human Rights
AMIS	African Union Mission in Sudan
AU	African Union
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
L.R.T.W.C	Law Reports of the Trial of War Criminals
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organisation
OHR	Office of the High Representative
OTP	Office of the Prosecutor
PCIJ	Permanent Court of International Justice

Prep Com	Preparatory Committee for the Establishment of an International Criminal Court
TRC	Truth and Reconciliation Commission
VCLT	Vienna Convention on the Law of Treaties
WWII	World War

The Last Page

If the world lasts longer than I do.

As my twilight lingers and fades to dark

I ponder another nightfall

Neither mine nor yours

But the nightfall of the world

That comes as secretly as creation

Heralded yet unannounced

Without lyric farewell

Without autumnal warmth

With fury of unrequited love

Not a spectacle caught on TV

No falling towers no cosmic tremor

Unnoticed by the nearest galactic neighbor

Unworthy of attention by our space siblings

Unnoticed unmourned fully deserved

Yet the saddest day ever recorded

For those dying amid species dusk

IV/08

Richard Falk (Vol. 20 no. 4, EJIL 2010)

CONTENTS

CHAPTER I

INTRODUCTION

Sovereignty as a normative conception is a "distinctive ideal''. It is about the right and duties of states and their citizens with respect to rest of the world. It empowers citizenry to carry out large number of activities as matter of rights and obligations. This becomes even more important for The Third World countries due to their long history of colonization. Sovereignty as a 'general will' represents voice of the people (Vox Populi) and empowers its citizens to determine constitutive structures to govern themselves. Criminal law is one such constitutive element in the armory of the sovereign and has been looked at as an exclusive domain of the sovereign. The emergence of international organizations and increasing judicialisation of international law has created an interesting power structure. Sovereignty is largely structured by an interplay of rules and interpretative abilities of international organizations and interests of the transnational class. In this backdrop, majority of the Third World countries were increasingly apprehensive about the judicisalisation of International Criminal Law (ICL). Therefore, to have an international court to try and punish international criminals was considered as a severe threat to the national sovereignty of member countries.

Unlike its predecessors like the Nuremberg and Tokyo tribunals, International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for Yugoslavia (ICTY), the International Criminal Court (ICC) has been established as a permanent body with its headquarters in Hague. The ICC incorporates a strong criminal justice mechanism to ascertain the degree and nature of crimes committed and then enunciates the modicum to adjudicate them. The ICC was established through the Rome Statute and it codifies four crimes. Almost all these crimes are identified as heinous offences which create grave obstacles for the progressive growth and development of human civilization. The ICC seeks to prohibit and punish international crimes universally and its jurisdiction extends even to non-parties. It becomes essential to examine whether the ICC ensures the interest of third world countries, especially because it naturalizes many prevailing fundamental rules of international law. This study will concentrate on understanding the ICC from the perspective of the third world approach to the international law (TWAIL).

I.1 International Criminal Law and the International Criminal Court

The genesis and development of any discipline is part of a larger dialogue of contemporary times. Its growth and fermentation faces the test of time, bears birthing pain arising from conflicting ideas. This is equally true about the genesis, growth and progressive codification of International Criminal Law (ICL). It has faced unparalleled challenges from various actors including state and non-state actors.

International criminal trial is a historical concept, and in this regard, Nuremberg and Tokyo were important milestones for the creation of the ICC by the Rome Statute. Unlike its predecessors, ICC is a permanent institution and has a wider mandate for its operationality. It is entitled to take cognizance of any situation even if it is located in a territory which is not party to the Rome Statute, if that matter is referred by the United Nations Security Council (UNSC). In such a situation, the ICC seems to be moving away from the consent based regime of international law. The ICC is further clothed by the Rome Statute with final interpretative authority over criminal law and the body of laws which are related to criminal law.

International criminal justice has traditionally been referred to as 'justice of the victors'. The Nuremberg and Tokyo tribunals were created in a particular background where the crimes of defeated nations were punished but the same did not happen for crimes committed by the victors, making it a process of selective justice. This selectivity has given the Global North an upper hand in controlling the fundamental matrix of criminal law. This also helps them in creating an ideological space for the maintenance of this ideological monopoly. In a sense, the ICC today seems to be reproducing the role played by Nuremberg in the post II World War period.

The ICL deals predominantly with serious breaches of civil and political rights of individuals. It is however silent on breaches of economic, social and cultural rights. The ICC operates within the monetized world economy. Therefore, donors play an extremely significant role and their contributions may in fact influence the process and judgements of the court. Thus, it can be said that justice is substantially dependent on the financial capabilities of parties.

Contemporary international criminal law is flawed because of its historical origins and thus is fated to represent a mechanism which will ensure that the maintenance of the existing power structure. International criminal courts seem selective and their choices manifest subjective influences. The choice of potential defendants raises the suspicion that "the Court has been vested with the task of applying international justice to international society's “outsiders” (Christie, 2011:375). It is legitimate to be suspicious about international trials because they set the theater for politics. This does not mean that trials cannot be objective and saying so would mean completely negating the rule of law. However, it needs to be acknowledged that trials are also used as a means demonstrate power. Criminal prosecution is in some measure politically motivated by ‘social power, prosecutorial discretion, or legislative choice’ (Christie, 383, 2010). Even while accepting the objective, neutral, predictable character of law it is difficult to refute that international law both reflects and reinforces political identities and interests (Steinberg and Zasloff, 2006: 65).

As a method to examine the ICC, this study employs Third World approaches to the international law (TWAIL) to further explore the intricacies of the modus operandi of the ICC. *Third world approach to the international law (TWAIL) is the language which gives voice to the voiceless. Language of law for larger period of time was captive to the mouthpiece of the language of imperialism.* TWAIL is a critical approach, method, pedagogy and movement of international legal scholarship. It has theorized the colonial impact and its operationality on the international law. Through this movement attempt was made to forge unity among third world countries and generate a sense of self confidence to challenge the hegemonic character of international law. Anand, Baxi and Weeramantry are prominent among the first generation TWAIL scholars, while Chimni, Anghie, Mutua and Gathii belong to the second generation TWAIL scholars. Second generation scholars are conceptualising their theories beyond the framework of nationalism and focus on, substantially but not limited to, the materiality and the expansion of post-colonial structures such as North-South divide.

TWAIL can be seen as a language to express the pain and sorrow of the marginalized and to find sustainable remedial solutions. In the report *Fragmentation of the International Law: Difficulties arising from the Diversification and expansion of*

International Law, TWAIL has been looked at as regional approach comparing it with the traditional Anglo-American approaches. It is viewed as representing an alternate legal culture (Koskenniemi, 2006:103). It becomes important to note that fragmentation of international law is not power neutral; indeed the functioning of tribunals and development of voluminous international law neither treats everyone equally nor is it ideologically neutral (Chimni, 2007:499).

A fair amount of research is required to understand the effect of this on poor countries. Anghie writes that international lawyers have to develop a sociological vision, an understanding of various attributes of societies and their customs and the way in which they function both independently and in relation to each other (Anghie, 1999:19). Mainstream international law has never been politically neutral to the power structures in the world (Anand, 2006:1). It is shaped by the dominant discourses of contemporary times but is sometimes restructured by alternative discourses as well. International law has remained silent to the plight of colonized people for the longest time. In this regard, TWAIL is a methodology or an alternative discourse which attempts to restructure international law to create a just and egalitarian world order. To begin with, TWAIL viewed international law as a bubble of the western civilizing mission, false universality, imperialism, and a cultural package that sought to make international law seem egalitarian, participatory, transparent, neutral and consistent irrespective of factors and actors. However, later TWAIL also problematized the presence of imperial elements within international law based on material factors and proposed an argument that International Organizations (IOs) were subsuming the sovereign space of third world countries under the garb of international law.

This is where present study takes the precepts of TWAIL to look at the working of the ICC. Recognizing the need to understand the effect and relevance of the ICC, the present study is largely an overview of the ICC from the third world perspective to the international law.

I.2 International Criminal Law and Sovereignty

International law emanates from the free will of states and therefore restrictions on the independence of states cannot be presumed (Lotus Case, 1927: 63). This was the

reason that the Soviet Block viewed customary laws to be subject to the consent of the states. Even during the Nuremberg tribunal while the USSR did not object to the completion of trial but it was unable to fit this within its own stand on international law. With the establishment of the United Nations (UN), sovereign equality of nations and their free consent have been duly recognized as the foundational principles of international law.

However, in the post-Cold War era, international law has been changing its character, tending more towards centralization where the state's free will is viewed as an obstacle to its evolution and development (Chimni, 2010:304). It is worthwhile to note that such views have their roots in the idea of democracy itself and also in the way the victors of the Cold War viewed their culture, political beliefs and market systems to be the only legitimate ways of running the world order. Thus, in effect after the cold war era, international law appears to be clothed in the language of democracy (Franck, 1992: 46). Due to this expansion of a set of common procedural practices we see the appearance of some common agendas of international law which is further seen to be entering the domain of international criminal justice system.

In this process, sovereign spaces and their apparatus have begun to be regulated by the paraphernalia of international criminal justice system. This tension had emerged during the ICTY and ICTR itself (Cassese, 1998:15). What could be the potential or possible relationship between the sovereignty and the ICC is a question which may have contradictory answers. Whether they are part of the same coin and mutually reinforcing to each other or they are antagonistic to each other is a question that needs to be pondered upon with utmost seriousness. As mentioned earlier, criminal law has largely been considered to be the sovereign's exclusive domain. This is reflected from the conclusive statement of Max Weber that state has a monopoly over violence and also a final say on the justice delivery system. Considering the fact that for the larger part of history, the state system was regulated by the Westphalia model where internal mechanisms of the state were linked with Hobbesian ideas which viewed the state to be immune as far as their internal conduct was concerned. Current international law talks about state responsibility and tightens its grip further to demystify abstract entities of state and collective apparatus of state as individual criminal responsibility.

It is to be noted that the acceptance of this idea is widely contested and gives birth to tension and skepticism about international law. This skepticism is because international law is changing the character of sovereignty of states and in this change language of human rights, rule of law, democracy, free election constitute fundamental rider to discipline any country. Glimpses of this change reflects by Schabas when he explains that the creation of the ICC marked a milestone in international affairs emanating from a 'hesitant commitment' to human rights in the 1940s to 'a point where individual criminal liability is established for those responsible for serious violations of human rights'(Schabas 2004: 25). On an another note, Schabas says that due to ICC heart of the State concerns with their own sovereignty and without any doubt, its creation is the result of the human rights agenda.(Schabas,2012:61)

TWAIL is skeptical about these changes as it looks at this process of change from a different standpoint. According to TWAIL, as long as sovereignty was confined to the Europeans countries it was used in muscular sense where atrocities on natives were never subjected to the rule of law. However, with third world countries beginning to gain sovereignty, there was a change in the tone of international criminal justice system with a desire to punish leaders of the third world nations based on the doctrine of individual criminal responsibility (Anghie and Chimni, 2003:88). It is true that supremacy of state sovereignty in the form of excessive restrictions on the jurisdiction of international criminal courts can only result in the creation of ineffective institutions.[1] However, a complete negation of state's sovereignty is also imperious especially for the third world countries. Thus the objectivity of international organizations has long been questioned by scholars of the third world countries where they view these IOs as substitutes of erstwhile colonial structures.

The Rome Statute mandates a criminal justice system which is based on 'individual criminal responsibility'. It seeks to challenge the cemented boundaries of sovereign immunity which are grounded in customary international law, viewing them as mechanisms which promote impunity. It is important to note that the Rome Statute comes in direct conflict with the principle of free will at political and legal level because it can exercise international criminal jurisdiction directly over individuals

[1] Report of the International Law Commission, 46th Session. 1994. at 36.

living in any state and subject them to the authority and supervision of the ICC. This seems like a moralistic or self-proclaimed obligation on the ICC which reflects or communicates in the language of collectivity of 'international community' to protect, prohibit and punish core crimes. In this complex web of norm creation, the responsibility to protect (R2P) gets linked with the ICC because it is designed as subset of the Rome Statute with more or less the same fabric to act as a lubricant in the functioning of the Court.

The ICC and R2P work on the logic of division of labour. One seeks to prohibit while the other is designed to punish. Thus, effectively R2P is not a distant and separate doctrine; rather it operates in a much similar background as the ICC. The principle of complementarity further creates a nuance to analyse the changing contours of sovereignty in international law. It gives leeway to the ICC to have the final authority over the effective functioning of the trial system. Thus, it legalizes the Court's surveillance on the domestic legal system and gives primacy to the words of the ICC over domestic criminal justice system. There are riders which are too spacious to accommodate and interpret and finally it is the ICC which has the final say over these riders. It has been said that the trend towards 'criminalization of International law', through criminal prosecution and punishment of breaches of international humanitarian law by international criminal tribunals should not blind us to the basic dilemma facing international tribunals, that of prosecution and punishment or continued respect for state sovereignty. It thus casts aside the 'shield' of state sovereignty.

Therefore, it is essential to identify its possible ramifications on the sovereign space of third world countries. An analytical study into the present internal and external modicum of the ICC will help to unpack the possible apprehensions and reservations of the third world approach about the ICC.

I.3 Relationship between the UNSC and the ICC

The rule book of the ICC specifies and designs legal remedies or in other words it seeks predominately prosecutorial solutions to international crimes. On the other hand, Chapter VII of the UN Charter espouses political solutions for such international crimes. Before the establishment of the ICC, the United Nations Security

Council (UNSC) had established international tribunals to resolve the grave and extremely violent situations in states like Rwanda and Yugoslavia. However, the UNSC's discretion to employ Chapter VII to seek political solutions has now been confined to the limited space it gets under its power to refer cases to the ICC.

The application of Chapter VII of the UN Charter employs economic and non-economic measures which have substantially been codified in practice. In addition to this, the UNSC mostly takes cognizance of exemplary situations of violence. With the involvement of the UNSC to refer cases to the ICC, the latter enjoys universal jurisdiction.[2] The UNSC creates another layer of whimsical possibility in the working of ICC by having the authority to determine whom to prosecute and whom to give a leeway in cases. It would be logical to say that by the fiat of its power the UNSC can seize and turn the ICC in ways that it desires. Therefore, involvement of UNSC in relation to the ICC has indeed multiplied the power of UNSC itself now it "threat to the peace" to include not only international conflicts but also internal matters of "extreme violence" (Doria, Peter, Bassiouni, 2009:454).

It has created a space which has triggered the possibilities of using the power bestowed upon it by Chapter VII of the UNSC with its application to the ICC. In this context, an examination of the limits and peripheries of political power needs to be undertaken. Looking at judicial review as a technical tool to examine the discretionary power of the UNSC is a possible option. Both of these institutions' cooperation with each other and the possible misuse of such a relationship may have larger ramifications that need to be understood.

The present study will also help in recognizing the referral and deferral mechanisms contained in the Rome Statute and Chapter VII of the UN Charter. It will also focus on a detailed study of their applications and possible misapplications and analyze the problems/speculations of the third world countries about the relationship between the ICC and the UNSC.

[2] See Article 13(b) of the Rome Statute

Rationale and Scope of Study

This study seeks to examine how the ICC operates to create an imperial global state. It will unpack this dominant emerging discourse and endeavor to understand both substantive and procedural aspects of ICL. It will map out its ramifications on the sovereign spaces of third world countries. Further, the study will review the processes of criminalization in the domain of international law, the procedural apparatuses of the ICC, the doctrines of individual criminal responsibility and complementarity, responsibility to protect, and the relationship between the UNSC and the ICC.

Research Methodology

The present study will be based on in-depth review of primary and secondary sources of ICL. The primary sources include the Rome Statute, *Travaux Preparatoires* of the Rome Statute, relationship agreements between the UN and the ICC, UN General Assembly resolutions, UN Security Council resolutions, ICJ Judgments, Judgments of the ICTY, ICTR and VCLT 1969. The secondary sources include books, journals and internet sources.

The study seeks to employ the narrative of TWAIL as a guiding tool to provide an overview of the working of the ICC and its effect on Third World Countries. In other words, it will focus on the overall analysis of the provisions of the Rome Statute from the perspective of Third World Countries. More specifically this context this study seeks to:

1. Outline emerging boundaries of international criminal justice system with special focus on the codification processes of the core crimes and its relationship with the Global South.
2. Examine effects of provisions such as Individual Criminal Responsibility, Complementarity, and Responsibility to Protect under international law.
3. Study the relationship between the UNSC and the ICC and its possible effects on the working of these two institutions.
4. Analyze the effect of the ICC on domestic criminal justice systems and the global criminal justice system.

Research Questions

The following are the research questions that the present study seeks to explore:

1. Is the International Criminal Court an expression of Eurocentricisim?
2. Does the International Criminal Court press for homogenization and centralization of power?
3. Does the involvement of the UNSC target the Third World countries in the processes of referral and deferral?
4. Is International Criminal Law tilted towards civil and political aspects of human rights?
5. Does international criminal law come into conflict with the sovereignty of the third world countries?

Hypotheses

1. The working of ICC reflects a North- South Divide.
2. The ICC undermines the sovereign space of third world countries.

Outline of the Study

The study has four further chapters.

Chapter II has been further divided into two sections. Part I focuses on the evolution of the international criminal trial in pre and post UN era. It further touches the economic aspects of the core crimes and finally examines the emerging contradictions of the international justice system. Part II looks at the ICC from the standpoint of the Global South.

Chapter III highlights the effects of the ICC on sovereignty. It studies three important parts of the ICL related to individual criminal responsibility, complementarity and responsibility to protect.

Chapter IV examines the relationship between the UNSC and the ICC. It touches upon historical debates to understand the intention of the drafters about certain provisions of the Rome Statute.

Chapter V summarizes the findings of the study and puts forward some recommendations.

CHAPTER II

INTERNATIONAL CRIMINAL LAW AND THE INTERNATIONAL CRIMINAL COURT

II.1 Introduction

The Rome Statue has put in place the framework and modus operandi for the establishment of the ICC.[3] Since its inception in the year 2002,[4] the ICC has received an overwhelming response from its member states. The Rome Statue was ratified by 124 member states and the ICC currently has 139 signatories. Following cases have been tried by the Court till date:

Table 1: Cases tried by the International Criminal Court

Year	Country	Mechanism	Accused	Membership Status
2004	Uganda	Self Referral[5]	Lord's Resistance Army	Yes
2004	Democratic Republic of Congo	Self Referral	Thomas Lubanga Dyilo	Yes
2005	Sudan	Security Council Resolution[6]	Omar Al Bashir	Not member
2004	Central African Republic	Self Referral	Jean-Pierre Bemba Gombo	Yes

[3] (Rome Statute is the treaty document for the International Criminal Court. The Statute was adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. In accordance with its article 125, the Statute was opened for signature by all States in Rome at the Headquarters of the Food and Agriculture Organization of the United Nations on 17 July 1998.)

[4] Came in to force on 01 july 2002. For Further information: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&lang=en

[5] See Article 13 of the Rome Statute

[6] UNSC resolution S/RES/1593 (2005)

Year	Country	Mechanism	Accused	Membership Status
2010	Kenya	Prosecutor opens proprio motu investigation	William Samoei Ruto	Yes
2011	Libya	Security Council Resolution[7]	Saif Al-Islam Gaddafi	Not member
2011	Cote d'Ivoire	ICC Prosecutor opens proprio motu investigations[8]	violence erupted after Presidential election results between opponents Mr Laurent Gbagbo and Mr Alassane Ouattara were disputed.	Not member
2012	Mali	Self Referral	Different Armed Groups	Yes
2014	Central African Republic	Self Referral	Jean-Pierre Bemba Gombo	Yes
2016	Georgia	ICC Prosecutor opens proprio motu investigation	Alleged acts of war crimes and crimes and crimes against humanity, violation in international Armed conflict Situation in South Ossetia	Yes

(Source: https://www.icc-cpi.int)

These cases have at a fundamental level triggered and shaped the modus operandi of the ICC. However several tribunals such as the ICTY, ICTR, East Timor and Sierra Leone were already in place before the establishment of the ICC. However, unlike its predecessors ICC is a permanent and independent body which ensures unique place for the ICC in international legal structure.

The Rome Statute defines and criminalizes four crimes namely genocide, crimes against humanity, war crimes and aggression.[9] It seeks the cooperation of states to criminalize these sets of crimes through incorporating them in their domestic laws. It

[7] UNSC Resolution S/RES/1970(2011)

[8] This was the first investigation opened while a country had accepted the Court's jurisdiction (under article 12(3) of the Rome Statute) but was not yet a State Party.

[9] See Article 6 to 8 of the Rome Statue.

ascertains liability based on individual criminal responsibility and advocates to punish individuals irrespective of sovereign immunity granted to them by their domestic laws. The development of the ICC has thus unpacked many problems of international law which were traditionally considered to be states' privilege (Akande, 2004:407). The Rome Statute also entitles the ICC to have a final say over the efficacy of the domestic legal systems[10]of states and to transfer relevant cases to Hague. In this context, it is important to revisit one of the golden rules of international law where only customary laws are applicable despite states non-consent to such laws.

In the Post-Cold war era, international criminal trials and democracy were viewed as two sides of the same coin. Democracy was seen as an essential pre-requisite to be member of the international community (Mark, 2011:524). The troika of free market, democracy and international institutions has played an unparalleled role in the shaping of international law. The acceptance and adherence to international criminal law is another pre-condition that has emerged in recent times for states to qualify as full members of the international community. It is important to mention that international crimes are invariably tilted towards the breach of civil and political rights. International law does not have a mechanism to address the root causes of violence essentially because the ICC does not consider situations of marginalization and deprivation like socio-economic backwardness which can be seen as important factors causing violence, especially in the third world countries. The Rome Statute also does not have the mandate to punish parties for corporate criminal liability and does not look at the role of prominent international financial institutions for the creation of situations of such crises.

It therefore becomes significant to explore the structure of the international criminal justice system. Many fundamental questions arise around the discussion on structure of international criminal justice system, some of which are: what could the ramifications of a court having an universal jurisdiction with a centralized character be like; would the methodology of a prosecutorial model bring about justice or would it create even more conflicts; should justice be restorative or retributive; what could be the possible effects of punishment led deterrence, etc. Exploring the answers to these questions also looks at how a monopoly of knowledge, a battery of lawyers,

[10] See article 17 of the Rome Statute.

elite NGOs create a high knowledge economy within international criminal law. This further leads to the understanding that international justice is in fact part of a monetized economic system where structurally powerful nations tend to have an upper hand. The international criminal justice thereby system proposes to create a regimented system of global legal order. It may superficially target internal problems of third world countries but it most certainly does not empathize with the sufferings of poor and marginalised nations of the Global South.

International tribunals and courts, mechanisms of trials, processes of investigations, a body of jurisprudence, systems of punishment, arrangement of finances and execution have emerged to shape a peculiar world 'order'. It might be of relevance to look at the sociological understanding of 'order' as defined by Sigmund Freud who says that, *'order itself constitutes a tension between the individual and the collective'* (Jain, 2010:261-264). It seems relevant within the spectrum of criminal justice system as it is today; it is most certainly difficult to negate the possibilities of tension among states.

A criminal justice system should be participatory, communicative, and transparent and the concept of prior consent is most essential in such a system. As far as the Rome Statute is concerned, the language of the court is confined to the English and French. It is not a hidden fact that majority of the international community have a limited ability to understand these languages and unless outcomes of the trials are published in vernacular languages, the idea of people's participation in the criminal justice system would remain significantly challenged. Participation of the Global South is anyway minimal because of the meritocratic outlook of the ICC. Majority of the centers of international criminal law are located in the Global North and their views are considered final and authoritative in nature. This presents a scenario of extreme hegemony of the Global North in the name of delivering justice for the Global South. The debate of justice vs. peace is framed in a manner in which the ICC has the final say over justice, trials being the only way to get such justice. This process has created a situation where a vast market involving global NGOs and lawyers from the Global North has emerged who specialize in dealing with cases of international criminal law and it in turn provides them the opportunities to earn a good living out of the system. This has also created a cartel of criminal lawyers in which

access to the justice system is completely dependent on the purchasing power of individuals.

Selectivity of cases has also created another question for the Global South that compels them to look at the modus operandi of the ICC with a lens of skepticism. If one reviews the cases tried by the ICC, it would not require much effort to see that maximum cases in the court are from Africa. This forces one to think that the court targets only smaller fish in the pond, giving the more powerful ones the benefit of impunity. One is reminded of the colonial perspective of the white man's burden in such situations.

If one looks at the ideal knowledge creation processes and examines their social base, one would see the participation and contribution of various segments of the international society in the same. Inclusive spaces of knowledge production lead to an inclusive and participatory mode of codification of law. However, TWAIL scholars have expressed their concerns about how international law was deliberately used to multiply the colonial interests of developed nations and how Afro-Asian nations were considered unworthy and incapable of contributing in the law making process, leading to their points of view being neglected. It thereby becomes important to note that current international criminal law is just an extension of European views on criminality. The question of whether concerns of the Global South have been incorporated in the whole paradigm of international criminal law remains largely unanswered.

II.2 History and Development of the International Criminal Law and International Criminal Court

II.2.a Pre-UN Era

Ever since humans developed a sense of power and authority over surplus production, it seems that wars have become more like pastimes of the international community. It is relevant to look at Charles Tilly's statement that war made state and state made war. War is an act of savagery and involves killing, plunder, destruction and all sorts of devastation. Jurists of different eras have made various efforts to control barbarism and create an orderly structure in the world by codifying fair means of fighting wars.

Humanitarian principles that regulate armed conflicts today have evolved over time across different civilizations.

These have been widely disseminated through multiple narratives ranging from folklore to religious texts. In cinematic age pictorial images have disseminated the body of rules about how to a large extent religious texts like the Mahabharata, Bible, Quran have successfully controlled the brutality of war through principles that have adversely moralistic overtones. And these in turn have become commonsensical knowledge or wisdom.

The parameters of "crimes against the laws of God and man" were first developed by theologians and jurists between the twelfth and fourteenth centuries based on a diverse historical background (Bassiouni, 2013:1004). The laws of wars emerged first as matter of ethical duty and with the passage of time these got cemented as codes of law, which were soon legalized and nations were left with no choice but to follow these principles.[11] This process was again given a push by modern weaponry which had a spillover effect on the catastrophic ramifications of war. That is why the Liber code, Hague Principle, Geneva Convention, Convention on Prohibition of Chemical Weapons came in to being. Moynier, one of the founders of the International Committee of the Red Cross (ICRC) presented a proposal to the ICRC calling for the establishment by treaty of an international tribunal to enforce laws of war and other humanitarian norms on 3 January 1872 (Hall, 2015:59). He was originally not in favour of establishing an international criminal court. In his 1870 commentaries on the 1864 Geneva Convention concerning the treatment of wounded soldiers, he considered whether an international criminal court should be created to enforce universal laws on minimizing the impacts of war. However he soon rejected this approach in favour of the opposite due to the pressure of public opinion.

First Armenian genocide created a move among Christian countries to punish the culprits. In this background crime against Christianity was conceived which later changed by crime against humanity (Cassese, 2008:84). Thus The attempts to bring to justice the 'Young Turks' responsible for the massacres of the Armenians in 1915-16 was first minor attempt. The first decisive and benchmark effort to curb international crimes through an international penal process arose after World War I. Due to

[11] Liber Code 1863, Hague Principles 1907, Geneva Convention 1949

advanced scientific and technological developments such as poisonous gas, the horrific effects on causalities of war had increased tremendously. Therefore, it was felt necessary to regulate sovereign excesses under the jurisdiction of international law through an international penal process and the promotion of international justice.[12] The Paris Peace Conference laid down the fundamental reference point to establish a system in place in the form of Allied Commission on the Responsibility of the War and the Enforcement of Penalties (Allied Commission). In addition to this, after much deliberation and a series of negotiations to ascertain the culpability of atrocities, Article 227 of the Versailles treaty provided for the creation of an ad-hoc international criminal tribunal to prosecute Kaiser Wilhelm II for initiating the war. It further provided in Articles 228 and 229 for the prosecution of German military personnel accused of violating the laws and customs of war before Allied Military Tribunals or before the Military Courts of any of the Allies.

In response to the Allied request to undertake prosecutions, Germany who had previously passed a national law to implement provisions of Articles 228 and 229 of the Peace Treaty of Versailles, passed new legislation to assume jurisdiction under its national laws in order to prosecute accused offenders before its Supreme Court. It is important to note that this was the first time in history that a successful attempt was made to criminalize mass murders as a crime under international law and was adjudicated in accordance with international norms within the ambit of a domestic penal code, thus substituting national laws for the rules of international law. However all attempts at the establishment of an international criminal court failed because the states did not show enough political will or commitment to take this idea to its logical end (Bassiouni, 2002: 244-253). In addition to this, the United States of America actively opposed the idea of punishment for individual criminal responsibility.

In 1920, the ‘Advisory Committee of Jurists was requested to prepare the project for the establishment of a permanent Court of International Justice and it was suggested that a ‘High Court of International Justice’ be established to try crimes constituting a breach of international public order or against the universal law of nations referred to

[12] The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, usually called the Geneva Protocol, is a treaty prohibiting the use of chemical and biological weapons in international armed conflicts. It was signed at Geneva on 17 June 1925 and entered into force on 8 February 1928. It was registered in League of Nations Treaty Series on 7 September 1929.

it by the assembly or by the Council of the League of Nations and the scholarly bodies such as the International Law association' (Cassese, 2008:254). Parallel to this, the civil society's moves such as draft statutes of an International Criminal Court were adopted by the non-governmental organizations such as the Inter-Parliamentary Union in 1925. However, despite necessary intensity and zeal to find the solution to stop serious wars and criminalise certain conducts, these efforts did not succeed.

The Second World War reminded the world of the sordid damage, brutality and loss of lives caused by wars. There was wide scale economic damage, millions of human lives were lost and cities were left in rubbles and ruins. The war left the sketch of violence on the minds of people and made them see how fascist tendencies activate narcissism in human beings and create social ruptures which break all cohesive bonds among societies and 'nationality' remains the only litmus test to prove one's allegiance and identity. Allies or enemies, friendly or hostile regimes became the bipolar yardstick to express social relationships. After the war the allied forces attempted to punish and prosecute the axis powers in a neutral and objective manner. Amongst all available options, the court and military tribunals were considered the best. They served the purpose of deterrence and also created space for international justice for those who suffered atrocities in the war. However by this time, despite all past legal developments, there was a legal vacuum to punish someone for retrospective crimes.

The idea of punishing through trials was an American proposal. (Bertodano, 2002: 411) In fact, Churchill had an altogether different plan for the Nazis and wanted Nazi leaders to be executed as soon as they were captured and identified.[13] However later he changed his mind and agreed to what became the Roosevelt-Churchill agreement in Quebec. Jackson, one of the legal luminaries of the time convinced Truman about the long term benefits of the trial (Parish, 2011:91). He understood the importance of trials as an act of vengeance against the defeated. He advanced the proposition that "aggressive wars are civil wars against the international community".[14] For this the Allied powers had to prove that the law created by the London Agreement and the

[13] https://www.theguardian.com/world/2012/oct/26/britain-execution-nuremberg-nazi-leaders accessed on 15th June 2016.

[14] Jackson's speech was read by Ambassador George L. Messersmith on March 27, 1941, as bad weather had prevented Jackson's flight to Havana. This address is printed in 35 Am. J. Intl L. 353 (1941).

Charter of the International Military Tribunal attached to this Agreement was but declaratory of already existing rules of general international law. As a matter of fact, the verdict of the tribunal, apart from its immediate purpose of retribution, should be seen as the first attempt in history to establish a legal precedent destined to act as a powerful deterrent against a possible future resort to illegal warfare.

By addressing the historical roots of ICL, Jackson pictures the trial as a self-evident reaction to the events; that is, the trial did not invoke history, rather history invoked the trial. Thus, he attempted to unearth the political origin and philosophical sources for trial as far as possible.

The Nuremberg Trial was itself conceived in a process of political bargaining. Making the four nations arrive at a consensus was a difficult exercise. The French in particular wanted to know where it was stated that waging aggressive war was a crime. They flatly told Jackson that they did not consider aggressive warfare to be a criminal act (Philippe Sands: 2003, 7). During the discussions, differences in opinion about trial procedures became obvious. The Russians were unfamiliar with the American custom of cross-examination. The tribunal's judgment was final and no appeal and review was permissible. However in a different version of the story, according to Pashukanis, the victory of the bourgeoisie throughout Europe had led to the establishment of the rules and institutions of modern international law. It means that there though socialist forces were defeated, the USSR had expressed serious reservations about establishment of a military tribunal (Hirsch, 2008:706).

The trials were without question a political act, agreed at the level of diplomacy, and motivated by political interests. They were selectively and summarily wound up. The allied powers had committed similar acts but the Nuremberg and Tokyo military tribunals prosecuted only the crimes of the defeated. In other words, judges and prosecutors from each of these four victorious nations were largely concerned with crimes committed against their own people (Bertodano, 2002:412).

The crimes in the Nuremberg Charter namely waging aggressive war, war crimes and associated crimes against humanity were applicable only to selected defeated belligerents of the war. The Tokyo War Crimes trial can be regarded as an exercise in Orientalism as it enacted "a Western style for dominating, restructuring, and having

authority over" Japan and its version of events and attributions of responsibility were widely accepted (Kei, 2007: 218).

The outcome of the trial created a reservoir of legal bodies to undertake similar exercises in the future. However, the trial was violative of many core principles of natural justice and those recognized by many civilized nations. All modicums to facilitate such trials were conceived and designed by the interested parties as a result of political victory. In the hour of peace no such alliances were made and there were no international tribunals to punish aggressive acts.

As a matter of fact, not a single judge from a neutral country had been called to join the judicial body, nor any German judges selected. The achievements of Nuremberg and Tokyo were lauded in North America and parts of Europe. However a minority group of legal jurists also critiqued them. The Chief Justice of the US Supreme Court, Harlan Fiske Stone, savaged the Nuremberg proceedings as a 'high-grade lynching party' (Mason, 1957: 13). In a similar tone Judge Radha Binod Pal from India dismissed the Japanese prosecutions as little more than cynical neo-colonialism which further reflected his profound anti-colonialist sentiments (Schabas, 213:545-551). It is suggested that the publication of fundamental dissents, particularly those explicitly challenging the lawfulness of the exercise of judicial power by a court played a constructive role in strengthening the legitimacy of those institutions and enhanced their capacity to pursue the substantive aspiration of justice (Mistry, 2015: 450).

The Nuremberg trial was not a trial of international law. With the unconditional surrender of Germany, its government ceased to exist as a sovereign state and its sovereignty was held in trust by the condominium of the occupying powers. The allied powers played the role of a trustee to punish the perpetrators of war (Finch, 1947:22). The trial of 22 major Nazi war criminals by the international Military Tribunals in Nuremberg was 'one of the most significant tributes that power ever has paid to reason'.[15]

[15] Trial of the Major War Criminals before International Military Tribunal, Nuremberg, Germany,14 Nov 1945-1 Oct 1946('Nuremberg Judgement'), Opening Speeches of the Chief Prosecutors, Opening Speech by Mr Justice Robert H Jackson,20 Nov 1945, at 3.

II.2.b Post Second World War Era and Birth of the United Nations

Lemkin coined the term 'genocide' and the Nuremberg trial provided a prosecutorial solution to the acts of genocide. Such developments have been incorporated in the Genocide Convention of 1948, which declared genocide, as defined in the Convention, to be a crime under international law and directed that persons charged with genocide would be tried "by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction". The Nuremberg trial created the legal infrastructure for the further growth of international law in general and international criminal law in particular. The trial was recorded in twenty-two volumes with over 13,000 pages.[16] Therefore, a momentum was emerging for the creation of a permanent body to give justice on sensitive matters. In this regard, United Nations General Assembly's resolution on 11 December 1946 proved to be another milestone which incorporated Nuremberg Principles as 'principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal.'[17] Subsequently, a Special Rapporteur relating to the establishment of the court submitted its first report to the International Law Commission (ILC) in March 1950.[18] In fact, preparing the momentum for the ICC was one of the earliest agendas and mandates of the ILC. The ILC ultimately advocated the creation of an International Criminal Court and prepared a draft statute in 1951.[19]

In its initial years, the United Nations sought to institutionalize these developments with the creation of a permanent ICC.[20] However due to inherent contradictions between the allied powers especially between Soviet and USA and their contradictory views about substantive aspects of international criminal law, particularly on Genocide Convention and other human rights, it failed to develop any consensus for the establishment of a permanent ICC. In the meanwhile, the ILC and General

[16]http://www.ushmm.org/research/research-in-collections/search-the-collections/bibliography/nuremberg (Last visited on 13th June 2010).
[17] GA Res 95, UN GAOR, [188], UN Doc A/64/Add 1 (1946).
[18] Report of the International Law Commission on the question of International Criminal Jurisdiction, UNGAOR, 5th Sess., UN Doc. A/CN.4/15 (1950).
[19]International Law Commission, Question of International Criminal Jurisdiction, http://untreaty.un.org/ilc/summaries (last visited May. 16, 2016).
[20] General Assembly Resolution, 95(1), 1946, 177(II),1947, General Assembly resolution 488 (V) of 12 December 1950) for further details. Visit. http://legal.un.org/avl/ha/ga_95-I/ga_95-I.html.

Assembly made several attempts to break the siege and develop mutual points of convergence on the issue. However due to rigid positions and a sense of suspicion to prosecute allies, it was difficult to go beyond the rhythm of sovereignty. It was only after the end of the Cold War that it became possible for the United Nations to renew its interest in a permanent ICC (Dugard, 1997:329-342). From the perspectives of international criminal justice, the decade of the 1990s seems to have been productive and welcoming especially when compared to the post second world war years (Schabas, 2010:1).

Under the fog of cold war such a talk about the creation of a permanent international court did not receive wider support and hence no mechanism was established to look after these issues. Despite all the air of suspicion, in 1981 the General Assembly asked the ILC to revive its work on the Draft Code of Crimes.[21] In December 1989, in response to a request by Trinidad and Tobago, the General Assembly asked the ILC to resume work on an ICC with jurisdiction to include drug trafficking.[22] During the 1990's a confluence of factors led to the creation of a draft statute for introducing the ICC to the General Assembly. In 1990 and 1991, various western leaders suggested an international tribunal to try Saddam Hussein and other Iraqi officials, but the idea was not followed up (Cassese, 1996:7-11). Eventually, in 1994, it submitted a draft statute for an ICC.

In February 1993, the United Nations Security Council (UNSC) recognized the principle of an international criminal tribunal to deal with serious violations of international humanitarian law committed in the former Yugoslavia. By May, the Secretary-General had prepared a draft Statute, which the Security Council adopted without change. This move was further ignited by genocide in Rwanda which led to the creation of a second ad hoc body, the ICTR. After this, ILC in 1994 produced a Draft Statute which was in many terms defining moment for the process of creation of the ICC. After two years of examination by the Sixth Committee of the General Assembly, an Ad Hoc Committee and a Preparatory Committee, finally in 1998 General Assembly called for preparatory work for the ICC in Rome.

[21] GA Res.36/106(1981).
[22] GA Res.44/89.

In June 1998, representatives of more than I50 nations gathered in Rome in the office of FAO to negotiate a treaty to create an ICC. After five weeks of intense deliberations and debates, 20 nations[23] voted in favor of the Rome Statute. Less than four years later. Far sooner than even the most optimistic observers had imagined- the Statute had obtained the requisite sixty ratifications for its entry in to force, which took place on 1 July 2002(Schabas:2012:ix)

II.3 Social Justice and International Criminal Justice: Method and its Narratives

II.3.a Introduction

John Locke says that 'every man has property in his own person'. A man owns his person and thus his own labour. He can also appropriate the external world through putting his own labour into it, mixing himself with it and earning the right to exclude the rest of humanity from its use and enjoyment (Orford, 2003:115). There appears to be a connecting link between personality and property. Property and personality in the liberal philosophical tradition forms one of the conceptual links between capitalism and modern liberal laws (Waldron, 1987:145). It appears that property is the focal point to establish jural relationship with the existing structure. It is property which sets the criteria to ascertain criminal behavior. For example, for a very long time in history, women had been considered to be the property of men and crimes against women were considered as crimes against men. That is why personality of women was considered to be shadow to those to men in various forms. Once property has been defined then it has to have a relation with person. Same is true with the Hobbesian and Westphalia models of international law where individuals were considered to be subjects of the state. Perhaps state seems to have a patronizing character or may be state owned subjects. Therefore, state's dialogues with their subject were not considered to be subject matters of international law. Thus the idea of individuals as subjects of international law is a much recent phenomenon.

It is to be noted that the modus operandi of property is embedded in possession and ownership, which is further reflected in expressions such as lease, sale, gift, mortgage,

[23] Alessandra Stanley, Conference Opens on Creating Court To Try War Crimes, N.Y. TIMES, June 15, I998, at

license and exchange thus rendering property with a monopolizing character.[24] This might be the reason behind legal orders to create rules of inheritance and succession. The production and distribution cycle created various divides which can be viewed as appropriation and dispossession. This divide was maintained through deterrence and that is where law came into the picture. The Marxist view on this is that state is a fundamental creation to expedite this process which in turn creates class divides and a structure of hegemony. This class division constitutes a basic tension in society and installs perpetual powder keg in the order and subjecting inner relations to the rationality of law.

The fear of deterrence works towards questioning this very class divide. The state not only gives sanctity to the class divide but also ensures its maintenance. In today's times, private corporations are very powerful and influential. Multinational corporations have achieved unprecedented economic power and geographic scope, which have given them an enormous influence over the enjoyment of a broad range of human rights. Corporate interests and people's interests led to many situations of armed conflict and human rights violations. Due to availability of minerals and mines, corporates push the government to vacate the land and in this process it activates to destroy the habitats of indigenous peoples, interferes with the right of all peoples to freely pursue their economic, social and cultural development, including the right to not be deprived of their own means of subsistence. Often when locals resisted this onslaught, it created a situation of armed conflict, which in turn led to crimes against humanity. However, the current discourse is very silent on this issue of defining the role of corporate-state nexus and their fixing their liability.

The essential question that arises is that looking at the core of violence at the global level and the current codified regime of the international criminal law, can we afford to neglect answering the question around defining this nexus. Therefore being a significant question such as the role of property in the escalation of conflict and creating situations of systemic and widespread violence. The UN Special Court for Sierra Leone has identified the unlawful international trade in diamonds as central to the funding and motivation for conflict.[25] It is important to recognize that core crimes

[24] See the Latin term Right in Personam.
[25] UN Security Council Resolution,1306/2000.

are committed within an organizational structure which themselves represent an inherent class character. It needs to be understood that army, bureaucracy, arms, police and other state apparatus consume a vast supply of resources and one who controls the supply of money is the one who dominates the economy. Here, Semeulers writes that to identify collective motive, the masses aim to get rid of the alleged privileged classes or minorities whom they blame for their misfortune (Wilt, Vervliet, 2012:67). Therefore violence is never neutral to class either at the level of either perpetrator or that of sufferer. However, the Rome Statute is neutral to these material realities that define violence.

The Statute is neutral towards class conflicts and deprivation of economic, social and cultural rights as prime factors leading to the committing of prohibited acts. Chimni's work is truly enlightening as he elucidates how 'international law is class law' (Chimni, 1993:102). Thus, this neutrality itself legitimizes the class oppression through the creation of powerful classes.[26] It has been rightly pointed by Bass that International criminal trials bring 'a sense of order to a violent world'. (Bass, 2000: 36). In this respect Schabus says that crimes against humanity might usefully be viewed as an implementation of human rights norms within international criminal law (Schabus, 2010:139). In essence, it seems that the criminal trials present a conspicuous application of legal rules in a neutral, even-handed manner, punishing criminals and affirming social order, but without ever touching on the social relations in which crime is rooted (Gabel and Harris, 1982, 369).

Crimes are not phenomena that can be easily defined according to any objective set of criteria. Instead, what a particular state, legal regime, ruling class or collection of dominant social forces define as "crime" in any specific society or historical period is what reflects the political, economic and cultural interests of such forces.[27] Thus, crimes have a social base from their very conception right up to their objective assertion. In this regard, Pashukanis says that private law is the 'fundamental, primary level of law'. The concept of public law, for example, 'can only be developed through its workings, in which it is continually repulsed by private law, so much so that it attempts to define itself as the antithesis of private law, to which it returns, however,

[26] Notes from Akeel Bilgrami's lecture.guest speaker in Krishna Bharadwaj Annual lecture held on 20th Oct 2015.

[27] http://attackthesystem.com/crime-and-conflict-theory last visited on 5th June 2016.

as to its centre of gravity' (Mieville: 2005, 86). What had to be transformed were the underlying social conditions and class relations that shaped the entire approach of seeking to assess and attach 'guilt' to anti-social behaviour. (Pashukanis, 2008:185) International criminal justice indeed speaks a monotonous language of peace in a status quoist framework and substantially overlooks the significant and fundamental questions of economic justice.

As mentioned earlier, Marxian principles enunciate that all crimes have a class character which shows the suffocation of class sufferings (Marx and Engles, 1975:617). It is the ruling class which employs to serve its interest and uses instrument of crimes through interpretative prism. Critical scholarship in international law has contended more broadly that politics and economics are 'intertwined projects' that bear upon the juridical field (Kennedy, 2013: 460-61). Whereas on the other extreme, bourgeois jurisprudence consciously or unconsciously strives to conceal this element of class (Pashukanis, 1927:169). Chimni argues that international law during last two decades has been the principal instrument through which the rule of private property is being extended in the world economy. Second, it is the means through which the rights of transnational capital are being safeguarded (Chimni, 1999, 347). On the other hand Pashukanis a doyen of Marxist jurisprudence says that 'law starts from a law-suit'. Through this statement he attempts to focus on contractual mode of production and how law is rescuer to the crisis of the private capital. *Locus standi* is the basic acknowledgement of state's authority at both level one who can sue and another state's authority to maintain status quo. He further claims that in order to maintain status quo violence is intrinsic to law, but it is in the absence of a sovereign that the violence retains its particularistic, rather than abstract impersonal (state) character (Pashukanis, 1927:136). Bourgeois international law in principle recognizes that states have equal rights yet in reality they are unequal in their significance and their power. The fact is that although both parties are formally equal, they have unequal access to the means of coercion, and are not therefore equally able to determine either the policing or the content of the law (Pashukanis, 1927:137). On the other hand, Pogge claims that existing international economic law has contributed to or caused in part the existence of extreme poverty, what he is really saying is that had a different set of rules and institutions been devised for the international economic order, the worst forms of poverty could have been eliminated in great measure

(Howse and Teitel, 2010:438). Thus it would be correct to say that economic gains or changes in the patterns of ownership of capital is a prime factor for the perpetuation of violence.

II.3.b Statutory provisions and Cases

International crimes are part of the *Jus Cogens*. The writings of scholars are uncertain, if not tenuous, as to what they deem to be the criteria for justifying the establishment of crimes under international law (Bassouni, 2013, 142). Article 46(1) of the Hague Regulation on land warfare (1907) says that 'private property must be respected' by any army occupying the enemy territory. The essential feature of 'grave breaches' is that under the system envisaged by the 1949 Geneva Conventions, it constitutes violation, appropriation and deprivation of property rights. In a similar tone, Article 6 (3) of the Rome Statute talks about genocide; it is defined as deliberately inflicting on a group of people conditions of life calculated to bring about their physical destruction in whole or in part. The elements of crimes specify that the term "conditions of life" may include but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systemic expulsion from home (Schabas, 2010:505).

In this context, condition of life also encapsulates surroundings which may amount to jobs, access to water, right to form a family, ability to possess money, house, land and run businesses. It is important to note that while this provision imposes an obligation on the state to not commit such acts through police or direct use of force, but it gives leeway to the state to do such things at the policy level. For instance, if a state deliberately fails to provide polio vaccination to children, supply clean drinking water, control air pollution, improve yield of crops, is unable to ensure minimum wages by the local multinational corporation, such cases do not generate any liability under this provision. This provision makes it seem like states are viewed as police states where their failure to manage civil and political order is punishable but they are not necessarily under the obligation to provide for the welfare of the people.

Enslavement is defined as a crime against humanity under Article 7(2) (c) of the Rome Statute as 'the exercise of any or all of the powers attaching to the right of ownership over a person'. The crime of enslavement produces economic benefits

through the selling of the enslaved individual and his or her subsequent exploitation. Sexual exploitation is another instance which shows the profitable motive of crimes. The Japanese military authorities regulated the rates charged to soldiers in the comfort stations and how profits were divided between managers and victims. Here it is important to know that corporate invasion of tribal areas led to the introduction of monetized economy and which effectively broke their hereditary relationship with the land and they began to work as unskilled labourers for their subsistence. Very often, women of these tribes were sexually abused and exploited in an organized manner which led to introduction of sexually transmitted diseases in these communities finally leading to the extermination of several tribes.[28]

War crime of pillaging is also known as plunder, spoliation and looting which gives opportunities to groups of people to target specific group who hold material. Deportation and transport of persons may be done for multiple reasons including possible acquisition of land and natural resources. Deportation is a way through which state changes the composition of population of a place and transplants alien population or forces original inhabitants to settle in new lands. During colonial period these activities were rampant and were used by colonial powers to perpetuate their colonial mission. First they created the condition of starvation and then they deported these labourers to other colonies for work. Similarly they encouraged native colonized population to settle in new lands and in case of confrontation, the retaliation of the colonized was severely thwarted. However, the ICC refuses to look at the corporate land grab and displacement of millions of people whereby they have had to leave their natural homes and lives to finally live as homeless in cities being forced to fall in the vicious cycle of poverty. Chimni further highlights that the geographical spread of capitalism over the last few centuries has thus engendered a global ecological crisis. However the relationship between the expansion and accumulation of capital and environmental degradation is most often erased (Chimni, 2011:20-22). The same analogy is equally applicable to the domain of international criminal law where again corporate culpability is granted permanent impunity. Due to such changes people have been increasingly losing land, agricultural land, water resources and facing huge difficulties in adapting to changing environmental conditions.

[28] https://nacla.org/node/6720/sitemap last visited on 17th July 2016.

Deportation and forced transfer is allowed on 'grounds permitted under international law'. Evacuation is by definition a temporary and provisional measure and the law requires that 'individuals who have been evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased'. This provision specifically mentions intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions. Conscripting or enlisting children under the age of fifteen years into the national armed forces also has economic advantages because child soldiers are paid less and their economic liability towards family is also limited.

The destruction of homes, habitats, the cutting off of water sources and their deprivation from land rights, exclusion of certain groups from education or cultural life, or forcing people to work under inhumane conditions has been commonplace throughout history. Rarely, however, have such violations been addressed through legal processes. Indeed, international criminal lawyers have generally assumed that international crimes are confined to certain violations of civil and political rights, to the exclusion of their socio-economic and cultural counterparts.[29] In this regard, Trial Chamber II in Katanga saying that care must be taken to assess the practical value of property of victims is another juridical recognition of right to property.

Thus it seems that in many ways 'acts of individuals that threaten violence to persons or property' are criminalized whereas other systemic forms of social violence, economic exploitation, discriminatory social order in which their roots are embedded are implicitly approved. Here it is pertinent to note that ICTY's Statute spoke in broad generalities, describing offences in terms more appropriate to a human rights lobbying pamphlet than a comprehensive legal document (Parish, 2011:97).

In the following cases, the role of economic stress seems very prominent. In recent times, after Nuremberg, Rwanda has become a focal point for the activation of the whole process of international criminal law.

(i) Rwanda Case

[29] http://www.intlawgrrls.com/2012/03/genocide-socio-economic-rights-response.html last visited on 6th of July 2016.

The year I994 registered another act of gruesome massacre of humanity. It was precisely activated by the deaths of the Presidents of Rwanda and Burundi in a plane crash at Kigali airport in Rwanda after which unprecedented violence occurred in which Hutus killed millions of Tutsis and moderate Hutus.[30] It is important to note that Tustis were 10 -15 percent of the Rwandan population but were better organized and well armed due to which they had ruled over majority agrarian Hutus for several centuries. Even during colonial times both Germany and Belgium supported the Tustis' dominant position in Rwanda. However past animosity was paired and relaunched with the intervention of IMF. It attained momentum due to deteriorating price of cocoa in international markets.[31] This led to a situation of conflict and a larger spiral of violence which finally saw the death of 11% of the entire population of Rwanda.

The ICTR did not discuss or did not have the mandate to question the policies of the IMF contributing to the genocide in Rwanda.

(ii) Sudan Case

In Sudan's western Darfur region, a massive campaign of ethnic violence claimed the lives of more than 70,000 civilians and uprooted an estimated 1.8 million more people since February 2003. In 2005, the case was initiated in the ICC through the Security Council's referral.[32] The Darfur situation can be used as an example to understand the crisis which had developed over a decade as a result of expanded desertification of Sudan. Desertification means that herder tribes had significantly reduced access to water and grazing land, which resulted in their encroachment upon the farmer's lands. Even though both groups were Black African Muslims, they nonetheless belonged to different tribes. However, it is not the tribal distinction that has caused the conflict, but rather access to water and grazing lands. Thus it was essentially an economic issue. If an emergency economic conflict prevention plan had existed a number of wells could have been dug, or other means of obtaining water supply or feed could have prevented the conflict. With the deployment of a joint United Nations-African Union peacekeeping mission, the peacekeeping and humanitarian operation costs

[30] http://www.bbc.com/news/world-africa-13431486 (visited on 15th of May 2016).

[31] http://www.nytimes.com/2006/08/06/business/yourmoney/06coffee.html?pagewanted=all&_r=0 (visited on 16th of May 2016).

[32] http://news.trust.org//spotlight/Darfur-conflict (visited on 16th of May 2016).

exceeded an estimated 6 billion dollars in only last five years.

Bassouni says assuming for the sake of argument that providing water supply by means of wells or by means of a pipeline from a river as distant as Nile, as well as transporting feed via certain cities in the Sudan, would have cost them 100 million dollars, and would have been an effective conflict prevention cost in light of the potential human and material costs of the conflict that finally ensued (Bassouni, 2013:1032).

(iii) Yugoslavia Case

Yugoslavia was a multi ethnic and multi-cultural country with communist rule. Tito as a state builder founded its institutions which were based on social coexistence and amity. As a matter of fact, Yugoslavia had six provinces and strong federal structures which held multiethnic population. It survived the test of time and emerged a strong nation with principle of secularism and economic justice. However this country was later broken into parts and it witnessed unprecedented violence. In the 1970s and 1980s, the IMF imposed a policy of structural adjustment which led to the state, as usual, being stripped off of most of its functions, except maintaining law and order (Anna Orford:2003;94). In this context it is important to note that transition of economies from socialism to privatization too create various social ruptures. IMF's structural adjustment provided ambience and proved to be a catalyst for the creation of an environment to aggravate conflict. Thus, economic distress, soaring food price, joblessness, end of subsidy created an atmosphere where people started searching problems and at the social space historical prejudices were unearthed, which finally led to genocide.

In this context it is important to note that economic deprivation or unequal or unjust concentration of wealth in the hands of a few may trigger violence. Violence is also committed to appropriate property. Current international criminal law is more titled towards civil and political rights which in a way is applicable to all without recognizing the unequal conditions on the ground. Therefore there is an urgent need to look at international criminal law with a sense of social justice so that it addresses the ongoing process of deprivation by both state and non-state actors. This approach is more suitable and effective to solve conflict in Global South because most of the conflicts in these regions have roots in exploitation and deprivation. In today's time

corporate bodies are powerful actors of the current global order. The ICC seems to be silent about their potential roles in the situations of conflict. It does not look at the rationale and ultimate logic of the violence. Such an approach technically produces cases and judgment but fails to give justice. In order to make the judgment socially acceptable and inclusive, it is important that the court should address and take notice of the root causes of violence.

II.4 International Criminal Justice System and its Discontent

II.4.a Introduction

International criminal justice system compared to domestic justice systems seems to be in nascent phase. It is evolving its own mechanisms. This evolution of international criminal justice system has its own flaws. International criminal justice offers legal solutions like punishment, trial and arrest etc., but it does have non-legal solution as acts like heeler, restorative and victim oriented mechanism. In current time, international criminal law is becoming codified and institutionalized. Thus it appears that positivist international criminal laws are certainly barometer and guiding principles of international criminal justice system. Here International law proposes or either eliminates other possibilities of justice system at domestic level and conceptualizes tribunals and ICC as just and standard way of justice system. In this context, Gerry Simpsons says trials are viewed ideally as 'a place liberated from politics and the contamination politics threatens' (Boas, Schabas and Scharf, 2012:61). He further says that politics dictates expressions of international criminal justice, and in doing so shapes our consciousness about where, why and how it applies. Victims have their own sense of justice and the current discourse does not align with international legal regimes resulting in their exclusion from a legal political system. One view of international criminal justice is that it is designed to be the 'end of impunity' and not the end of sufferings (Boas, Schabas and Scharf, 2012:68).

ICC is also not neutral to the cultures of the third world countries. Rulers of third world countries are projected as dictators and attempts have been made to create an image of dictators. On the one hand, it is highly desirable to have elements of crimes but it has failed to include crimes committed during colonial times. On the other hand there is skepticism of destabilization of unfriendly regimes. It further reflects in the

arguments of Schabas who has criticized the creation of the special tribunal for Lebanon, on the basis that the 2005 killing of Rafiq Hariri, a leader friendly to the west with international connection, gave rise to hybrid tribunals, when many other more serious events have not led to a similar level of international involvement (Elgar, 2012: 168). On the similar lines, Parish says that it is transparent that ICL is brought to bear only against defendant who fall out of the powers (Parish, 2011:117).

In the making of justice system more inclusive and participatory, inclusion of large number of stakeholders in society is required for peace and justice. In this light, the criminal justice system needs a more decentralized mechanism. Community based approaches include all the participants of the societies and consensus is generated within to solve their problem and find more societal solution. Keeping these factual details in mind, one can fairly says that international criminal justice system is heading towards centralization and it is undermining plurality at the local level. It proposes similar solution to all problems and creates a super structure of courts where local situation is visualized through law rather than by political and social tools. Needless to say that legal system is a plural domain. It is inundated with multiple schools, narrations, systems, case laws and divergent jurisprudence which caters the needs of diverse people. However, homogenization of international criminal justice system has to fight with its own diversity.

As a matter of fact, participation of victims or marginal social groups in the judicial process is an essential attributes of any democratic legal system. Based on objective assessment, it appears that the participation of local communities in the justice delivery system has been overlooked. The court is becoming formal and institutionalized at every level, which in itself creates impediment and challenges to get justice.

II.4.b International Community and the Language of Collectivity

Power creates narratives of dominance. Power operates in a centralized structure and in the domain of international law it appears in the form of control over information, creation of groups, alliances and more importantly by international organizations. In this process it regulates its upper hand on both substantive and procedural body of laws. Perhaps international justice system is also not untouched by this process.

The proliferation of international criminal tribunals or institutions in recent years reflects the reality that the international community has agreed/determined that the gravest crimes are in fact proper subjects of criminal justice systems. Although each of these institutions formally is independent from the others, James Crawford demonstrates how they draw strength from each other and weave together to form the tapestry of international criminal law. However Global South needs to look at this narrative and find out who is this international community and in whose name this international community works.

It is important to find out the operational language in which power operates. It is further important to remind ourselves that language has territory and words have their own political meanings. This language of power in the domain of international justice starts with the collectivity. International criminal justice is a form of criminal law without a state and thus seems premised on a theory of global justice that emphasizes the possibility of justice even without a central sovereign institution (Megret, 2015:79). The actor and factors of global justice lie in the international community. Therefore a valid inquiry arises to ascertain what international community is, that is, what matrix constitutes this community. It is important to note that fundamental DNA of the international community and international organizations are not different. It would be relevant to revisit the words of Chimni that it is only when a coalition of powerful social forces and states is persuaded that an international institution is the appropriate form in which to defend their interests, is it brought into existence, albeit through state action, and that it survives only if it continues to serve these interests, was overlooked (Chimni, 2011:19).

It is important to highlight that International organization too speaks the language of collectivity but serves miniscule minorities' interests. In the similar manner new regimes of laws are emerging in the domain of international law and its language is collective and it is expressed and designs to appeal collectivity. However, in theory and practice it propagates to follow atomistic and individualism. but its operators are from different territory and their operational area is different. This language to express collectivity in the international community too serves the interest of minority. This phenomenon is further theorized and expressed by the Herbert Spiegelberg in 1973 identified the tendency as 'part of the "arrogance of power" behind the

patronizing usurpation of the right to speak for the "free" people of the world, when they have never been asked' (Spiegelberg, 1975:215). It needs to be noted that the language of collectivity seeks to appeal universality.

Thus, the association between international law and universality is so ingrained that pointing to this connection appears tautologous; it is today hard to conceive of an international law which is not universal (Anghie, 2005:34). And yet, the universality of international law is a relatively recent development.

Universality is the signature tone of the international law and for that matter for international community. Universality is now signature tune of the Rome Statute. It is another point to look at its merits and demerits in totality. For this discussion it is important to discuss the character of universality. Ideally, the different legal cultures that are at the basis of international criminal law merge in to a supranational criminal law, which transcends national roots. This is a result not readily achieved because, as Fletcher notes, international criminal law lacks its own supporting culture of ideas and principle (Flethcher, 2011:9). In this context, universality creates a cultural space for international justice which may be dominated and manipulated by the powerful.

This framework constitutes paraphernalia of international criminal law. In another instance of commonality to ascertain a fixed set of criteria or parameters to be considered as crimes again invite critical thinking to unfold its real character. Cassese posits that the determination of a crime as an international crime inter alia depends on the values that are considered important by the whole international community (Cassese: 2008: 23-25). It is to be noted that shared experiences of different parts of the world are different because somewhere social forces are more tyrannical than the political regime. However when it comes to International criminal law it appears that the same is drafted by an abstract entity and criminalization serves the hidden interests of the powerful when we see cases where the use of poisonous bows is treated as a war crime but use of atomic weapon is very well permitted.

International community represents from nobody to everybody. However, in reality it is grounded on provincialism or the voices of a microscopic minority. International community is clothed with the expansionary agenda of universalism. On this issue, Greenwalt's words seem relevant when he says that the search for consistency and

uniformity is misguided and that international criminal law should be pluralistic rather than uniform (Greenwalt, 2011:5). Here one can say that elements such as repression of offences such as genocide or the crimes against humanity, apartheid and war crimes may be seen as necessary prerequisite efforts to promote plural and inclusive societies but it speaks in an identity neutral framework while conscious of the facts that identities play significant role in atrocities. Thus this ignorance is not accidental but rooted in the discipline of formalism. The Rome conference can be viewed as a cosmopolitan space. It exclusively represents civil society, bureaucrats, diplomats, and urban centered population. In other words, the cosmopolitanism of international criminal justice appears more ideational than real, and must, at any rate, be measured against the underlying interstate game that gave rise to the ICC. ICC is rooted in the notion of cosmopolitan control while creating a supranational judicial body while other side it presumes about failures of sovereignty at the state level (Roach, 2009:186).

Since its inception, though ICC seems to be operating its business in the name of the international community but it has failed to touch any countries from North. Its major cases are from Africa.[33] This Afro-Asian centrism reminds us of an old chapter in the rule book of international law. Schabas while looking at the growth of criminal tribunals and finally incarnation of courts says that two factors contributed to this. First, the end of the Cold War changed the atmosphere in the United Nations, enabling middle-sized powers, who found security in international law, to thrive. Second, the increasingly powerful human rights movement had begun to develop a victim-oriented discourse that required states to ensure that perpetrators of atrocities were brought to justice (Schabas, 2006:422). However, keeping the situation on ground it does not seem that third world countries endorse such views. The court has created an apparatus for trial and punishment at the international level. How far it is able to deliver justice and reduce the situation of conflict is a question to be thought about. The court seeks legitimacy from the people or narratives created through its own success stories.

[33] Kindly refer Table I,at p.n 16.

II.4.c International Criminal Justice: A Crossroad

It is said that criminal justice is the most civilized response to the intolerable amounts of suffering that human beings cause to one another through cruelty, armed clashes, and aggression (Cassese, 2011:271). At the same time legitimacy to the institution depends upon acceptance of final outcome by the people. Perhaps there is no barometer to judge international criminal justice. It can't calculate its success and failures in mathematical terms but based on certain normative parameters. Ideally criminal justice system should lay the foundation stone of justice delivery system. It must create an ambience through procedural and substantial mechanism to respect rule of law, reconciliation, restore the ruptured relationships, heel the wound, and serve civil society actors as well as victims. It must be inclusive, participatory, affordable, approachable, communicative and restorative; it must be healer than the aggrandizer of pain and should control the potential situation of crimes through engagement not artificial notion of deterrence; it must ensure peace and justice. In simpler words, the ICC cannot be legitimate unless and until it is democratically accountable (Glasius, 2012:44).

'The purpose of a trial is to render justice, and nothing else', wrote Hannah Arendt in the epilogue to her famous account of the trial of Adolf Eichmann in Jerusalem. However she was skeptical of the notion of using the trial as a means of creating a historical record (Ardent, 1994:243). As Richard Goldstone has pointed out, prosecution is not the only form of justice, nor necessarily the most appropriate form in every case (Boas, Schabas, Scharf, 2012:12). In this similar fashion, William Schabas, too believed that 'post conflict justice requires a sometimes complex mix of therapies, rather than a unique choice of a single approach from a menu of alternatives'. Glasius and Meijers too note that in a trial, the prosecutor and defense are constructing narratives about the political legitimacy of the court itself (Stolk, 2015:993). In this way international criminal law has relied on trials as sole trustworthy partner to render justice on its own terms.

During the work of Preparatory Committee large numbers of developing countries were not informed about the ICC. A like-minded group (LMG)[34] was created which originally consisted of maybe ten or fifteen representatives to the General Assembly's sixth (legal) committee, who were incidentally also friends. It occupied major bureaucratic decision making posts during the negotiation time and they had intention to form a strong permanent court. [35] Thus negotiation of ICC was itself not participatory and informed one. In democracy prior consent requires information but most of the developing countries' participation was not effective. At domestic level, courts are constituted through technocrats and governments of the day, people, media, and legal fraternity all are independent but interdependent to each other. Judges' decisions need legitimacy from the people and people need justice from the judges. Governments should ensure fair procedure so that qualified, neutral and independent persons can come to the seat of justice. Similarly media can make system communicative channels to reach the people and vice versa. In this process, role of lawyers become very essential therefore lawyers should come from all the communities and form plural background.

We live in an era of democracy. Democratic ethos is the most essential precondition for Court. It may have its normative image for its proceeding however unless and until it does not have democratic backup and support of the collective masses as a political identity it cannot have legitimacy. Society and criminal justice system can't be seen in compartments. One should view conception of criminal justice as an expression of a society's collective conscience. In this respect, prior democratic consent is a tool on which democratic centralism should be based (Glasius: 2012).

Justice should be communicative and this process starts from legal language itself and language is proved to be one of the barriers for the people to comprehend the working of the courts. In Yugoslavia tribunals, working language of the court was English and natives barely knew English which led them to face great difficulties in the

[34] Like Minded Group." It is an informal coalition of states. The Like Minded Group included countries like Canada (the original chair of the group), Australia, and most European countries with the significant exception of France, Argentina, Costa Rica and others.

[35] Eleven of the fifteen coordinators came from members of the LMG; the crucial issues of the prosecutor, jurisdiction and admissibility were coordinated by trusted representatives of Argentina, Finland and Canada, who had each had a long involvement in the negotiations, and been long-time members of the LMG.

participation of trial. However at the level of international criminal law, rule making at the international level is highly qualified. It needs specialized training and reaches to powerful institutions. It is true that Sixth Committee, Law Commission, and Embassies are again restricted for the common people.

When it comes to the international criminal law this process becomes more tedious due to the cultural understanding of the Third world countries about laws and crimes. Many states in third world at least at practice level supports firm implementation of the Westphalia model and their justice delivery system is based on undemocratic laws, summary trials, inheritance based Judicial body, laws are not made through democratic consultation. Therefore their understanding at International level seems very different about the International crimes and actors of crimes as well, however their participation is equally important. That is why there was no unity among NAM groups during the negotiation of the Rome Statute.

Some supported death penalty, some asked exclusion of penalization of child soldiers, some argued for the prohibition on nuclear weapon as war crime and some argued for the inclusion of the Security Council and some exclusion of the role of the Security Council and some even wanted not the incorporation of international armed conflict. These various demands of the Third World Countries show their internal contradiction and understanding about the rule of law. However when comes to negotiation rules are made with technical understanding of the North's views and these countries bargain for their safe guards in negotiation process rather than changing the outcome. In effect, Rome Statute has failed to incorporate legal views of the Third world countries. It has been managed through high sense of bureaucratic management to build consensus and pass through procedural mechanism. This process of engagement becomes urgent because ICC is not accountable to any democratic body. Its judgment is highly confined to the elite people around the globe. Therefore critical analysis of judgment seems difficult.

Fairness comes through objectivity and neutrality and application of rule based normativity. Similarly right to a fair trial as process and outcome requires that judges must have objective and neutral vision and there must not be vested interest. It is equally essential that judges must also be institutionally and personally independent of political or administrative control. It is important to see the apparatus of selection

of judges and it is pertinent to ask how ICTY and ICTR judges get elected in the first place. Both the Security Council and the General Assembly have a role in the election of the judges. Member states and non-member states with observer status are entitled to nominate up to two candidates from different countries. The Secretary General then forwards the nominations received to the Security Council.[36] The Security Council screens the nominations and prepares a list of twenty-two to thirty-three candidates for consideration by the General Assembly. The General Assembly selects sixteen judges from the list of candidates. In this process, final say over selection of the judges is exercised by the Security Council. The process of appointment of judges is again subject to the further grouping and most cases due to specialized training it is restricted to the scholars of North based legal institution where these people's world views have been shaped through their training that is not necessarily means inclusive.

Lawyers require years of training to argue and understand complicated language of the court. Particularly in third world countries legal infrastructure is struggling to educate and train lawyers and judges to know national laws, and, understanding international criminal law seems herculean task. Cartel of international criminal lawyers has monopoly over the international criminal law. Therefore knowledge is not freely accessible. It requires investing large sum of money to create legal infrastructure. High costs per defendant in an international criminal trial, tribunal proponents must regularly explain to government donors and other interested parties why individual criminal accountability for a small number of alleged perpetrators should contribute to a broader set of interests involving peace, security, and development.

What differentiates a court recognized by rule of law and a Kangaroo Court is difficult to answer but certainly courts recognized by rule of law must ensure effective participation of the parties. In this regard, media, press, networking of Global North has the potential of perception builder. Media gives us news and most of the media is run for private profit. In a fair speculation, many media houses' budgets are more than the GDP of many third world countries. Once they speak and portray to their habitual audience then it becomes truth for the masses without any cross trial. Situation of law

[36] Article 13 (2) (c) ICTY Statute

or order may be projected as situation of genocide and urgent requirement of intervention can be appealed to the masses for projected intervention.

Global NGOs are another important stakeholder of the justice system. They play a significant role in the whole process of justice delivery system. Most of the NGOs offices are located in west (e.g. coalition of the International Criminal Court, Amnesty International, Human Rights Watch etc) and their major employees are from Global North although they operate globally. Their reports and views play significant role. It is true that these NGOs are in many ways nationalistic as well. During the Cold war era, USA used human rights as soft weapon of diplomacy against Soviets. In this process HRW played an important role. It selectively focused on the Soviets atrocities and case of human rights violation however it equally escaped North's role in the mass atrocities and cases of human rights violations in South.

International criminal law seems to have adopted a neoliberal orientation, in the sense that neoliberalism draws market-based rationalities into traditionally non-market-based domains. As Werner argues, the monopolization of the term 'global justice' by the field of international criminal law forecloses debates regarding the meaning of justice (Kendall: 2015). One way in which this transpires is through presenting international criminal law as a commodity within the realm of private interests rather than as a public good subject to the scrutiny of its political constituency. Money should not be a basic need for accessing the criminal justice system. Justice delivery system should be financially inclusive. However tribunals are expensive.[37] The cost of tribunals has led many to object to this form of implementation of international criminal law.

The tremendous costs involved make it difficult for the UN to establish Tribunals in parts of the world where it may be equally necessary.[38] It would seem that the 'dividends of international criminal justice', to quote the title of former ICTY Prosecutor Del Ponte's, are multiple and diverse: there is an expanding field of professional knowledge accompanied by a market-driven demand for teaching, training, and practice, as well as the indirect effects that this profession has on state

[37] For 2008-09, the ICTY's annual budget was US $ 188 MILLION, The equivalent figure for the ICTR US$133 million(Parish,2011:103)

[38] See SC doc S/2004/616, 23 August 2004 ('Zacklin Report') which states that 'the tribunals have been expensive and have contributed little to sustainable national capacities for justice administration.'

and local economies, whether in Freetown, Phnom Penh, or The Hague. In this light, Bassiouni seems correct that international criminal justice processes have evidenced a tension between the interests of power and wealth represented by states and the commonly shared moral and social values of the international community (Bassiouni, 2000:409).

The ICC is not answerable to the any democratic body. Therefore its function may create several challenges to nations. One such challenge seems to be emerging when it comes to judges' rule making. It is a serious question whether judges should have the authority and mandate to create the law. In reality bulk of jurisprudence and laws relating to international criminal law is the primary product of judicial invention. There are a number of judges and jurists who support law making by judges, while many oppose it and believe in the religiosity of the separation of power. In the name of 'non-liquet' a whole gambit of interpretative adventurism has been carried by the judges to create substantive laws. In his separate opinion, Tadic Judge Li described the majority decision as 'an unwarranted assumption of legislative power.' But it is clear that the tools of interpretation have helped judges to fill gaps in the Statutes and the law.[39]

In this regard, much of the work of Hart has been concerned with the question of what happens when legal rules run out. He believed that judges must use their discretion to make law when legal rules have 'open texture (Hart, 1961:128). Similarly Judge Cassese has spoken of the judges revealing the 'hidden rules' of customary international law. Most of these judges are from Global North and their views regarding conflicts in third world countries supports the views of their governments and due to minor participation of judges from Global South it has given them a sense of monopoly over judicial interpretation. This crisis of representation and poor legal infrastructure in Global South has led to situation of vulnerability.

The independence of the judges and the institutional independence of the ad hoc tribunals are inextricably linked. It is much more probable that the goals of the Tribunals, including the primary goal of restoring and promoting peace and reconciliation in any conflict zones will be achieved if the judges are perceived to be fair and neutral. In the Tadic Jurisdictional Decision the Trial Chamber discusses the

[39] Tadic Jurisdictional Decision (note 29) Separate Opinion of Judge Li, Para. 13.

question of independence of judicial bodies and went up to saying that the question of whether a court is independent and impartial depends 'not on the body that creates it but upon its various constitutive elements including its constitution, its judges, their background and manner of functionality is equally determinative factor.[40] In this regard Cockayne's words seem still a day dream that 'judicial independence and propriety are at the heart of the liberal democratic project that underpins contemporary institution-building in international criminal justice' (Cockayne, 2004:1161).

In the common legal tradition, the interests of victims, as the injured parties, are represented by the prosecutor who has the sole responsibility to vindicate the crime as a breach of community norms; victims seeking money damages from a defendant generally must file a separate, private action, to do so. In the civil law tradition, the public law action of the state prosecutor and the private law action of victims to seek reparation for the harm caused by a wrongdoer may be joined in a single proceeding. While the ICC framework contains elements of each tradition within the victim participation provisions as well as more generally, the statute and rules of evidence and procedure are the result of political negotiations among state representatives. The resulting regulatory regime owes perhaps as much to the process of negotiations as to a principled effort to integrate common law and civil law legal traditions. Despite grounding its decision in the international legal framework of victims as rights holders the imagined victim the extent of their participatory rights was limited. The judges ruled that victims would not have access to the investigation files or be able to attend closed sessions; what "participation" of victims in the investigation meant was that they would be notified of proceedings and could have access to the public documents. In other words, victims had no greater access to information in the possession of the OTP than the general public. The Court, while formally siding with victims, in fact offered a hollow victory. Its decision did nothing to give effect to what victims purportedly wanted: the ability to influence the direction of the investigation and the decision by the Prosecutor regarding which crimes to charge.

Similarly, the victims of international crimes are typically not selected on the basis of their individual characteristics but on the basis of their actual or perceived

[40] Prosecutor v Tadic, Decision on the Defence Motion on Jurisdiction, IT-94-1-T, Para 32.

membership in a collective. International crimes are also collective in the sense that they are committed with the consciousness on the part of the individual perpetrator that he is part of a common project (Jain, 2014, 3). It cemented the possibilities of international crimes where non state actor's particularly corporate entities commit breach of basic obligation under human rights. Further, the exemplary character of sentence is seen as showing the superior impartiality and moral authority of the judicial body. Exemplariness is a typical feature of pre-modern penal systems. The more exemplary a trial, the more it was degrading and stigmatizing, and the more it led to popular condemnation of an individual who broke collective values and was therefore deserving of a severe and solemn punishment.

Many a time forgiveness and realizing people their sins through a social process of confession and guilt works more as a healing and help to restore rupture in the society. There are many cases of peace agreements which helped society to back to normalcy. South Africa's post conflict mechanism is considered quite successful. During the Rome Statute's negotiation delegation, for example, regularly reminded the drafters of their country's national approach to post conflict justice, which was flexible and substantially based upon a renunciation of criminal prosecution for the crime against humanity of apartheid, and further supported by an amnesty mechanism in the event of specific atrocities where the offender acknowledged the crimes committed (Schabas, 2010:22). Further it should be noted that the exemplary justice can be a highly divisive and polarizing notion, as highlighted by the contrasting ways in which Bosnian Serbs and Bosnian Muslims reacted to the news of the arrest, in July 2008, of the indicted war criminal Radovan Karadzic. While members of one group protested, members of the other celebrated (Clark, 2010:375).

In this regard, it seems true that 'the pursuit of criminals is one thing and making peace is another'.[41] The Rome Statute does not incorporate a specific provision on amnesties. Article 16 remotely keeps the possibility to provide statutory basis for amnesty and peace deal under the banner of Court it run as follows ''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

[41] Anonymous, 'Human Rights in Peace Negotiations', 18 Human Rights Quarterly (1996), 258.

effect.'' However apart from its unauthorized use by the UNSC there is no authoritative interpretation and working which suggest that such wider interpretation is possible. it is again important to mindful of the facts that scholars from north are vehemently and except few exception uniformly argues which gives an impression that there is shared belief and convincing evidence that exclusive focus on punitive 'trial' justice is in fact helpful for the victims of war crimes and crimes against humanity and the wider societies that have suffered from such crimes (Glasius, 2011:44). Nonetheless, there are spaces in the domain of international law that does not prohibit amnesties per se, and there is growing support for the position that amnesties for the core crimes of the Court are generally incompatible with international law.[42]

In this way in order to escape internal conflicts and civil war Africa landed in another trap where it allowed external hands to examine the matter with subjectivity of past. In this context, Global South needs to revisit why the ICC is only targeting leaders from Global South. Objectivity of this selectivity creates spurious doubts among working neutrality of the court. It seems that Courts are neutral to the western countries and friendly countries in Global South. There is voluminous evidence that Gaddafi, Bashir, Assad have been prolific critics of the Global North even before their alleged crimes and selective targeting nowhere question the genuineness of their sins but there are similar dictators who are given shelter in western emblem.

II.5 Role of Ideology and the Global North and South

II.5.a Introduction

The world and international community are not monolithic units. They represent plurality and diversity. Identities such as Global North and Global South are essentially layers of this diverse international community. Perhaps due to historical reasons, particularly colonialism and imperialism by western powers, many

[42] See most recently, D. Orentlicher, Amicus Curiae Brief Concerning the Amnesty Provided by the Lomé Accord in the case of the Prosecutor v. Morris Kallon, SCSL-2003–07 ('To the extent that the amnesty encompasses crimes against humanity, serious war crimes, torture and other gross violations of human rights, its legal validity is highly doubtful and in any event contravened the United Nations's commitment to combating impunity for atrocious crimes'). See also M.T. Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of
Gross Human Rights Offenses', 23 Human Rights Quarterly (2001) 940 ff., at 956.

unwarranted identities have taken birth out of which Global North and South divide, binary and antagonism seem to most definitely have colonial roots. On the one extreme it represents powerful class and on the other, it reflects the aspirations of weakest and most down trodden.

In environmental law and trade law regime, it is rather easy or acceptable to identify North and South. Many view it in terms of materiality and physical infrastructure. In this context, one of famous work says that North-South trade in a world economy where the North has better-defined property rights for environmental resources than the South (Chichilnisky, 1994:862). However identities need to be revisited particularly when international criminal law is due for applicability and operationally. It is a herculean task to identify the binary and bipolar map of Global North and Global South.

International law aspires for universality. Perhaps questioning the uniformity and universality of international law may be one of the frameworks to ascertain relic of Global North and South. This is where TWAIL scholars empirically not driven by ideological passion create cemented space for what is Global South and Global North. This is not a bloody battle where we see our enemy face to face but indeed this is movement and methodology to break structural dominance, game of hegemony, and foreplay of assertion. This process needs to be understood gradually and a political unity is required. In this regard, TWAIL scholarship on the one hand creates legal space for strong political bond for just world order and on the other hand critiques existing structure of international law for its self-change.

While employing the methodological rationale of Freud and Stieglitz, Balagopal argues that 'TWAIL believed that it is the failure of international law to be truly universal that contributed to all its moral and political failure, and therefore we need to make it truly universal' (Balagopal, 2012:117). He further says that TWAIL II began with a critique of the world system as an exploitative one in which the poor, weak, and vulnerable have no chance unless they can engage in collective action. Here we need to revisit the terminology collective action more in essence than symbolism. TWAIL I was more ideologically formed to counter euro centrism and create state building process in third world countries. TWAIL II however involves more of answering a call to the changing economic, political, and cultural power, and

the transformation of the role of the main participants in the system states, transnational corporations, transnational networks, inter-governmental organizations, NGOs, and transnational social movements. While acknowledging inner contradictions, power relations, hierarchies, oppression and dominance, it is of utmost necessity to reconsider that there is a need to be alert to the politics of critique of the category "third world". To misrepresent and undermine the unity of the other is a crucial element in any strategy of dominance (Chimni, 2006:3-27).

In the post-world war notion of universal human rights, coupled with a thickening network of international rules directly affecting citizens, has given birth to the utopia of a global rule-bound society. Hence, the idea of global civil society is historically connected with the ideas behind humanitarian and human rights law. Substance of human rights laws and idea of international fraternity is based on right to property. Under the pretext of human rights global society lawfully not allow movement of people and adopt serious measures to control movement of people through multiple regimes but at the same time digital capitalism has multiplied movement of goods and capital as barrier free as possible. In this light, Chimni further argues that International human rights law, on the other hand, unites global peoples in a language that is coming to be universally shared and frequently deployed in the struggle to secure a global law of welfare from the international institutions that constitute the emerging global state. Here it is important to reiterate that this unity of people and civilization under the banner of human rights seem more a rhetoric than a legal aspiration. Legal operationality creates several doubt zones about the DNA of human rights regime for the people of Global South. On the one hand it empowers TRIPS regime on the other hand same tool is used for the right to accessibility to health.

In this process human rights law have been used as positivist book image of positivist law and more regulated in the structure of laws whereby it runs in the texts, courts, commentaries and articles which itself neutral or silent to marginal conditions of Global South. Inequalities in wealth and power between the Global North and the Global South have a major impact on the shape and operation of the human rights system. Human rights laws fail to control thrust of Global North to maximize its monopoly over factors of production and question of redistribution. An indeed human right is essential tool in the hands of Global North to demonize culture, tradition,

belief system, education of Global South as barbaric. It further propagates privatization of community wealth so that global capital can acquire common national heritage of people in third world countries. Human rights has become more or less a trust system whereby Global North is trustee of knowledge production, norms generation, civil society and NGO lead its authoritative interpretation. In this light, criminalization of human rights is the last stage of development of international law (Bassiouni, 1982:193).

How the theoretical picture of the relationship between Global North and Global South is perceived depends in large measure on where one stands in terms of the theoretical perspective. Global North and South are not merely manifestations of society's unequal power; indeed it is a voice, language, movement of mutuality and commonality to have a dialogue to create a just world order. How far this theme is reflective in the terminologies like first and third world, rich and poor countries, colonial and colonized is a question of further research. Even looking at the material conditions of world through the lens of domination and exploitation may invite complex situation because large number of countries in third world as well don't treat their citizens justly. Elites of the first world are equally labeled as colonizers and many movements are going on to make the inner structures of third world countries more just and participatory.

II.6 Area Beyond State's Territory: A Perspective of Solidarity

Political sovereignty and economic sovereignty is interwoven, mutually inclusive and reinforcing paradigm of world view of third world countries (Bodley, 149:166). During and after the liberation of third world countries from the yoke of colonialism, third world countries had been asserting to claim legitimate space to exercise people's will. It was soon realized that they have political sovereignty but their economic sovereignty is conditional to the pre-colonial laws which resulted in a paralysis of decision making. In other words it was realized that positivist's international laws created such conditions where without questioning those, it was unlikely that they would be able to exercise their sovereign functions. In this regard, third world countries have asserted in multiple ways, through initiatives and methods to gain economic sovereign space.

Creation of UNCTAD, resolutions such as New International Economic Order[43], Permanent Sovereignty to Natural Resources[44], Friendly Declaration among Member Nations[45] and International Commodity Agreements[46], were early foot steps to fulfill legitimate aspiration. However, end of cold war era brought the discourse where terms and conditions of economic space have been shaped by International organizations. IMF and World banks, WTO, TRIPS, BITs, and other regional trade agreements have created conditions where change of government doesn't bring changes in policies. It now shows that government is unable to fulfill the electoral promises made in their election's manifestos and more importantly legitimate constitutional rights of the people. Many scholars see this phenomenon as an erosion of sovereign space of third world countries (Chimni: 2004).

Erosion of economic sovereignty seems more as objective facts than mere surmise. Therefore expression of such views can't be genuinely termed as ideological gospel. It is important to note that process of decolonization initiated with the demands of economic sovereignty to exercise political sovereignty effectively. Now loss of economic sovereignty is pushing towards a process of loss of political sovereignty. In this process basic and fundamental role of sovereign that is dispensation of justice delivery system comes under direct scrutiny. Through Complementarity, international criminal law is moving in the direction of categorizing, divide in hierarchical grades or have final say over efficiency of the judicial infrastructure of third world countries.[47] In this process it is getting interpretative powers to define what is delay and inefficiency in the domestic spheres of any of the countries and thus shift the trial of any case to the ICC. This quality check essentially reminds colonialism that third world needs supervision.

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[43] A/RES/S-6/3201, (1974).

[44] General Assembly resolution 1803 (XVII), (1962).

[45] A/RES/25/2625, (1970).

[46] The term "international commodity agreement" (henceforth ICA) refers to a treaty-agreement between governments of both producing and consuming countries to regulate the terms of international trade in a specified commodity. There have been six ICAs which have had "economic" (i.e. interventionist) clauses: the International Cocoa Agreements (ICCAs), the International Coffee Agreements (ICOAs), the International Natural Rubber Agreements (INRAs), the International Sugar Agreements (ISAs), the International Tin Agreements (ITAs) and the International Wheat Agreements (IWAs).

[47] See article 17 of the Rome Statute.

Court propagates prosecutorial and retributive justice. Thus it seeks legal solution over political solutions. Many a times end of violence and roadmap of peace can be achieved through political solution rather than legal means. However under the current dispensation end of violence is visualized more in terms of deterrence by punishing the perpetrators based on individual criminal responsibility thus possibilities of political solutions are getting blink. It proposes that trial system and subsequent punishment will end the conflicts in the world. Keeping the limited resources of third world countries it seems difficult for them to carry forward trial for each case.

In this process, it is important to reiterate that due to colonial intervention in the third world countries and their racially loaded divide and rule policies, deep hatred and animosity has been created and many territorial lines were drawn to fulfill the colonial aspiration of colonizers; due to which ethnicity, tribes, language groups have been divided among several countries and after independence colonial boundaries have been followed religiously under the pretext of sovereign's territorial thrust. Many liberation movements in these countries are supported by neighboring countries and thus give propensity to the violence. It is again important to note that colonial rules have created monopoly of economic resources in the hands of few and which resulted deprivation for the masses. In many countries indigenous and native population don't have any entitlement and land whereas on the counter part large part of resources have been monopolized by the western settlers or thorough their policies microscopic local elites (Menon, 2009:16-20). So these economic structures on the one hand create social conflicts whereas on the other hand derive their legitimacy from the human rights regime[48]. In real terms, it creates powder keg like circumstances. In other words, modern criminal justice system believes that criminals are not born, they are made. However current international criminal justice system doesn't attempt to view or take consideration of cause of violence. It looks more retributive than restorative in its operation.

[48] Article 17,UNDHR, (1946).
(1) Everyone has the right to own property alone as well as in association with others.
(2) No one shall be arbitrarily deprived of his property.

II.7 Locating the Identity of the Global South

It may sound astonishing that 'Prior to the events of 1989-91, democracy was a word rarely found in the writings of international lawyers'.[49] In current times, as per popular perception it is unbelievable that a discourse based on democracy in international law is at least at surface level new generational habit. Perhaps in our time, world views and imagination have been shaped in a way where democracy becomes a primary thing and international law secondary. In everydayness all discourses relating to international law are carried out in the name of people. In other ways international law sounds as if it get its legitimacy from people. So much so that Thomas frank argues democracy as a right protected by international law and institutions and international law is now in the process of defining the contours of democracy (Frank, 1992:46). The underlying line between democracy and international law is difficult to demarcate. Many are critical about this inner content of democracy that it is merely in procedure and lacks substance (Chimni, Mark, Orford). Democracy has been propagated and circulated in a way that now it is no more a matter of choice but an essential condition for states to survive.

It appears that International organizations have already endorsed these agendas in their policies and practices. UN runs departments which keep eyes on fair and free election and sometimes provide electoral assistance as well (Susan, 2011, 510). This process is not neutral to power. Suggesting an alternative to democracy seems to be an anomaly and creates an impulse to form opinion/judge them on their levels of 'modernity'.

In many ways it seems that procedural democracy is a mask of Global North to perpetuate their own interests in the name of democracy. It is double game where on the one hand, North aspires to maintain all the privilege and hegemony whereas on the other hand it creates world views where all problems of the world are located and situated in Global South. Barbarism, uncivilized behaviors have changed to corruption, nepotism, redtapism, dictatorial, mal-governed terminologies. In this regard, democracy and rule of law becomes important interpretative tools for

[49] American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States, § 203comment e (1987).

intervention and character assassination of third world countries.[50] Here real challenge lies to the Global South to understand these expansionary practices of the democratic discourse of the current era and make their space in this space in a way which gives them legitimacy to their acts.

Critical legal scholars have long been arguing the indeterminacy of law and view how discourse of law is based on discourse of power. Susan Marks has applied what she calls a critical conception of ideology to the analysis of international law (Susan, 2000:15). International law is an ideology itself or not? Such debates will invite many questions and one of the possible points may raise about the legal nihilism. In the words of Scott, she accounts for the ideology of international law "as both oppressor and liberator" (Scott, 1995:276). It is true that international law has been essential tools to emancipate suffering of most marginalized and poor of this world. Complete negation of international law may sound like cynicism. International law is becoming more managerial and works of crisis management team. Rule of engagement is more bureaucratic and requires serious study and deliberation to decode and demystify it. This is where unity of marginalized is required to effectively participate and frames their arguments and argues in a manner through the power of collective engagement so that their voice may be heard.

It is a hard fact that the history of international law for the longest time was marked by the practice of exclusion. Exclusion was used as a wild card to eliminate the self of third world people. Based on this experience it can be said that Global South is the group of countries and people who at one point or still facing exclusion or their existence were challenged as civilization. In contrast, Global North is privilege club. It shapes the discourse of international law where views from Global South structurally don't play significant part. It happens predominately through monopolization of knowledge. Elite legal scholars and jurists of North have all the authority to carry on the organic life of international law to serve the interests of North whereas critiques from Global South is tagged as legal nihilism (Gathii, 2011:26- 48). In this dispensation of international legal order unity of third world countries and poor and marginalized from Global North is very essential. In this regard Global South is a collective effort to make the international legal order just and

[50] See the ongoing cases In the ICC, Refer Table:1 pp. 16.

egalitarian. It propagates democratic means and methods to change the order. It does not encourage and propagates violence of any sort but indeed endeavors to make democracy and rule of law more inclusive and just. It seeks to reframe international rules in a way which gives equal footing to all (Mieville, 2005:64).

In this regard it is important to note that liberal theory of international law include: the primary actors in the international system are not States but individuals and groups seeking to promote individual interests; government reflects a subset of domestic society whose interests are reflected in a State's foreign policy; and State behavior reflects some configuration of State preferences formed by individuals and groups in domestic society (Slaughter, 1995:505). In other way the dichotomy and inner contradiction of Global North and South poses serious antagonistic threats to those who believe and propagate that rule-book image of international law which refers to an understanding of law that (often implicitly) assumes that law is a body of rules that is separate from politics, neutral and universal. In this regard perhaps Chimni in his foundational theme of one of his work conceptualizes 'Global State' as to reveal the imperial character of Global North and at the same time he attempts to show vulnerability of Global South in the emerging superstructure of international order (Chimni, 2004, 1-37).

Chimni argues to create global laws of welfare for most poor and marginalized. He highlights post cold war development and emerging role of transnational business class where international law serves the interest of Global North and phenomenology of global class divide has now been laid on top of the existing North-South divide to produce a complex map of global fractures (Chimni, 2006:17). While Fanon argued that the Global North was literally the creation of the Global South. He argued that the question after colonialism was the question of how to move the resources built by the appropriated labor power of the Third World from the Global North to the Global South. (Dianne Otto, Roberto Aponte-Toro and Anthony Farley, 2002:50-52) According to Marx, people make one another but do not make themselves (Lawrence and Wishart, 1976:52.) So proposed antagonism of Fanon seems correct that Global South as a life form exists and dependent on Global North. Orientation and significance of Global South can be extrapolated in the expression of TWAIL itself

that TWAIL can more accurately be defined as being concerned with the impact of international law on 'the governed' no matter where they are spatially located.

In this respect, Chimni critically examines national interest in the domestic parlance and draws the political economy of national interest. Who are the beneficiary and trustee of national interest? (Chimni, 1999:337-349). He further draws concern about the emerging sense these propositions point towards a perception of international law and institutions as a device which serves sectional global interests. International criminal justice system is clothed with the language of international justice.[51] Here it is important to explore the sense and paraphernalia of international justice from the TWAIL perspectives. When what basis international society has been created and during this process how economic inequalities are undermined. This sense of equality is more than legal because it treats human more on terms on Lockean model of person i.e. person property is his personality than Kantian model of global citizen.

International law is law of transition and international jurists are either patriarch of transition and remain at the margin of critiquing it. Once Grotius was poster jurist of international law and he helped and theorizes a legal discourse of colonial project. In this process, national production and financial systems are globalised. This process is not power neutral and emerging markets of third world countries are sources of cheap labour and base of production is now locating in these countries however profits go to parental countries. In this process Global North is having upper hand and power to lay and change rule books of laws to maximize their interest. In this spiral cycle of production and redistribution those who stand at the margin are global south. In this process world is going through unparalleled process of transformation and sovereign functions are becoming more of a gate keeping function this is where basic functionality of sovereign states making distinction of insider and outsider is making blur. This is where international criminal law is emerging as mechanism to control and regulate the remaining the sovereign space of global south. Initially African countries eagerly joined now impliedly they are showing the symptoms of its trap.[52]

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[51] See the eleventh perambulatory paragraph of Rome Statute.

[52] (See 34 African countries resolved during the 26th African Union Summit in Addis Ababa in January to withdraw from the Rome Statute) for details, http://www.theeastafrican.co.ke/news/Mystery-of-the-resolution-at- Addis-AU-summit-to-walk-out-of-

II.8 International Criminal Court and the role of Global North and South

The Rome Statute is the foundational document for the establishment of the ICC. Galius says that during the negotiations over the text the current North–South divide was virtually absent (Galius: 2006). The main division was between a majority of states who were in favour of a strong, independent Court and a minority trying to curtail its powers. He further reiterates that while each separate sub issue saw different divisions of states, very few of them ran along North South lines. In the Prep Coms, the Non-Aligned Movement (NAM) did play an active role, led by India and converging on two principles: no Security Council control over the Court, and inclusion of nuclear weapons in a list of prohibited weapons (Galius, 2005:24). It is further important to note that most of the small states pressed their bottom for the strong Court and wanted to include aggression as crime.

In this context, it seems that small states are optimistic about the ICC that the ICC may provide a breathing space for them and punish any aggression against them. There was different consideration predominately guided the decision of the states. Based on preliminary reading of the *Travaux préparatoires* it is clear that those states that wanted a strong Court readily joined the Court as well whereas states who had serious reservations remained reluctant to sign the Rome Statute. However, negation of North- South divide is itself not politically neutral. Why it is that NGOs and many western governments spoke in a similar voice is a pertinent question to be asked. The incorporation of role of the UNSC, questions of aggression, ban on nuclear weapons, referral mechanisms for UNSC and role of independent prosecutor reveals the complex differentiation among states.

Most of the African states overwhelmingly welcomed the Rome Statute. They enthusiastically participated and supported the idea of permanent ICC having universal jurisdiction and independent prosecutor. In this way in order to escape internal conflicts and civil war Africa landed in another trap where it allowed external hands to examine the matter with subjectivity of past. In this context, Global South needs to revisit that why court is only targeting leaders from Global South.

ICC/-/2558/3065628/-/8o1l89z//index.htmlhttp://www.theguardian.com/world/2013/oct/12/african-union-icc-kenyan-president last visited on 18th June 2016.

Objectivity of this selectivity creates spurious doubts among working neutrality of the court. It seems that ICC is neutral to the western countries and friendly countries in Global South. There is voluminous evidence that Gaddafi, Bashir, Assad have been prolific critique of Global North even before their alleged crimes and selective targeting nowhere question the genunity of their sins but there are similar dictators but they carry and are in shelter house of western emblem.

However, during the negotiations many were resilient to the idea of permanent court having jurisdiction over core crimes. Many nations proposed that only state will refer the case to the Court otherwise it amounts to breach of sovereignty. Many asked that prior consent of the nation is mandatory for any trial to begin. India raised serious objection that about the inclusion of Security Council having wider power to refer and defer the matter. Some countries viewed the end of distinction between non international armed conflict and international armed conflict as inheritance of ad hoc tribunal's legacy (Schabas, 2010:196). It is important to note particularly from the Global South perspective about the involvement of Security Council while it was argued in particular that the judicial functions of the Court should not be subordinated to the action of a political body. However this petition was outnumbered and finally passed. In addition to that except China Security Council represents Global North and China is itself in the process of transformation and about to join the club of Global North.

In this respect, one of the primary provisions relating to the jurisdiction of the ICC namely complementarity was considered as necessary homogenization process where domestic jurisdiction of third world countries will always be considered with the infrastructure of western criminal justice system and question will be raised and inefficiency will be label against them and finally intervention of ICC is inevitable. In this way Global South is legitimizing its own profile making by the Global North. Place of the court is based in Europe and majority of the judges are from Europe. Human rights are *lingua franca* of our time. It is also true that there is serious reservation of Global South about current human rights regime. In this light, the Rome Statute has incorporated some of the provisions of human rights and now makes their breach as core crimes in a particular way where as it surgically cut the dominant reservation and breach of economic social and cultural rights were to be

crimes only in a distant sense. This process also indicates a triumph of the Global North. It is burdensome for Global South to sustain and fund the cost of trial. There are vested groups. Conflicts, trials, and serious activism of courts will provide work for them. Therefore there is serious doubt that these categories of people will influence decision of ICC.

In this context, we need to remind ourselves that human rights organisations and global NGOs are perception builders through their reports and activism they create image of the state. It is equally true that most of the NGOs and global civil society gets their substantial funds from multinational corporate and their head offices are located in North. In case of dispute or capital unfriendly countries there is serious doubt that these corporate may use human rights groups as bargain chip for more accessibility and better deal. Another form of eurocentricisim is seen in the functioning of the ICC. It employs and borrows the established notions of criminal justice systems of Europe where as Global South has diverse cultural spaces for criminal justice system which suit their needs as well. Liberal values of Western Europe finds themselves more secure in the Rome Statute. (Schabus, 2012: XI) Their liberal states' foundational wall is deep rooted and now wishes to implement similar state as role model. While most of the states of Global South are still struggling to lift its population from the above poverty line and are attempting to transform their character from police states to liberal states.

Due to colonial past there have been severe changes in the structures which are sometimes manifested as violent. The role of the colonizer in the conflict of Rwanda needs to be reviewed. Was there any historical animosity generated and multiplied by the colonialists? This is where it is important to remember that the Rome Statute has not created any special procedures for Global South. Positive discrimination is part of social justice and without social justice criminal justice system will lose its essence and efficacy. International criminal law prohibits and restricts victim participation in the investigation system. It even from the victim's point of views is really weak and fragile. As most of the victims are from Global South therefore serious awareness and special provision for their relocation and rehabilitation are welcoming steps to control the spiral effects of violence.

Thus in many ways current discourse of international criminal justice system is the replica of Nuremberg and Tokyo trial which is commonly accused as victor's justice. International criminal justice system has till date bites its victims from the Global South or those who were defeated in the war. All prominent cases be it Yugoslavia, Rwanda, Sierra Leone, East Timor, Lebanon, Sudan, Libya, Mali, Uganda, are coming from Global South where as in this process decision to initiate such proceedings have designed and executed by the global north. ICC helps to create sanitize image of Global North despite of its engagement in the conflict as perpetrators or accomplice. All procedural and substantive parts of Rome statute reflect the traditions of Global North and now it has been imposed on the Global South.

II.9 Conclusion

The ICC has triggered the button for wider phenomenon of change due to which new paradigms in international law and international relations are emerging. It seeks to unfold its sensibility and diverse orientations at multiple levels. In this process, International Criminal law engages various stakeholders of the international law and emerges as the central point of norm creation. In this crusade, international law seems more like an ideology. Freud concludes in *Civilization and its Discontent* that while civilization's climax will bring high order, it will finally lead to nervous breakdown of the individual. That seems true with respect to the international law moving towards individualization and finally judicialisation of all streams. It creates exponential growth and body of knowledge for all streams. Its growth is moving towards to seek determinative solutions for all problems.

Thus emergence of international criminal law with an adjudicative body is a larger phenomenon and any questions, doubts, apprehensions or critiques must touch the current political economy of international law. International criminal law itself is blurring the boundaries of nation states. Concentrating power in the Global North. That criminal law is designed to create a violence free world is a question open to debate. After the ICC has come in to being, several acts of war and atrocities have in fact mushroomed across the length and breadth all around the world. However ICC being a juridical institution needs to assess and provide solution in legal terms.

It seems that international criminal law is attempting to release itself from the theater of Nuremberg and its myopic image of victor's justice to rule of law (Rome Statute) based Court system. However, it renders a sanitized image to the rich and powerful Global North and creating the image of Global South as receiver. Justice is conceived with a formal structure and formal language which further intends uniform legal order may creates procedural effects. Acts of violence are not merely clash of legal interests and many a times states with genuine interest attempt to control such situation but finally lead to grave breaches. It appears that formal rules must have material map so that conflicts can be understood much better ways and extra legal solutions can be provided to cement legal measures.

Law making exercise should be deliberative, engaging, participatory, and transparent. While on the other hand, positivism operates in top down approach. From lawmaking to law implementing exercise happen in fixed hierarchy. However current dispensation of international justice system happens not in the name of positivism but in effect it creates similar results. Lawmaking exercise is confined to few elites personality located in North. Large number of people such as victims of violence and those who working in such situation and have potential to help to make better world are not participant of rule making process. Instead qualifications to be participant in this process require class, high education, language and accessibility to elite circles. This shows the dark side of the justice delivery system. How can justice be universal unless and until it is not inclusive in the first place?

In this context it is important to note that international community with reference to the ICC shows a manipulation of situation where few speak and appropriate the voice of others. The Rome Statute is drafted in a background of its own politics. It suits the needs of Global North to find multiple such situations in Global South and through ICC now they may have reach to these territories to fix culpability.

As far as applicability and selectivity of cases are concerned it seems true that justice is a snake that bites only bare feet. Most of the countries which further invite to research on the applicability of identity politics or game theory in the working pattern of the ICC are in fact from Africa. However, it needs to be understood that questioning does not mean nihilism of the court but highlights that there is growing fear among third world countries about the possible victimhood of its leaders. Finally

International Criminal Law is going far from the expectation of the Global South and has come too close to design a new playground.

CHAPTER III

INTERNATIONAL CRIMINAL LAW AND SOVEREIGNTY

III.1 Introduction

In recent times, the emergence of an independent and permanent ICC has reopened the debate about the boundaries of sovereignty. In fact sovereignty and international criminal law are stand so close to each other that they are looked at as each others' shadows. The ICC is seeking a space which has traditionally been a domain of the sovereign and this remains an area of confrontation wherein nations feel uncomfortable in losing their grip over their sovereignty. Generally, international criminal law scholars from the North see sovereignty as part of the problem. In the words of Antonio Cassese, one either supports the rule of law, or state sovereignty (Cryer, 2006:981). In many ways these two seem to be contradictory to each other. However, close cooperation between states is required for the success of the international justice system. Otherwise states being a fundamental unit in the international legal order may undermine the legitimacy of the ICC or the ICC may breach the sovereign rights of weaker states.

Mainstream scholars are seeking to subject sovereignty to democracy, human security, good governance, transparency and human rights. It portrays the liberal state as the ideal image of sovereigns where free market, periodic elections, free press and political rights go hand in hand. In this scenario sovereignty is constructed as a mandate to do functional work to maintain law and order in the society. This process is divisive in nature as it creates a divide between bad sovereign and good sovereign. As such a state which doesn't hold the percepts of liberal states is in danger of being classified as an outlaw state.

Sovereignty can be analyzed in terms of appropriation and monopolization of power. What is the gap between a dictatorial and liberal state can be defined by a close of examination of sovereignty. A dictator holds power and undermines all the institutions. In a democracy power must be shared and there should be checks so that counter balance can be maintained. However in the neo liberal era, market has an equally forceful presence in everyday life. The availability of consumer goods is

equally important and everyone aspires for it. It is equally true that corporates through their predatory practices create a monopoly and monopolization may affect a large of population. In Africa, due to high costs of life saving medicines millions of people died. However, it is unfortunate that even in such cases corporate monopoly is not questioned and is allowed to thrive in the name of individual rights. Thus international law looks at violence from a fixed lens.

The Global North advocates that criminal justice needs a rule bound sovereign and what the rule is and to what extent this rule will cost the sovereigns is a question of great deliberation. It is seen as a sibling of realpolitik, thwarting international criminal justice at every turn. States view ICC with paranoia or as an assault on their exclusive domain of criminal justice. This transformation from state bound criminal justice system to international community based justice system is fundamentally defined and demarcates the sovereign's limitations and obligations.

Sovereignty has its own juridical foundation; however in many ways sovereignty is being constituted by the international legal order. (Kelsen, 1960:627) In this scenario the notion of international community is the assertion and expansion of a state's sovereignty to other borders. This was reiterated by President of the ICJ, Gilbert Guillaume, who opined that to accept universal jurisdiction in absentia would 'be to encourage the arbitrary for the benefit of the powerful, purportedly acting as an agent for an ill-defined 'international community''. [53] Universal jurisdiction is also not power neutral. It is one thing to prosecute state officials of Congo in the Belgium but it would be completely different if the opposite were to happen. Thus in this hierarchical world, the weaker states' claim and participation in the international criminal justice is severely subjected to the support of powerful states. Afghanistan cannot approach the ICC against USA's occupation of its territory because USA is a permanent member of the UNSC with a battery of lawyers and has the power to use veto on any such referral.

Sovereignty has its own modus operandi. Sovereign immunity, non-intervention, monopoly over the criminal justice system are some primary cards of the sovereignty. If a state official is not given immunity from prosecution then it might be difficult for

[53] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium), ICJ List 121, 14 February 2002, Separate Opinion of President Guillaume, para. 15.

them to freely perform their sovereign functions. The new rule of criminal law states that officials are no more immune as they are liable to be punished even during their tenureship. In this context, it is important to understand the flipside of individual criminal responsibility. Punishing an individual or a few for their culpability portrays displacement from state responsibility. Individual criminal responsibility may sometimes seem decisive because a leader may be viewed as punishing a tribe and ethnicity which leads to escalation of their grievances and not to a process of healing. Therefore its application needs to be a prudent choice. However, its legal application takes away that choice and emphasizes its application in an objective manner.

R2P is not a legal principle and it is in the process of transformation from doctrine to norm. It advocates direct military intervention in countries and use of force to control the power of regimes that carry out crimes against its people. It endeavors to save lives, create deterrence and uphold the rule of law.

Complementarity is one of the fundamental principles of the Rome Statute whereby it enunciates division of labour. It demarcates the primary job of justice delivery to domestic courts and identifies ICC as the final court of appeal. In this process, the ICC has wider latitude to decide the basic parameters of a fair trial and gets leeway to judge any particular situation. From the threshold of the western world, the judicial systems of third world countries can be easily labeled as inefficient. Thus complementarity is creating a space to reformulate the inner content of sovereignty.

In this process states are becoming more disciplined and power is being transferred to the hands of international community. It is a challenging task to determine what this 'international community' stands for. Some view it as an appropriation of power by the Global North. Here hard earned sovereignty is not only tamed but liberal states with free capital are creating the contours of sovereignty. While on the other hand, Professor Luban has demonstrated that such an intervener's conclusion that a government's behaviour is 'uncivilized' may merely reflect 'a distinction based on social sentiment' of the intervening state 'rather than universal reason'. Thus, applying standards of 'civilized' behaviour to specific instances (even when such standards have been broadly defined in global conventions), to some degree is likely to reflect specific cultural values (Luban, 2002:79-80).

Finally there is a desire amongst all that there should be an end of the culture of impunity. It is true that culture of impunity gets shelter in the backyard of sovereignty itself. However, it is equally true that intervention, punishing individuals and creating a homogenous space for trials will not end this culture of impunity instead it may make situation worst and abusive

III.2 Individual Criminal Responsibility

III.2.a Introduction

Individual Criminal Responsibility with some exception is a new phenomenon in the discourse of international law. For the larger part of the history of human kind and particularly in the life span of international law, international law attributes acts of individuals who act through state organs exclusively to the state. Although in functional and factual realties, states act through individuals, in legal terms state responsibility is born not out of an act of an individual but is collectively conceived as an act of the state. The evolution of the ICR as a legal principle is a recent phenomenon in international law.[54] Prior to Nuremberg trial international responsibility was predominantly fixed on States not on individuals, since States are the first and main subject of international law (Askar, 2004: 73). In this regard, it appears that the Nuremberg and Tokyo tribunals are the turning points for the ICR. Further, a new wave emerged in post cold era, to fix the individual culpability for serious crimes, with the establishment of ad hoc tribunals which was further cemented by the establishment of the ICC. Nuremberg enunciates ICR in a much more concrete manner than any previous attempts of the past.

In this context, in Article 5 and Article 6 of the Statutes of the ICTR and the ICTY the personal jurisdiction of the ad hoc tribunals is limited to natural persons. Thus, while in compliance with the jurisdiction of the Nuremberg Tribunal[55], criminal acts enumerated in the Statutes of the ad hoc tribunals are carried out by natural persons, not by associations or organizations. Further ICTY and ICTR make statutory

[54] Treaty of Versailles signed by Germany on 26 June 1919 that established the individual criminal responsibility of the ex-German emperor, Kaiser Wilhelm II, see Article 227, 228 of the Treaty of Versailles

[55] Article 6 of the Charter of the Nuremberg Tribunal states that: '… the power to try and punish persons who,acting in the interests of the European Axis countries.

provision to elaborate ICR.[56] In this context, case laws seem to be authoritative points where Trial Chamber in the Tadic Case held that in order to hold an individual criminally responsible there must be an intent, 'which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime'.

The Rome Statute envisages wider scheme for ICR. Article 25 of the ICC Statute, containing the general principles of the individual criminal responsibility concept, is much broader than the equivalent provisions of the ICTY and ICTR Statutes (Damgaard, 2008: 114). It is important to note that ICR is linked with the core crimes.

It seems that current change is agenda driven from the criminality of states to that of 'privatized individuals. At this point one may logically ask how is ICR is anyway beneficial, an individual who 'just happen' to have occupied leadership functions within the state. The fundamental change or decline of state responsibility in relation to individual responsibility also suggests a shift from collectivity to atomistic points. This development is very much visible in other fragmented regimes of International law as well particularly human rights and financial laws where states roles are reduced to as mangers with rule books. However this change in current time is very intense particularly in the domain of International criminal law. This broader displacement has created individuals as the absolute basic unit of the international legal system.

Liability and responsibility are the foundational pillars of the law. It is punitive measures to fix the responsibility of crime and set an exemplary case for potential wrong doers. This is equally true for international criminal law it enunciates individual responsibility for international crimes. ICR is the foundational pillar of the international criminal law. Efficacy of any system is judge from the effectiveness of its mechanism to fix liability and responsibility. For large part of the international law situation was precarious in a sense that it wasn't incorporating concept of punishment for individual's crimes. Instead, States were allowed to go for war and take revenge, retaliation, restoration and self help etc. Customary international law gives sovereign

[56] Article 7 (1) of the ICTY Statute and Article 6 (1) of the ICTR Statute provide that: 'A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning,preparation or execution of a crime shall be individually responsible.'

immunity to the head of the state. It may be understood as curtsey or creation of an order whereby head of state can freely move from one country to another. ICR is different from collective responsibility. In collective responsibility guilt is shifted on the either juridical body or collective identity. Proponents of individual responsibility build up their arguments on the basic premises that state works through men.

It is human being in the veil of state take decisions and finally execute. Therefore, for wrong doing individual should be held accountable. However at the same time it is difficult to identify who is this person who has initiated such acts. State is an apparatus with complex web of networks. It manages huge territory and population. There are multiple sociological factors which shapes the orientation of the state. Hence work of an individual is itself shows the collectivity and through collectivity only individual. So it is highly difficult task to find the culprit. However, for the convenience ICR looks for mainly head of the state.

International conflicts are the creation of cerebral work of human. They are designed, planned, executed and fueled by humans. Therefore punishing natural person serves the interest of international criminal law rather than punishing juridical entity. International Crimes deal with the crimes of crime.[57] These are severe and intense atrocities which results in to large magnitude of violence and sufferings. However gravity is not the threshold of some crimes.[58] But in larger terms International crimes necessarily employ organized structure as perpetrators to commit such crimes. It needs network, money, ideology, motive, agendas, weapons and serious engagement of state and non actors to ultimately commit such crimes. Thus international crimes are not something like road rage or incidental happenings but indeed it is rooted in deep divide and alienation at the political, social, economic, religious, cultural and similar other factors. In certainly Individuals are cogs in larger systems but attempts should be made to revisit the penal model of international criminal law.

III.2.b History

The establishment of the ICC and punishment of an individual based on ICR has historical roots. It has been in practice since time immemorial. In this regard we can

[57] Yugolasiva Tribunal term genocide as crime of crimes.
[58] See article 8 of the Rome Statute where illtreatment to the Prisoners of War may be war crimes.

collect several facts from the archive of history and build up our arguments. In recent times, the next significant event in the recognition of the concept of ICR in international law for violations of the laws of war came by way of the 1863 Lieber Code issued by the President Lincoln in connection with the American Civil War. The Lieber Code had become magnum opus or rule book to transform the percepts of rules relating to wars from moral code to law. It sought to control the atrocities in the war not through appeal to the conscience of human kind but stipulated punishment for the violation of humanitarian principles. The Lieber Code created punishment for the violation of such rules. Further, In the United States, the Articles of War were enacted in 1775, pinpointing military commanders' duties during an armed conflict, to be followed in the nineteenth century by the famous Lieber Code of 1863. In Europe, the Brussels Declaration of 1874, the German Army Regulations of 1902 and the British Manual of Military Law of 1929 followed a path of codification and further progressive development of laws relating to war (Bassiouni, 1986, 14).

In the early twentieth century, the 1907 Hague Convention Respecting the Laws and Customs of War and annexed Regulations provided more clearly the conditions that a combatant must fulfill to be accorded the rights of a lawful belligerent (Roberts and Guelif, 1907:67). That condition requires the forces of the parties to the Convention to be commanded by a person responsible for his subordinates. The responsibility of individuals, though limited to the military, was affirmed after World War I, for example in the Treaty of Versailles with regard to Germany, calling for the trial of the Kaiser, the Supreme German Commander (Bassiouni, 1992:373). That treaty provided, more generally, for the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. However, no such military tribunals were formed and no accused individuals were prosecuted. It should also mention the Treaty of Sevres of 1920,[59] which, inter alia, dealt with the responsibility of the "Young Turks" for the Armenian genocide. Again, no trials were instituted.

The 1919 report of the Commission recognized that all enemy perpetrators who had committed war crimes should be liable to prosecution, irrespective of their rank or

[59] Treaty of Sevres, signed on 10 August 1920 but never ratified.

authority.[60] The Versailles Treaty represents the first attempt to impose punishment on individuals for the commission of a category of international crimes, namely, war crimes, which traditionally entailed only state responsibility. The Leipzig trials in particular cannot be regarded as a successful example of justice as regards individual liability (Cassese, 2008:329).

In 1950, the United Nations General Assembly adopted the "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal" of particular note, Principle III, which as Professor Cassese argues has come to acquire the status of customary international law, (Cassese, 2008:305) states: The fact that a person who committed an act which constitutes a crime under international law acted as head of state or responsible government official does not relieve him from responsibility under international law.[61]

It is interesting to note that, the ILC accepted such a distinction and included Article 19 in its first draft on state responsibility. International crimes were defined as wrongful acts resulting "from the breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole".

III.2.c Post UN developments and Individual Criminal Responsibility

End of the Second World War brought Nuremberg Tribunal and since then Individual Criminal Responsibility (ICR) has been operational principle. In this theme, crimes are perpetrated by individuals or a state is a central point to demarcate whom to blame and punish. But this does not mean there is no connection between individual criminality and state policy. International criminal justice was developed to ensure the prosecution of crimes committed with state complicity, involvement or tolerance. Genocide, crimes against humanity, war crimes and crimes against peace were all 'crimes of state', even if the specific perpetrators were individuals. The concept that

[60] Report on the Responsibility of the Authors of the War and on Enforcement of Penalties to the Preliminary Peace Conference, March 1919.

[61] Documents of the second session including the report of the Commission to the General Assembly, Yearbook of International Law Commission, U.N. Doc. A/CN.4/SER.A/1950/Add.1, 6 June 1957, vol. 2, no. 1, p. 375, available at http://untreaty.un.org/ilc/publications/yearbooks/1950.htm last accessed on 15 May 2016.

individuals are just agents of a state changed over time into the understanding that individuals are responsible for their own behaviour during an armed conflict.

This change happened not with the commitment to end the atrocities. In fact it is the phenomena of individualization of the international law, where burden is shifting from states towards individual. Thus, persons who participate in the planning, preparation or execution, or otherwise contribute to the commission, of crimes during an armed conflict are held individually responsible. An interesting element of this international recognition of ICR is its functional interpretation. This initially led to command responsibility; later it included any persons acting in an official capacity, such as government officials and even heads of state.

ICR has its own evolvement. Initially it was believed that higher superior armed officers had command over army and hence they should be held responsible for the acts committed by their fellows battalion and armed unit. Later on it was directed at political leaders, not being commander in chief and public officials. This shift is problematic. It is true that civilian administration has upper say and they have ultimate command to use armed forces for their disposal. However, in many cases armed official do their whimsical acts and army as an institution is a powerful institution and holds collective respect from the people (Freud, 1952:46). Therefore many a times it is possible that civilian leaders are unwilling to use violence or such situations which may lead to situation of core crimes.

However modicum of the Rome Statute does not really touch consider the ground reality in to its account. It provides a boarder language under Article 6(c) of the Nuremberg Charter, ‘leaders, organizers, instigators and accomplices’ who took part in the formulation or execution of a common plan or conspiracy to commit a crime against international law were responsible even for acts performed by others in execution of the plan. Here it is pertinent to see the Eichmann trial that despite of his unwillingness he was forced to commit heinous crimes. He pleaded that he had no option but to follow the order of the superior command. At the same time he successfully cited many examples where he showed the cases of rescue and help for Jew. However, finally he was tried. At this instance, Ardent writes that in Banality of Trial that punishing an individual is not serving the purpose in fact it was whole society which has lost its consciousness and became murderer.

In the subsequent years principle relating to the ICR became more stringent and individualistic. . In 1946, the ILC's Nuremberg Principles stated that ‘complicity in the commission of a crime against peace, a war crime or a crime against humanity is a crime against international law’. The breakthrough to a more sophisticated doctrine of participation was ultimately achieved by the ad hoc Tribunals. With the wording of Article 7(1) ICTY Statute and Article 6(1) ICTR, distinguished between committing, planning, ordering, instigating and aiding and abetting. Moreover, the Yugoslavia Tribunal has acknowledged joint criminal enterprise as a form of commission in international customary law.

In latest updates by the Rome Statute, article 25 of the ICC Statute now seeks to regulate ICR in details. Article 25(1) of the Rome Statute provides that the ICC shall have jurisdiction over natural persons, not over states or organizations. Paragraph 2 of Article 25 reiterates the principle of ICR. Paragraph 3 of the provision distinguishes various modes of individual responsibility. While Article 25(3) (a) to (d) addresses modes of criminal participation, subparagraphs (e) and (f) deal with incitement to genocide and with attempt and abandonment; this might be seen as misleading from a structural point of view, because neither incitement to genocide nor attempt can be classified as modes of participation, but should rather be classified as inchoate crimes. Finally, Article 25(4) of the ICC Statute rules that provisions on individual criminal responsibility do not affect the responsibility of states under international criminal law. So, this article has made the situation more complicated. What may be possible state responsibility apart from the ICR? So far now ICC does not have authoritative interpretation of this provision.

However, the most important difference between prior legal frameworks and Article 25(3) ICC Statute lies not in the redefinition of the scope of individual responsibility but in systematizing modes of participation. Unlike the statutes of the ad hoc Tribunals, Article 25(3) ICC Statute does not simply enumerate the different modes of participation, but also classifies them. It distinguishes four levels of criminal responsibility: first, the commission of a crime; second, ordering and instigating; third, assistance and fourth, contribution to a group crime. At the same time, the wording of the provision clearly reflects the difference between commission, as liability for the crime as the result of one's own conduct, and all the other modes of

participation, as accessory liability for a crime committed by someone else. For in accordance with the case law of the ad hoc Tribunals, ordering, instigating, assistance and contribution to group crimes all require that the crime itself has in fact been committed, or at least attempted.

In addition to the above mentioned statutory provisions. There are case laws out of which following two cases have its own significance. However their importance has been minimised due to the Article 25 of the Rome Statute.

The Pinochet case brought to the concept of sovereign immunity as an opportunity to determine its possible limits. Pinochet resisted extradition from the United Kingdom by claiming diplomatic immunity and immunity as a former head of state. On 1 November 1998, several Belgian and Chilean nationals residing in Belgium filed a complaint as civil petitioners before a Brussels investigating judge against Augusto Pinochet Ugarte, former President of Chile. The investigating judge ruled on 6 November 1998 that he had jurisdiction to initiate proceedings against the former head of the Chilean State, who, at that time, was held in London following an extradition request brought forth by the Spanish authorities. The prosecution did not appeal the decision, in which the investigating judge couched the exercise of his jurisdiction in customary international law. The investigating judge later issued an international warrant for Mr Pinochet's arrest and submitted a request for extradition to the British authorities, who had already received such requests from three other European countries. In January 2000, the investigating judge also sent two international letters to the British authorities after they announced their intention to free Pinochet on grounds of his health.

It is essential to consider the 2000 holding of the ICJ in the case concerning the arrest warrant of 11 April 2000, *the Democratic Republic of Congo v. Belgium*. Ironically, as one of the "worst human rights abusers during its colonial period," Belgium enacted one of the most aggressive universal jurisdiction statutes. Utilizing these provisions, the national court in Belgium issued an international arrest warrant charging the then serving Minister of Foreign affairs for the Democratic Republic of Congo (DRC), Abdulaye Yerodia Ndombasi, with war crimes and crimes against humanity." When the DRC brought the matter before the ICJ, arguing that a national court had an international legal duty to recognize the immunity from criminal

jurisdiction exercised by an acting Minister of Foreign Affairs, the ICJ agreed thereby a vote of thirteen to three." The ICJ concluded that the issuance and circulation of the arrest warrant violated Belgium's obligations towards Congo, "in that it failed to respect the immunity of that Minister and, more particularly infringed the immunity from criminal jurisdiction and the inviolability enjoyed by him under international law." However in practical terms it does not have effect because Yerodia was never arrested.

III.2.d Conclusion

Criminal law derives its existence from the legal and moral authority of states to protect society and its members against anti social and disruptive behavior, and it focuses on individual responsibility and guilt. (Wilt, 2007:91) Domestic penology is largely based on punishment to individuals in their individual capacity, who commits breach to the sanctioned and prohibited behaviors. It is a serious question that domestic norm is how far applicable to punish and ascertain culpability for core international crimes. Nonetheless, Individuals are brought to trial before national and ICC and, if their responsibility is proved, they will face criminal punishment. While awarding punishment ICC consumes the same logic of grave damage to the international community and therefore in the name of international community

ICC is entitled to react against such breaches. Individuals are certainly among the subjects that can commit international crimes. What is important to stress is that international criminal law applies only to individuals and not to juridical persons. It is important to highlight that unregulated arms industry provides all means to killing capacity of perpetrator regimes but their participation is legalized in the name of freedom of trade and commerce.

Indeed sovereign immunity is one of the customary principles of international law. In history it has been used as fundamental tenants of international law. First Sovereignty was scared card and only few nations were allowed to hold it and group who were playing this card not only overlooked violence and atrocities' in their colonies in fact it was done in the name of historical necessity to make the barbaric as civilized. In this period International law and state sovereignty was used much as the relationship of Christianity and Pope to preach and propagate evangelism of Global North towards

Global South. In both of these cases their alliance was holy and interconnected or designed in the name of betterment of human world by the Global north for the Global South.[62]So no procedure and law was allowed to question. The modus operandi of this mission. That is how brutal acts and policies in colonies were never viewed as criminal acts. Indeed after the independence still former colonies are carrying the imprint of such laws.[63] But after the decolonization period, due to the change in the global political economy, sovereign immunity was viewed as necessary impediment to control and regulate Global South. In this context, One of the brutal colonizer from Europe Belgium sought for universal jurisdiction[64]of its national legislation and started a trial but nowhere it has ever revisited its past atrocities' in the Congo.[65]

The Yugoslavia and Rwanda conflicts have been crucially important in raising the whole question of individual responsibility for internal conflicts, and the international community has devoted a massive amount of its resources to the creation and administration of the two tribunals charged with trying individual perpetrators in both types of conflicts. In both cases, however, it is clear that policies authored by international financial institutions (IFIs), the World Bank and the International Monetary Fund, in which powerful actor play a dominant role, were in part responsible for creating the wider environment in which these human rights violations took place.

III.3 Principle of Complementarity

III.3.a Introduction

The manner of establishing the jurisdiction by the ICC and commencement of the procedure presents the most important aspect of the relation between the Court and a State. In essence, the principle of complementarity represents one aspect of the principle of universality (Xavier, 2006:397). The association between the ICC and the states are in many ways explicitly written down in the Rome Statute. It further highlights many spheres of criminal justice delivery system. It is relevant to note that

[62] See the term Pax Britannica.
[63] See Article 361 of the Constitution of India, Section 197 of the Criminal Procedure Code,1973.
[64] See Congo Vs. Belgium.
[65] https://www.youtube.com/watch?v=grYjrdbDHOc.

criminal justice is one such arena where States have had long association with the national courts. The ICC does not have monopoly over justice delivery system and its functional efficacy is widely subject to the cooperation of states. It exercises jurisdiction when the state that would ordinarily exercise jurisdiction has failed to bring perpetrators to justice. In this regard complementarity is such provision which gives the jurisdictional say to the ICC along with States.

Complementary as a principle is laid down in paragraph 10 of the preamble of the Rome Statute.[66], as well as in Article 1.[67] Article 1 of the ICC Statute states that the ICC will "be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern and shall be complementary to national criminal jurisdictions." During the time of negotiation it was realized that states and ICC cannot exist in clinical isolation. Indeed, their functioning requires a symbiotic relationship and mutual trust for each other. Thus, complementarity needs to connect the overlapping lines between the state sovereignty and the international criminal law.

States are older organizations in human history and their command over criminal jurisdictions has been given legitimacy. It has various institutions like police and courts which use mechanisms like investigation and execution to implement criminal justice in the society. On the other hand, ICC is a relatively new institution and it desires to get strength from states as copartners in the commitment to the international peace and prevention of such crimes. It has limited staff and money and does not generate its own funds and indeed survives on contributions of member states. The complementarity principle is based on considerations of efficiency and effectiveness since states will generally have the best access to evidence and witnesses.

It is interesting to note that the Rome Statute uses the term complementarity but nowhere defines it. Based on historical context and wider practice, it can be said that complementarity is the signature tune on which the overarching model of international criminal justice system is based. It seeks to create space through legal mechanism whereby domestic trials of core international crimes become subject

[66] Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.
[67] See Article 1 of the Rome Statute.

matter of international scrutiny. In effect it seeks accountability of domestic courts for the trial of international core crimes and primary terms on their sovereignty. The Rome Statute maps out and defines the international justice system. However, in the absence of a global government, the system still largely depends on state action for it to work; hence the need for national prosecution of the core crimes is the part of package of the delivery of the international criminal justice system. One can say that complementarity does not mean imposition; in fact it means participation of both mechanisms without making one or the other subservient. However national courts are also seats of power and in their routine mechanism they maintain the status quo and perpetuate the social and economic order which contain the structures of violence.

Complementarity seems to take presumptive situation of conflicts which weakens the legal infrastructure of conflict-ridden territory. It means there is inherent presumption in the Rome Statute that conflict may debilitate the judicial infrastructure. So in this case, ICC may try the case directly. However, it is true that various ongoing armed conflicts among the successor states, deep-seated hostilities and deep-rooted prejudices between the various ethnic, religious and social groups made their impact on judicial institutions in peace time. Thus there is no certainty that ICC will be immune to this process. In effect, courts are unlikely to be willing or able to conduct fair trials. It is likely that authorities will employ prejudice and bias and hesitate to bring their own people (Cassesse, 2013:293). While on the other hand, there is growing recognition that the goals of prosecuting international crimes can sometimes be better served when the prosecutions occur in the states where the crimes happened or when national leaders responsible for crimes are called to account by their own people (Cassesse, 2013:295). In this process states are legally bound to fulfil obligation of fair trial in objective and speedier manner.

In this context, Schabas says that it was carefully negotiated to ensure that States Parties would enjoy a level of confidence that their sovereign right to try crimes committed on their territory would not be encroached upon by the ICC (Schabas, 2010:336). However on the other note, he describes the term ‘complementarity’ as a ‘misnomer’ because it establishes a relationship between international and national justice systems that is far from complementary (Schabas, 2007:175). It has already claimed in the multiple judgments that international crimes were no longer to remain

unpunished. The idea that in certain and necessary circumstances sovereignty could be limited for such heinous crimes was accepted as a general principle[68] States were careful not to grant the ICC, as an international organization, the power to supersede their sovereignty over territories and citizens (Bassioni, 2006:423). Thus complementarity is one such principle of the Rome Statute which has potential to change the contours of sovereignty and challenge the inherent rights of the state over its justice delivery system. There are multiple qualifiers to put the ICC in a situation of high handedness where it is only potentially able to abuse the principle of complementarity in its favour and possibly may create precedents to intervene in the national jurisdiction. I wish to reiterate that this threat is not notional but real. It creates hierarchy and instrumentality as Court of final resort which can presume to be like instrumentality of the appeal. It is said that an authority at higher level will provide a formally authoritative ruling (Kastner, Nobles, Schiff and Zeigert 2004, 284-296).

It seems that the Rome Statute gives prime consideration to the limited abilities of the ICC to try and punish alleged offenders. In order to have a fair, free and independent trial it is very much urgent that ICC should give primary role to the nation-states to run such trials. The interest of justice requires shared effort to deal with the culture of impunity. Local people are better equipped to make the investigation engaging and Complementarity serves the need of legal scholarship. The ICC was established, not to compete with, but to complement national prosecutions. The Rome Statue propounds procedural aspects but it has wider and far reaching spiral effect on substantive aspects of criminal justice system in the Global South.

III.3.b Growth and Development of the Complementarity Doctrine

How far does the complementarity doctrine reinforce state sovereignty and establish a clear boundary between the ICC and domestic courts? Before answering this question state must locate its position. This information may be used for multiple purposes which may be potential threat for the state. ICC not only gets access to the domestic judicial system but its gets access to the large number of sensitive data's, information and files of national importance as well. Cooperation has proved to be one of the

[68] See Supr. Ct of Israel, Eichmann case, at 298–300; Supr. Ct of Canada, Finta, 24 March 1994, ILR, 104, at 305.

greatest challenges in the first practice of the ICC. It is equally true that there is a functional need to have ICC and having complementarity jurisdiction. The reasons for claiming the tribunal's primacy are clear. In the case of former Yugoslavia, at the time of the establishment of the tribunal, the still ongoing armed conflict among successor states and the deep-seated animosity between the various ethnic and religious groups made national courts unlikely to be willing or able to conduct fair trials. Hence the need was felt to affirm the overriding authority of the international tribunal. Similar considerations held true for Rwanda, where in addition the national judicial system had collapsed and consequently seemed unable to render justice (Cassesse, 2008:293).

When a national prosecutor investigates an international crime or national court conducts proceedings with regard to the criminal offence not as an international crime, but as an ordinary criminal offence', 'for instance genocide is being tried as multiple murder' or serious ill treatment of prisoners of war handled as 'assault'. In this case, the classification of the offence as ordinary crime presupposes a misrepresentation and undermines the very nature of international crimes. In addition to this, there is a growing recognition that the goals of prosecuting international crimes can sometimes be better served when the prosecutions occur in the states where the crimes happened or when national leaders responsible for crimes are called to account by their own people. It is equally possible that despite having of advanced legal order the state is unwilling or unenthusiastic about the ICC which cannot fulfill its mandate effectively without cooperation from states, international organizations, and other actors.

The Prosecutor requires cooperation and assistance at various stages of proceedings such as preliminary examination, investigation, judicial proceedings in order to conduct investigations and prosecutions. The ICC depends on the cooperation of states to execute the warrants of arrest and proceed to trial (Stahn and Nerlich, 2008:429-30). The future of international justice will depend largely on measure upon the relationship between the ICC and national legal institutions, and upon how the ICC goes about determining a state's inability to prosecute. Hence it seems that the ICC and domestic jurisdictions are meant to act as partners, rather than competitors in the enforcement of justice. It is a matter of serious deliberation between Court and sovereign states. In provisional terms it may be explained that the ICC does not

undermine states' rights, nor interferes with judicial matters that naturally fall within the jurisdiction of states. The ICC has jurisdiction only if there is a breakdown in the national justice system or if a state fails to prosecute.

This debate has approached the concept namely classical complementarity which is focused on the preservation of domestic jurisdiction. 'Positive complementarity' is founded on the conception that the ICC and domestic jurisdictions share a common responsibility. In other words 'complementarity' is no more than a term that describes the relationship between national and international jurisdictions. It helps to solve the conflict of jurisdiction that arose over certain cases by the organization of the exercise of such jurisdiction through either the domestic or international forum at any given time **(**Zeidy, 2008:132**).** To the extent that international jurisdiction played a role alongside domestic jurisdictions, "complementarity" emerged in various shapes depending on the scope, degree and nature of such contribution granted to the international jurisdiction.

Over the years international criminal law has developed from friendly and amicable complementarity to optional model of complementarity, compulsory model and combination of both mandatory and optional complementarity that functioned alongside each other. In this context, it is important to note, that the complementarity under the Rome Statute seems to give preference to the vertical model. In this process supranational bodies with muscular strength to supervise investigate the prosecutorial work of states and in case of failure or malafide intention assume its responsibilities. From state's perspective it seems genuine and legitimate that there are leeways to misuse and misapply this provision which may have deleterious effects on the state. Thus, it seems that implication of complementarity is problematic from the perspective of sovereignty.

On the other hand, the "positive" approach towards complementarity introduces a managerial division of labour in to the relationship between the Court and domestic jurisdictions'' (Stanh, 2008:87-88). However, positive complementarity advocates possible space of cooperation with the state and the ICC. In this context, it is important to mitigate difference or points of confrontation and focus on its joint stalks in the success of trial by Court and the State authority as mutual interest. Article

93(10) of the Rome Statute could be used as legal base for this model of complementarity.

However, the Rome Statute does not illustrate lists or provide any normative rider to constitute an unjustified delay; rather, the decision is left to the ICC. There are no parameters by which complementarity can be evaluated. This is because the jurisprudence of the ICC to date does not encompass an analysis or interpretation of all the components of complementarity.

III.3.c Statutory provisions

ICC's Prosecutor Luis Moreno Ocampo said that 'as a consequence of complementarity', the number of cases before the Court should not used as a measure of its efficiency (Schabas, 2008:5). He attempts to indicate towards the power and role of the state machinery in the international crimes. Complementarity is not a new provision in international law. There has been constant dialogue between international and domestic system for its coexistence. Historically, universal jurisdiction can be traced back to the writings of early scholars of note, such as Grotius (Grotius, 1625:1-2) and to the prosecution and punishment of the crime of piracy.[69] (Even after the First World War, urgency was felt to try and punish perpetrators for the crimes. In this regard, Germany asked for the primacy and genuine regard for the sovereignty of Germany and committed to try and punish culprits of war in the domestic court rather than international tribunals. In 1925 report of the ILA, Professor Pella viewed questions relating to the reconciliation the notion of state sovereignty. This report says that state sovereignty is not absolute due to the "very nature of the relations between nations and the necessity of international harmony by the sovereignty of other states.[70] Thus, "absolute independence of sovereignties" should be replaced by the theory of the "limitation of exterior sovereignties to the extent required for the maintenance of order and of international justice".

In 1937 League of Nations Convention for the Creation of an ICC further deliberated this question and engaged nations on the issues of prosecution of international crimes and national jurisdiction. The London International Assembly was the first to propose

[69] See United States v. Smith, 18 US (5 Weat.) 153 at 161–2 (1820).
[70] Report of the 1925 Interparliamentary Union, p.n 100.

a clear complementary relationship between domestic courts and a future International Criminal Court. In 1941, the assembly was created under the auspices of the League of Nations Union. It was proposed by the Professor Glaser that the role of national Courts was indispensable in the punishment of war crimes. National courts were, for many practical reasons, the forum convenience. The machinery of international tribunals was very complicated and slow, and thus should be "established only for special cases where justified by exceptional circumstances", where national laws fell short of criminalizing some crimes committed by the enemy. M.de Baer proposed that an ICC should be set up with jurisdiction over the "residue of crimes".

On the other hand Professor Lauterpacht opposed the entire system of complementarity proposed by M.De Baer[71](Zeidy,2008:69). On 14 April 1944, the United States presented a draft convention for the creation of an inter Allied court taking in to consideration the draft convention of the London International Assembly. The draft convention retained the jurisdiction of national courts. The Inter Allied Courts was designed to deal with cases where national courts lacked jurisdiction under international law or as a result of a gap in domestic legislation. The International Military Tribunal was set up to try only the major war criminals, while the bulk of the task of prosecution was left to internal criminal jurisdictions. This was done in a subsidiary manner. In the Moscow Declaration of 1943, the three main Allied powers declared that German war criminals should be judged and punished in the countries in which their crimes were committed. Only the major criminals, whose offences have no particular geographical localization, would be punished "by joint decision of the government of the Allies."

After the end of the IInd world War Nuremberg and Tokyo tribunals brought the fundamental structure (Zeidy, 2008:75). It must be recalled that the Nuremberg Tribunal was not an ICC in the strictest sense of the word. Indeed, the IMT at Nuremberg did not conceive of itself as having any kind of international jurisdiction. It grounded both its jurisdiction to prescribe and its jurisdiction to adjudicate on the fact that the Allies as occupying powers had stepped into the shoes of the German government. As the IMT underscored, the Allies had simply "done together what any

[71] United Nations War Crimes Commission, Draft Convention on the Trial and Punsihment of War Criminals, II/II, 14 April 1944.

one of them might have done singly" (Cerone, 2006:257-260). In addition to this, IMT was set up to try only the major war criminals, while the bulk of the task was left to internal criminal jurisdictions. Jurisdiction over international crimes has always been contested and challenging task.

The 1951 Draft Code of Offences against the Peace and Security of Mankind lacks references to the type of tribunal being considered for the punishment of the crimes set out in draft. It doesn't mirror any relationship between domestic and international tribunals (Zeidy, 2008:84). Genocide convention talks about the establishment of international tribunals. This convention doesn't talk about the modalities for the establishment of such tribunals nor discusses its possible relationship with the domestic jurisdiction of the states. It is important to note that during the *Travaux Preparatories* of the Convention reflect the two main aspects of the present study: First, the idea that even in the case of the creation of international tribunals, most states claim to exercise their own national criminal jurisdiction; and second, the concept of complementarity. First proposal indicates that the most States are terribly jealous about their powers of criminal prosecution. They perceive these powers as linked to the very concept of sovereignty (Zeidy, 2002:869).

Mr. Morozov of the USSR, stressed that no exception should be created, even in the case of genocide, to the principle of respecting national sovereignty by preserving a state's territorial jurisdiction (Zeidy,2008:79). Soviet Union held the view that only national courts carry out such a duty. By contrast, France conceived of an international tribunal with exclusive competence because it had no confidence in national justice systems to assume responsibility for genocide prosecutions.[72]

An inherent problem seems to exist. It appears that the complementarity is secondary to national jurisdictions, and in that sense is weaker than other international criminal courts such as the ICTY and ICTR, which have primacy over national jurisdictions. Due to this, ICC exercises authority over the states. In such cases the states have the option of maintaining the upper hand vis a vis the Court. It is within the power of the states to go forward with investigations and prosecutions. It is important to note that states give up less sovereignty with complementarity than they would in a system based on primacy of an ICC (Carter, 2013:457).

[72] UN Doc.E/AC.25/SR.7p.12.

Earlier the trials system was based on primacy. Article 9 of the ICTY Statute and Article 8 of the ICTR Statute prescribe the relationship between the tribunals and national courts. The establishment of the tribunals was based on the principle of concurrent jurisdiction. Primacy states upper hand to the Court and create a relationship of hierarchy. But the same is not the mandate of the Court. It needs to work with the state and win their trust and support (Stahn and Zeidy, 2011:889).

Unlike ICTY and ICTR, the ICC has not got a similar space for the Complementarity under Rome Statute; however in practice case seems different. It is to be noted that case becomes sensitive where international peace and security are at issue, even minor inconsistencies in prosecution, process, or sentencing could increase tensions (Brown, 1998:408). This primacy regime creates "a jurisdictional hierarchy in which domestic jurisdictions retain the ability to prosecute perpetrators, but which preserves an 'inherent supremacy' for the international tribunal." (Newton, 2001, 167) Since the international criminal institutions and national courts have concurrent jurisdiction over the most serious crimes in violation of international criminal law and humanitarian law, there inevitably will be conflicts between the two jurisdictions.

Stah says that International jurisdiction and domestic jurisdiction were thus presented as competing forums of justice (Stahn, 2008: 95). Thus compare to predecessor, The ICC Complementarity model is in sharp contrast to some of ad hoc tribunals, particularly the ICTY and the ICTR, which possess clear primacy over national Courts. In view of Tadic judgment in which it was told that ITCY has primacy over domestic courts. Practice of the Court has shown that Complementarity is not only an instrument to monitor state action, but also a forum for managerial interaction between the Court and States.

Language of ICTY uses primacy; this shows that despite having serious oppositions from the Global South[73]. Alfred von Verdross had held that a treaty 'binding a state to reduce its police or its organization of courts in such a way that it is no longer able

[73] China expressed the following views concerning the establishment of the Rwanda Tribunal: "The establishment of an international tribunal ... is a special measure taken by the international community to handle certain special problems. It is only a supplement to domestic criminal jurisdiction and the current exercise of universal jurisdiction over certain international crimes."

to protect at all or in an inadequate manner the life, the liberty, the honour and the property of men on its territory' was to be regarded as forbidden in international law (Verdross, 1937:574). The Security Council adopted the stronger language due to pressure by the particular crisis, and not because a general consensus on primacy existed among the members. Professor Swart felt that it is still necessary for the Committee to discuss the meaning of the term complementarity even it is not the focus of the Committee's work. This discussion should look at whether the concept of Complementarity can be divorced from the ICC context, and the challenges that African states face in relation to their capacity to prosecute. Specifically, the committee could study capacity and political will of States in Africa and Latin America and whether there should be local, regional, or universal standards regarding complementarity. Whether the ICC exercises a form of global governance and global justice through complementarity?

For North a space to leaving it to states to devise alternatives to justice appears to be in direct conflict with the preamble of the Rome Statute. In this regard, it seems that interest of Global South lies in flexible and application of positive complementarity where both things namely sovereignty and international criminal justice are important.

III.3.d Complementarity and Exceptionality: A Morphosis of Homogeneity

Complementarity comes after the referral and exercise of state's jurisdiction is evoked but in case of self referral story seems different. The drafters of the Rome Statute chose to allow "all" state parties to refer situations to the ICC. This was put forward in the Preparatory Committee in 1996, and received the support of the majority of States in the Rome Conference (Wilmshurst, 1999:134). The final formula preserved the applicability of the complementarity principle regarding state referrals (Holmes, 1999:78). In technical sense provisions of complementarity creates situations for admissibility for any case in the ICC except case has been voluntarily referred by the party herself. Article 19(2) (a) permits an accused or a person to challenge the admissibility "of a case on the grounds referred to in Article 17".[74] Classical complementarity assumes that the Court has a residual role under Article 17, which is triggered by domestic failure. Article 17 to 20 gives 'safety net' to the ICC for

[74] Article 19(2)(a) of the Rome Statute

allowing the ICC to review the exercise of jurisdiction if the conditions specified by the Statute are met. The meaning of ‘unwillingness to act’ was laid down in Article 17.2 of the ICC Statute. Marker like unwillingness, inability, sufficient gravity to justify further action, conditions to shielding person, unjustified delay, independent and impartial proceedings have used in the article 17 to examine genuineness of the domestic proceedings.

Now it seems herculean task to define and solidify consensus for the term what may constitute “unwillingness" became a contentious issue to resolve. In this context, Xavier Says that unwillingness is quite simple to understand but is more complicated to evaluate (Philippe, 2006). Article 17(2) requires a serious effort on behalf of the judicial authority, aimed at shielding the person concerned, or an intention not to bring the person concerned to justice, or unjustified delay that presumes bad faith.[75] The difficulties centered on how subjective or objective the test for determining unwillingness, it requires serious objective studies of facts so that intention, conducts, perverted plans of the any particular case can be substantiated with ground evidence. The drafters compromised by adding the word "genuinely" in order to serve in the determination of the unwillingness. Some delegations argued vigorously in favor of the word "genuinely."

Article 17 of the Rome Statute envisages three types of unwillingness. Out of which first criteria has three elements. It deals with the identification of the protective measures to the accused to shield the person from criminal responsibility. The second marker is the test of time which in a support justice delayed is justice denied. It demands from the national authorities to conclude judicial procedures in a reasonable framework of time. However, the Statute does not give a definition on what an unjustified delay is but leaves it to the ICC to make a decision. The third threshold is borrowed from the principle of natural justice. It test that whether 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’’.

[75] Article 17(2) of the Rome Statute.

The second criterion is the gravity or seriousness of the crime which basically identifies international crimes so that a case of genocide should not be treated at par with murder and vice versa. Further it is important to note that it is prerequisite mandate of the complementarity to amend the national legislation before the adoption and entry into force of the Rome Statute, a number of crimes and legal principles that were embodied in the Statute had been recognized under international law, international treaties, conventions and customary law.

It seems that it is difficult to define 'genuinely'. It is too much loaded with subjectivity and open for wider interpretation. In this context, it is important to highlight that this word has given preference over similar words like 'ineffective', 'good faith', 'diligently' and 'sufficient grounds. There is no authoritative interpretation of these words.

Another element of complementarity is 'sufficient gravity'. Two strong components to the determination of admissibility are complementarity and gravity. Crimes falling within the jurisdiction of the ICC have been designated 'serious crimes', yet the Rome Statute provides for the additional admissibility consideration of 'sufficient gravity'. Thus, even where subject-matter jurisdiction is satisfied, the ICC must determine whether the case is severe enough to justify further action.

One should also add cases where national court is unable to try a person not because of a collapse or malfunctioning of the judicial system, but on account of legislative impediments, such as an amnesty law, or a statute of limitations, making it impossible for the national judge to commence proceedings against the suspect or the accused.

The ICC is vested with role of a final arbiter over these disputes. It is mandated to determine questions of jurisdiction and admissibility. Complementarity is thus no longer a discretionary admissibility principle, but an institutional framework to determine the allocation of competencies and to settle disputes over the exercise of jurisdiction by the Court, States parties and third states.

III.3.e Conclusion

The principle of complementarity is not a panacea. It is intended to create an alliance between states and the international community, through the Rome Statute, to enforce

the principle of universal jurisdiction. It can be seen as a procedural tool allowing the international community to take back the initiative if states are unable or omit to exercise their jurisdiction. The principle of complementarity is intended to offer states and the international community a possible way out when the absence of trial or punishment for international crimes would be unacceptable. However, the question arises about the cost of complementarity who is to to pay for this. In this regard, Global South stands on the margin. It is further important to note that growth of complementarity regime shows the journey of International criminal laws and its institutional roadmap. In conclusive words, it appears that the international justice system believes that primacy is the only way to ensure uniformity in the legal process.

Nuremberg Tribunal and similar trials such as ICTY and ICTR have substantially contributed aspiration for the symbiotic relationship with the domestic courts. In this process, complementarity has emerged to address the issues of jurisdictional crisis and study and take cognizance of the issues of mass atrocities. Perhaps theoretical aspiration would be ground reality. Certainly, it creates regime to address the obligation and aspiration of the Rome Statute at the ground level, but it creates the process of homogenisation. ICC holds wider latitude to classify judicial infrastructure of any country not fit for the complementarity and therefore case can be transferred from domestic jurisdiction to the ICC.

Basically it creates an agency where power is located to legal bureaucrats to judge the integrity of any judicial system. ICC has failed to evolve any fixed objective criteria to examine what is due process, unwillingness etc. Therefore it has given birth to discretionary space to the legal technocrats to have say over larger questions of public interest without any further accountability for their acts. In this regard, it is important to note that judicial system represents identity of a state and any accusation may break the sentiments of native unless there are serious evidence to prove otherwise from a high benchmark institutions such as ICC third world will look centers of nepotism, corruption, inefficiency, logjam, poor management, poor infrastructure and it may invite further intervention such as pending of cases, ratio of judges and population, expenditure on judiciary. Further even role of the Security Council seems problematic because it’s referral to the ICC evades the domestic jurisdiction if not then these points are still not clear. In case of Libya this issue creates seems relevant.

Article 17 of the Rome Statute completely puts a ban on political solutions. Division of political solution and legal solution in two boxes might be tradition of modern legal system but there are many tribal systems where they employ primitive or indigenous justice system to heal the conflict situations with an emphasis on less punishment. Perhaps it is important to admit that plurality of this world's legal system need to be respected in both theory and practice. However such solutions are not acceptable to the Court and here nations' right to either ferment such deal or peace process is barred by the Rome Statute.

In this respect, *Ne bis in idem* represents one of the corner-stone principles of possibly all modern legal systems (Cheng, 2006: 339). Its Latin translation in to English means 'not again about the same'. This situation further widens the divide. Generally main stream international criminal lawyers reflect a sense of faith on the ICC. They look domestic courts with a sense of suspicion. This is also reflected in the concept of complementarity. Article 20 of the Rome Statute gives us details where a person can be tried twice if he/she is shielded by the domestic court but who will decide and what will be modicum. International relations in today's world is largely decided by the sensibility and orientation of media and diplomacy. Image creation is central theme of this process. Here media may paint the trial of any accused as unfair and court may proceed further based on that report. However, it is possible that a state rendered judgment after full and diligent proceedings and proper law qualification and investment of huge money and then ICC reopens same case for further scrutiny may ignite sense of outrage and violates principle.

This in totality gives birth to situations when the ICC can assume jurisdiction is based on terms which are vague and can leave much scope to the subjectivity of individuals who sits and chair the Court. The Prosecutor and the Court will find themselves examining whether a state wanted to shield a perpetrator, or whether a state was unwilling to prosecute or unable, or whether proceedings were not conducted independently or impartially. In a condition where prosecutor know limited knowledge about the plurality and diversity of the situation then situation may become more vulnerable. Certainly, there could be a number of situations where it would be obvious that a state was not proceeding in a genuine manner. But again, there can also be a number of variations where the situation is not sufficiently clear.

III.4 Responsibility to Protect

III.4.a Introduction

Doctrine of Responsibility to protect is not a new concept but it has been spoken or reappeared as old wine in new bottles at different intervals. In its new role R2P appears to work in close proximity with ICC both constitute expressions of international engagement seeking to respond to atrocity crimes.[76] The 'R2P' is an idea that was first codified in a 2001 report of the International Commission on Intervention and State Sovereignty (ICISS).[77] The Commission held that a 'modern understanding of the meaning of sovereignty' provides an approach that 'bridges the divide between intervention and sovereignty'.[78]

The R2P seeks to control the choices of sovereign and rule book of sovereignty. In this process it expresses itself in the language of duty to protect others who are facing the situation of core international crimes. It seeks to create a space where governments fail to protect its citizens then; the international community will intervene to protect them. R2P is layered in the language of human rights. It provides human sentiments upper hand than the doctrine not to intervene in other's countries. It proposes the authorization of 'action taken against a state or its leaders, without its or their consent, for purposes which are claimed to be humanitarian or protective'. The R2P embraces three specific responsibilities: the responsibility to prevent, the responsibility to react and the responsibility to rebuild. It is said that 'prevention is the single most important dimension of the R2P'. It seems that authority is central to the theme of the responsibility to protect. It says that there are three possible ways it must be either by UNGA, UNSC, regional organizations. Thus it empowers an institution like UNSC whose democratic credentials are repetitively being challenged. Although it has passed resolution for its favour.[79] Whereas in UNGA Global South proposed adversarial resolutions regarding R2P. R2P has certain qualifiers like right intention, reasonable prospects proportional mean, last resort, responsibility to rebuild.

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[76] See the Security Council's Resolution on Libya. UN Doc S/RES/1970 (2011).

[77] 1 International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty,' (Ottawa 2001).

[78] International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty', p.17.

[79] SC Res. 1674, 28 April 2006, UN Doc. S/RES/1674.

In this background, it is important to realize that though R2P is not a legal concept. However it is moving fast towards achieving the goal of a legal norm. To date the UNSC has referred two situations (Darfur and Libya) to the ICC under the auspices of R2P.[80] One can say that the international protection (R2P) and prosecution (ICC) agendas are in fact "two sides of the same coin. It reinforces the mirror image of each other. Thus it forms a fiduciary relationship whereby one seeks military intervention whereas another one employs judicial intervention.

In past, 'the doctrine of humanitarian intervention' formulated by the renowned Dutch scholar, Grotius, was legitimizing the intervention of states in the matters of state, which was believed to violate rights of its own citizens (Cakmak, 2006:4). However new updates make it more security oriented not for the state but human. It is said that state has primary obligation to protect its citizen if it fails then international community has to save such people. In this context, Orford says that there are two options, actions or inaction **(**Orford, 2003:444**).** Both seem as extreme measures in itself.

It is to be noted that in the long traditions of positivists arguments States are considered as sacrosanct entity and covered with the layer of impunity. In this context, state acts have been considered something supplementary to maintain law and order in the society despite of having internal dissent over many issues states had free will to suppress it with brute force which many a time resulted in catastrophe. It is true that large scale mass crimes like genocide, war crimes, and crimes against humanity happen by the own government. In this context, natural law advocates the limit the sovereign's made laws. It further reflects, in the word of Evans, the essence of the notion of sovereignty, in the Westphalian system that has governed international relations since the seventeenth century has been control: the capacity to make authoritative decisions about the people and resources within the territory of the state. (Evans, 2004:82) In contrast to this, at least on paper current international legal order propagates widely that the sovereign made laws are subject to rule of law and human rights. It can't take life and liberty instead laws are made to ensure effective assertion and exercise of life and liberty to its maximum strength.

[80] See UNSC Res, UNSCOR, 2005, UN Doc S/RES/1593 (2005) (referring the situation in Darfur to the UNSC). UNSC Res UNSCOR, UN Doc S/RES/1970 (2011) (referring the situation in Libya to the ICC).

In this context, it is to be noted that Responsibility' has a bewildering array of meanings, each of which occupies a distinctive role in legal and moral reasoning (Coleman, and Shapiro, 2002:548). The meaning that is most strongly suggested by etymology is what might be termed 'responsibility as answerability' (Gardner, 2003:157). But when it comes to doctrine of R2P, it is too wider and many previous examples are in abundance to show its misuse. In 1931, one of the Asian colonizers Japan claimed to have invaded Manchuria for humanitarian reasons (Brown, 1933:100). Even Nazi used this moral position to protect German in other countries. Hitler writes just before launching his takeover of the Sudetenland, he wrote to British Prime Minister Chamberlain, about the ethnic Germans in Czechoslovakia who 'have been maltreated in the unworthiest manner, tortured, economically destroyed and, above all, prevented from realizing for themselves also the right of nations to self-determination'.[81]

Recently in 2008, Russia used it to justify attacking Georgia and similarly France cited it after the cyclone in Myanmar, implying that humanitarian aid might have to be brought in by force if the regime persisted in stonewalling.[82] Latest use of this doctrine endorsed in Libya where the Security Council authorized the use of force against the Gaddafi regime.[83] On 17 March 2011, the Security Council adopted Resolution 1973 authorizing the use of force in Libya. Whereas momentum was made for the similar exercise for Syria in this case two oppositions have emerged namely Russia and China's vetoes and General Assembly support for peaceful and political solution.[84]

III.4.b R2P: Tale of two perspectives – Norm or Doctrine

The International Commission on Intervention and State Sovereignty was founded by Gareth Evans and Mohamed Sahnoun under the authority of the Canadian Government and consisted of members from the United Nations General Assembly. The Responsibility to Protect, the 2001 report of the International Commission on

[81] Letter from Reich Chancellor Hitler to Prime Minister Chamberlain, 'The Crisis in Czechoslovakia, 24 April–13. October, 1938', International Conciliation, 44 (1938), 433.
[82] http://www.economist.com/node/18709571.
[83] See S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).
[84] Rick Gladstone, General Assembly Votes to Condemn Syrian Leader, N.Y. Times, Feb. 17, 2012, at A12.

Intervention and State Sovereignty (ICISS), attempted to resolve the tension between the competing claims of sovereignty and human rights by building a new consensus around the principles that should govern the protection of endangered people. “The R2P” from 2001 the commission argued that states have the primary responsibility to protect their citizens, when they are unable or unwilling to do so, or when they deliberately terrorize their citizens, then “the principle of non-intervention yields to the international responsibility to protect’’. The principle of Responsibility to protect was adopted by the UN General Assembly at the 2005 World Summit. R2P seeks protection for the populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. Each individual 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.

In this respect, process of codification itself seems incorporated the features of positivism which is in a way attempt towards positivism. Thus commission has brought out five criteria of legitimacy for interventions, which are deemed to apply to "both the Security Council and UN member states,”. These five criteria is nothing new in the international law. In fact, it has been well established principles. However these criteria namely just cause, right intention, last resort, proportionality of means, and a reasonable prospect of success give leeway of subjectivity to enforcing bodies which creates potential misuse of this doctrine. The stipulated the concept in two parts of its report. It elaborated the nexus between sovereignty and responsibility in the opening pages and subsequently developed the contours of the concept in the context of the "use of force," in a section entitled "Chapter VII of the Charter of the United Nations, internal threats and the R2P.’’ Through these resolutions the commission proposed dealing with this problem by recharacterizing sovereignty, that is, by conceiving of sovereignty as responsibility rather than control.

Stahn traces the rise of the concept of R2P from an idea into an alleged emerging legal norm raises some suspicions from a positivist perspective. How can a concept that is labeled as a "new approach" and a "recharacterization" of sovereignty' in 2001 turn into an emerging legal norm within the course of four years, and into an organizing principle for peace and security in the UN system one year later? Orford

propounded central theme of her article that legal texts about intervention have a function or effect as cultural products. Whether through arguments about the need to control state aggression and increasing disorder or through appeals to the need to protect human rights, democracy and humanitarianism, international lawyers paint a picture of world in which increased intervention by international organization is desirable. Orford says that in the wake of the World Summit, Western states began to refer to the responsibility to protect in policy statements, stressing the concept's relevance to questions of international order, development and security. Here in this meeting US delegates says that the US has a responsibility to protect in cases involving genocide, war crimes, ethnic cleansing and crimes against humanity (Orford, 2003:17).

Many critical responses to the development of the responsibility to protect concept have focused upon its potential to authorize unilateral police action or humanitarian intervention. For example, in an interactive dialogue that took place before the General Assembly debate on the R2P in July 2009, Noam Chomsky focused upon the danger that the doctrine of R2P could be misused by powerful states seeking to engage in military intervention. Whereas Robertson suggests that the world is entering a 'third age of human rights', that of human rights enforcement. His vision of this age of enforcement is a potent blend of faith in the power of media images of suffering to mobilise public sentiment or the 'indignant pity of the civilised world', and belief in the emergence of an international criminal justice system. According to Robertson, in future the basis of human rights enforcement will be a combination of judicial remedies such as ad hoc tribunals, domestic prosecutions for crimes against humanity and an ICC (Orford, 2003:7).

III.4.c Sovereign Equality and R2P: How it works

Sovereignty is one mode of international governance without international government' (Hurd, 1999: 404). It imparts order, stability and predictability to what otherwise would be international anarchy. The international order is based on a system of sovereign states because this is seen as the most efficient means of organising the world in order to discharge the responsibility to the people of protecting their lives and livelihoods and promoting their well-being and freedoms. It is widely propounded now that if sovereignty becomes an obstacle to the realization

of freedom, then it can, should and must be discarded. This is where divide of North South comes. The principle of state sovereignty was traditionally given a wide interpretation and subsumes major areas of a state's treatment of its own subjects. This window period of leisure and comfort was backed by colonialism and only available to the colonizers. While adhering to the naturalist's faith in inalienable rights to individuals, right which they recognized as flowing from a superior being and which governments were obliged to observe.

Sovereign equality of states is a juridical concept. It gives normative content to the personality of the states in the international sphere that is how so ever small and economically insignificant any state is, when it comes to the international law states will be treated as par with big states. It enunciates to claim that small and weaker states are not the mere subject of international law but equal participant in the process of rule making, enforcing and adjudicating. Norm of non intervention is enshrined in Article 2(7) of the UN Charter. A state is by virtue of its sovereignty is entitled to exercise exclusive and total jurisdiction within its territorial borders; other states have a corresponding duty not to intervene in its internal affair.

In this context, ICC has itself posed challenged to the traditional notion of sovereignty. R2P has triggered the debate about the role and responsibility of the United Nations and the nature and limits of state sovereignty. In this context, Kofi Annan says "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 affect every precept of our common humanity?[85]

R2P seeks to do three principal things: change the conceptual language from 'humanitarian intervention' to 'responsibility to protect', pin the responsibility on state authorities at the national and the UNSC at the international level, and ensure that interventions, when they do take place, are done properly.

However in practice Global South has to bargain, negotiate and renegotiate for its existence in the current discourse of international law. In practice normative content

[85] We the Peoples: The Role of the United Nations in the 21st Century, Millenium Report of the Secretary-General of the United Nations 48 (Sept. 2000).

seems contradictory. IMF and World Banks are specialized agencies of the UN but equality of its member states seem jeopardized by its own structures and modus operandi whereby Global North hold over financial capital that gives upper hand and provide power to manipulate its policies and operationality.

In everyday political life of states, the Global South's vulnerability and fragility is particularly tangible. International relations in the 1990s, featuring the proliferation of failed states, terrorism, the targeting of civilians in conflict and the 'CNN effect' were said to have created a 'climate of heightened expectations for action' and less tolerance for the principle of non-intervention (Massingham, 2009:805). Due to this, large number of people across the Global North and South are suffering an unwarranted situation.

International law is used as a mechanism to control the global material wealth and legitimse wide range of inequality and in egalitarian structures of wealth distribution and control all across the world. At the same time it creates a structure and image of international civility where norms of Global North seem as only legitimate way. In this context one needs to revisit the concept of sovereignty in international law. In recent years, in the words of Anna Orford, liberal international law is increasingly appealed to as offering a bulwark both against the threats posed by terrorists, religious militants, failed states, environmental degradation and epidemics, and against the excesses of the measures taken by states in response to these perceived threats (Orford, 2009:1). International law investing more time and energy on security question and flow of capital. In order to make this move efficiently it is going through unprecedented change where direct confrontation of Global North and Global South is evident in unprecedented manner.

III.4.d Framework of United Nations and R2P

Since the inception of UN, sovereignty has been contested and challenged. Soviet lawyers were arguing for greater effectiveness and acceptance of sovereignty and so much so they went to argue that state's consent is fundamental to the rule making therefore customary international law is not applicable on the states unless states accept to do so. Whereas on the other hand western block has consistently and continuously maintained that the binding and effectiveness of customary international

law is not subject to the state consent (Akehurst, 1997:47). This understanding or positions have shaped the growth of international law for longer period of time. In this matter General Assembly's resolutions asserted that the aspiration and lawful demands of Global South and that use of force and intervention is contrary to the principle of UN Charter.[86]Many ways situation created an atmosphere where space for internal conflict which may trigger widespread and systemic violence was left under the domain of UN but due to the veto it was not controlled.

In the South West African Cases[87] the ICJ held that humanitarian considerations alone do not constitute rules of law. In fact, the ICC had held earlier in the Corfu Channel Case that Albania was liable for the destruction of British lives and warships through failure to notify the presence of mines. It held that the presence of mines. It held that the obligation to notify was based, on certain general principles" inter alia, elementary consideration of humanity, even more exacting in peace than in war" (Brownlie, 1963:342). It follows that humanitarianism is a source of legal right. There is an evident divide between the global North and South. The Non aligned Movement with 113 members, the most representative group of countries outside the United Nations itself three times rejected 'the so-called "right of humanitarian intervention" after the Kosovo War in 1999 and the subsequent statements from UN Secretary-General Kofi Annan (Thakur, 2000 245–59).

The hardest line against intervention and in defence of sovereignty was taken at the Round Table Discussion in Beijing on 14 June 2001.[88] The Chinese argued that humanitarianism is good, interventionism is bad, and 'humanitarian intervention' is 'tantamount to marrying evil to good'. In such a shotgun marriage, far from humanitarianism burnishing meddlesome interventions, it will itself be tarnished by interventionism.

It is important to note that the democratic states have these special privileges: they are not bound by international law, rather they make it. For scholars of international law, this is a familiar argument: only civilized states have proper membership of the family

[86] United Nations, A/RES/25/2625, General Assembly , Distr: General 24 October 1970.
[87] I. C. J. Rep. 1966.
[88] Unattributed, 'Rapporteur's Report, ICISS Round Table Consultation, Beijing, 14 June 2001'. The reports from all the ICISS regional discussions are available on the Commission's website at www.iciss.gc.ca.

of nations. Only they enjoy the sovereign rights necessary to act in the international system (Orford, 2008:395).

There is no formal link between the doctrine of responsibility to protect and the ICC. However incarnation of R2P can be traced with the simultaneous institutionalize ICC. It was claimed as such that both have the similar purposes (to confront atrocity crimes through prevention, protection or prosecution, and were expected to work in tandem to temper international politics and to end impunity.[89] The Security Council made its first express reference to the concept in Resolution 1674 on the protection of civilians in armed conflict.[90] Later on similar but important instance Security Council while referring the matter of Libya to the ICC revoked this phraseology in its resolution.[91]

III.4.e Responsibility to Protect and Identity of the State

The State as a juridical concept is separate from the State as a sociological concept. All sovereigns are equal is a juridical concept but whereas Third World or Global South is a sociological concept. It is based on shared experiences, memories, exiting similar realities. In this regard sociological understanding of sovereignty employs material conditions to exercise juridical rights. In this regard, Alf Ross defines that sovereignty emerges as a concept or word without a meaning independent from a full description of the duties and rights which the law ascribes to the State. Perhaps it seems acceptable that the rule book of sovereignty is an empty vessel. It is the power which determines and decides the legitimacy of Sovereignty. Therefore it seems that it is ambiguous and open for interpretation. In the word of Hegel, as he writes in his magnum opus philosophy of rights that sovereignty is highest power of self determination.

In this regard sovereign and its operationality are two different things powerful countries have say or decision making authority and aura in the current structure of

[89] Remarks to the UN Security Council by UN Deputy Secretary General Jan Eliasson, delivered on behalf of the Secretary General, 22 May 2014,
http://www.un.org/News/Press/docs/2014/dsgsm776.doc.htm , accessed 20 Jan. 2016.

[90] 0 See SC Res. 1674, para. 4 (Apr. 28, 2006) ("reaffiming] the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity").

[91] United Nations S/RES/1973 (2011) Security Council (Reiterating the responsibility of the Libyan authorities to protect the Libyan population and reaffirming that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians).

international law. It is important to look social domain of power groups in these lines of H. L. A. Hart assumes that power is centralised, operates in a top-down fashion and is essentially repressive rather than productive (Hart, 1961:10).

R2P norm attempts to shape concept of Sovereignty as Responsibility and argues that the state has an obligation 'to preserve life sustaining standards for its citizens'. Sovereign does not exist above the law but that the legitimacy of the sovereign is instead judged according to law. In this way it seeks to highlight that in case if a sovereign is not following the mandate of law and due to which large scale conflicts are happening then in that case breach of sovereignty shall be lawful.

In this context, it is important to note that, end of cold war started new paradigm in international law and international relation. A pillar to establish a new order was laid. In this process central theme of global society of states where conflict of one place was looked at the threat to another place but poverty of one place was not linked and analyzed with the prosperity of other place. This surgical methodology to examine problems is not incidental but it is a technique in itself. In this respect conflict and darker side represents Global South whereas prosperity represents Global North. It is true that binary in any analysis invites the tag of narrow and parochial outlook about the issues at hand. But sometimes binaries are reality and overlapping threads are rare and may be too superficial to realize. R2P is one such instrument or normative tool which endeavors to fill legal vacuum of covert and overt of Global North.

Since the end of the Cold War there has been a number of both UN approved and non UN approved humanitarian interventions.

In the words of Simma, 'NATO's intervention in Yugoslavia which was not authorized by the group of states but indeed plan and executed by an organization which itself works on realism of making allies and enemies was act beyond the four wall of International law but it was ethical act and done under moral persuasion of international community' (Hehir, 2012:217). In this regard, we may or may not accept Simma's arguments about the humanitarian intervention in Yugoslavia, but indeed this ethical intervention has triggered discussions about the legality and legitimacy of humanitarian which took place in 1999. Not only amongst academics, but also representatives of governments, intergovernmental organizations and non-

governmental organizations participated in this debate. It has been propagated that sovereignty is not absolute in an interdependent world. Rule book of sovereignty must not overlook restoration of the rule of law, respect for human rights and justice. It was claimed by the General Assembly that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.[92]

In this context it is further important to notice that as the Rome Statue gives power to referral and deferral to the UNSC which in a way endorses the weightful position of the UNSC in the domain of international criminal law. It is said that the members of the Security Council, particularly the Permanent five members hold an even heavier responsibility than other States to ensure the protection of civilians everywhere.

III.4.f Conclusion

R2P seems multiple things to various groups. It can be looked as the provision of life supporting protection and assistance to populations at risk. It propagates and speaks for the people who are at the risk. However this seems problematic to many Afro Asians nations. They view that the resilience of the opposition to the internationalisation of the human conscience lies in the fear that the lofty rhetoric of universal human rights claims merely masks the more mundane and familiar pursuit of national interests by different means. It doesn't challenge statehood and provokes militarism against such states indeed purpose it is to control and prevent the regime for the culpability of core crimes. In fact, it does not talk to control of weapon and possible restrictions which may reduce the effectiveness of any such regime. So that international community can ensure the life and dignity of the every individual. But in practice intervention doesn't seem to happen with the application of this doctrine but sounds more towards realism of international relations and balance of power. Friendly countries are nowhere talked about. Intervention in Libya is one such case where Gadaffi was quite vocal towards the dominance of North. Thus in practice it may be used as disciplining exercise as a weapon of deterrence not to speak directly against the structure of dominance.

However as a matter of fact, R2P shall not be totally opposed. It is true that state's organized structure plays significant role in the atrocities. Hence controlling such

[92] Para 6 of the preamble, Rome Statute

regimes need some doctrinal space where international community can make consensus based on objective facts. So that prompt and preventive action can save lives of millions. However, current order of things appears more as part of the problem than solution. It shall not be ideological apparatus to use against opposing ideological regimes. Therefore, current discourse on the subject is consistently making attempts to undermine sovereign rights of the nations which basically speak for opposite to the Charter's idea of non intervention. ICC will be instrumental to implement R2P.

III.5 Conclusion

Law is like language. It develops and evolves with the evolution of society. It strengthens with the strengthening of the society and finally it perishes with the death of the society. This proposition conceives law and society as mirror images of each other. However, international law seems to be working in ways different from this. First of all, for the international community to be called a 'society' seems a little too abstract. Furthermore, international society or international community is a divided entity. A major binary exists between Global North and Global South. Critical legal scholars have also theorized the internal hierarchical and class character of law, where society cannot be viewed as a homogeneous unit and any attempt of unity basically escapes the internal layers of domination and power relations. In this regard, it becomes important to reiterate that the application of laws differ from case to case. Law operates in a social context, where the black letter of law seems indeterminate.

This chapter attempts to throw some light on how international criminal law is subsuming the character of the state. In this respect, it breaks all the privileges of the states which states are suppose to get. Fundamentally it does not strike at the institution of the state but itself forms a centralized state and creates satellite federal colonies. It is important to note that the discipline of law has been designed in a way where changes happen within the matrix of law itself. Therefore, a current change in international law is entering through the gateway of the newly emerged body of international criminal law. Individual criminal responsibility, complementarity and R2P are helping in the speeding up of this process.

The idea of sovereignty is the *sine qua non* of the United Nations Charter. It is grounded and reiterated in international law in a variety of doctrines, statutes, resolutions, declarations, case laws, articles, movements, organizations, states' foreign policies. Among them, the sovereign equality of states, non-intervention in domestic jurisdiction, freedom to create one's own political structure, and sovereign immunity are most important. The idea of sovereignty and its related powers are basic currency in the society of states. In technical terms, it is associated with the legacy of the Peace of Westphalia in 1648, a legacy that has become a defining and transforming feature of international law from feudal to bourgeoisie order. In this context, a question whether state sovereignty and international criminal justice are two sides of the same coin can be asked.

The answer to this question may unfold many conflicting points of international criminal law where the traditional notion of sovereignty is forced to reconfigure according to changing needs and they may be dominant emerging norms of international law. International criminal justice system is based on the underlying assumption of institutionalization of international community which asserts itself to an extent where the state's immunity is challenged and commitment to prosecute even heads of the states becomes the signature tune of new criminal order.

Norm creation is an old habit of international lawyers and jurists. In fact juridical exercises are used as weaponry in the state's arsenal. In the post-Cold War era this process has been expedited. It is important to mention that judicialisation of thought process and norm creation is not neutral to existing power structures. Thus it seems that norms of the Global North appear in language to be universal but serve the interests of the Global North and add a layer for their own safeguard. R2P should be seen precisely against this background.

Nuremberg Tribunal and similar trials such as ICTY and ICTR have substantially contributed to the aspiration for a symbiotic relationship with the domestic courts. In this process complementarity has emerged to address the issues of jurisdictional crisis and study which takes cognizance of the issues of mass atrocities. This creates a regime to address the obligation and aspiration of the Rome Statute at the ground level. But it creates the process of homogenisation and ICC holds wider latitude to classify judicial infrastructure of any country not fit for complementarity and

therefore case can be transferred from domestic jurisdiction to the ICC. Basically it creates an agency where power is given to legal bureaucrats to judge the integrity of any judicial system.

ICC has failed to evolve any fixed objective criteria to examine the process. Therefore it has given birth to discretionary space of legal technocrats to have a say over larger questions of public interest without any further accountability for their acts.

In this regard, it is important to note that judicial system represents the identity of a state and any accusation may hurt sentiments of the natives unless there are serious evidences to prove otherwise. From a high benchmark of these international institutions, third world countries might look like centers of nepotism, corruption, inefficiency, logjam, poor management and poor infrastructure. However, it becomes important to understand the social contexts of these countries before jumping to conclusions about their characteristics.

Article 17 of the Rome Statue puts a complete ban on political solutions. Division of political solution and legal solution in two boxes might be a tradition of modern legal systems but there are many alternate structures (like indigenous legal systems) which employ their own justice mechanisms to resolve the conflict situations with an emphasis on lesser punishment. Perhaps it is important to admit that the plurality of the world's legal systems needs to be respected in both theory and practice. However such solutions are not acceptable to the ICC and here nations' right to either ferment such deal or peace process is barred by the Rome Statute. *Ne bis in idem* represents one of the corner-stone principles of possibly all modern legal systems (Cheng, 2006: 339).

Therefore, the concept of sovereignty is changing continuously and becoming subject to a vast body of international law and institutions, the ICC being one among them. It requires a particular set-up to try cases and for this a doctrinal space has been created which empowers international organizations but states are still standing on the margins. Further demystification of this process will lead to the concentration of power in the hands of Global North where they have high representation and capacity to make laws for the international organizations and give it the colour of universalism.

Hence, sovereign functions have become challenging and have been reduced to manage functional goals.

CHAPTER IV

RELATIONSHIP BETWEEN THE UNITED NATIONS SECURITY COUNCIL AND THE INTERNATIONAL CRIMINAL COURT

IV.1 Introduction

The UNSC is one of the principal organs of the United Nations. The UN Charter espouses the schemes of responsibility and powers for various organs and constitutes the fundamental fulcrum of power distribution wherein the UNSC emerges as the epicenter of Charter system. The permanent members have veto power which distinguishes them from rest of the members. Apart from veto power, Chapter VII of the UN Charter gives huge latitude to the Security Council to decide what constitutes threat to the peace, breach of the peace and acts of aggression and mandates to take appropriate measures which include use of force or otherwise as remedial measures to restore situations of peace in the states. Thus, the power of the Security Council envisages subjectivity, where both inaction and overt action cannot be judged and crosschecked. This unprecedented power of the UNSC has created many bones of contention and invited several accusations against the UN Charter. Although a background to the ICC has already been provided in Chapters 1 and 2, it important to reiterate here that the ICC is an independent legal organisation and has its own constitutive documents. The inclusion of UNSC is further flavored with various aberrations in international law. For instance, if the Security Council refers a matter to the ICC, such a case has to be taken up, even if it is not party to the Rome Statute. Through statutory provisions the Rome Statute creates jurisdictional role for the Security Council.

Thus, the Charter authorizes the Security Council, and only the Security Council, not the individual members or any other central organ of the United Nations, to ascertain the existence of the conditions under which the use of force within the system of collective security may take place. (Kelsen, 1948:786) It has extensive political powers under chapter VII of the UN Charter which ensures primary responsibility for

the maintenance of international peace and security.[93] On the other hand, the ICC is a much more recent institution. For its effective functioning the Rome Statute espouses a unique relationship with the UNSC.[94] Involvement of UNSC transcends state consent and helps to create a pan universal jurisdiction for the ICC. This provision creates a new paradigm in international criminal justice system which is beyond sovereign's consent and empowers international community to give justice in the best possible manner. The UNSC's stake in the ICC invites varied levels of optimism as well as critique.

In this regard, the most prominent critiques come from third world countries. It may however be noted that, initial negotiations for the creation of ICC taking place within the UN International Law Commission (ILC) had envisioned a Court that was subordinate to the UNSC, operating within the Charter of the United Nations (Rosa Aloisi, 2013:148).

The question of the relationship between the ICC and the Security Council was settled in principle at the Rome Conference, but some of its aspects are likely to remain subjects of debate for some time to come, notably the role of the Security Council, if any, with respect to crimes of aggression (Kirsch, 2011:3-11). For the purpose of independence of ICC, the Security Council's powers need to be controlled through objectivity of the referrals and deferrals. Security Council's power is further limited by different riders and safeguards of the Charter. In fact, it is worth noting that the UNSC's referral power extends the Court's jurisdiction over states that are not members of the ICC statute and it creates obligations for member states and non-member states that go beyond the obligations descending from the Rome Statute. Unlike previous special tribunals like ICTY and ICTR, the life of the ICC is not limited to a specific time and situation; it is in fact a permanent institution.[95] Its limbs are designed to effectively work and end the culture of impunity.

We have seen in the previous chapter how ICC and state sovereignty are coming in to conflict and leading to situations of ineffectiveness and jurisdictional paralysis. Keeping this in mind, the Rome Statue involves the UNSC in two ways and opens the

[93] Article 24 of the UN Charter.
[94] See Article 13(b) and the Article 16 of the Rome Statute.
[95] See Article 1 of the Rome Statute.

space for multiple interpretations and analyses. Article 13(b) of the Rome Statute provides referral power to the UNSC whereby it may refer any case and situation to the ICC. It can even refer cases from territories/ states that are not party to the Rome Statute. It promotes investigations but can also stop them based on concerns of security. The deferral power, in particular, was based on the need to reconcile peace and justice in situations in which the presence of peace talks or security concerns makes justice a secondary goal to the international community.

Article 16 of the Rome Statute gives UNSC the power to defer any matter from the ICC for a period of one year. Generally it has been said that under Rome Statute there is no space for political solution except under this provision. Although Article 16 doesn't explicitly talk about the reasons for deferral but in logical possibilities it may be designed to stop prosecution and find out alternate possibilities for peace. Thus the role of the Security Council becomes decisive with respect to the international criminal law.

ICC is a judicial body and its work is based on the Rome Statute whereas the power of the Security Council under chapter VII of the UN Charter is political (Jain, 2005:253). The difference between legal and political power can be described in terms of discretion. In exercise of political powers, the latitude of discretion is higher but the exercise of legal powers requires objectivity and neutrality (Ovakhelashvili, 2005:60). The engagement of political bodies in legal processes may at one level be indicative of the nature of the trial system itself, and on the other hand, it portrays the power dynamics of international law and international relations. Thus, Security Council's involvement gives birth to many contestations, some of which are listed below.

(i) Has creation of the ICC reduced the power of UNSC under Chapter VII?

(ii) Will involvement of UNSC undermine the independence and efficacy of the Court?

(iii) How does the role of UNSC impact the relationship of the court and third world countries?

(iv) Can ICC make judicial review of Security Council's resolution regarding its jurisdiction?

Ramanathan says that the other feature of the Statute which arouses suspicions about political or unfair use is in the office of the independent prosecutor and in the role given to the Security Council (Ramanathan, 2005:627-34). In this way one's take on the jurisdictional capacity of the ICC invariably involves questions of relationship between the Security Council and the ICC. China's opposition to the ICC highlights this question in further complexity. One the one hand, China says that court jurisdiction is not based on the principle of voluntary acceptance (Jianping and Wang Zhixiang, 2010:608-20) and on the other hand, being a permanent member of the UNSC , China has a final say over possibilities of such exercise. This benevolent position to serve the self-interest of permanent members acts as a lubricant to keep intact the culture of impunity since the same states have a final say on referrals and deferrals and they may use their position to save friendly regimes from such trials.[96]

The engagement of the UNSC and the ICC has further triggered many dynamics that need to studies and understood. . In recent times, UNSC resolutions namely 1422(2002), 1487(2003), 1497(2003), 1593(2005) have touched upon the core of the debates around limits of Security Council's referral to the Court and triggered controversy. It deserves reiteration that both these institutions are independent from each other. Whether decisions of one are binding on the other is an interesting question.

IV.2 Historical Debate

Looking at the post-Cold War obsession about territoriality, the Rome Statute and thereby the creation of the ICC might indeed be incredulous on many levels.

In pre cold war period it was hard to believe that a day will come when sovereign consent would no more be required for trials. Certainly the political package for such moves was laid down in the post cold war developments and subsequent era. Antonio Cassese's prophetic words, *"ICTY is a giant without arms and legs; it needs artificial limbs to walk and work on"* highlights the captivity of this universalism of international trials. (Cassese, 1998:9) However, today the words of Cassese have not only become archival but the subsequent changes have become a nightmare for many

[96] See the case of Sri Lanka. China and Russia are strongest allies of Sri lanka, where large scale violence has been committed which took life of thousands of people.

nations.

The ICC requires the cooperation of the Security Council, state parties, non-state parties and international organizations in order to effectively fulfill its functions. In the absence of effective execution mechanisms, the decisions of the ICC could remain no more than mere qualified suggestions. This was realized during the ICTR and ICTY trials that the Court in fact requires the Security Council to enforce its decisions when states fail to cooperate with it with respect to referrals.

The UN Charter bestows the primary responsibility of maintenance of peace and security on the Security Council.[97] Under the Charter, member states agree to accept and carry out the decisions of the Security Council in accordance with the dictums of the Charter.[98] Thus, the UN Charter has envisaged a wider focal tune for the Security Council under its chapters V and VII. Under chapter VII, the Security Council has been given the power to take control of situations of threat to the peace, breach of the peace or acts of aggression.[99] Therefore, it is empowered to take certain measures[100] to fix state responsibility and liability of aggressor and non-peace loving states. However, trial of an individual and individual criminal responsibility is explicitly missing in the UN Charter. In the Rome Statute, ICC entertains cases based on individual criminal responsibility which essentially means that it does not deal primarily with fixing state liabilities.

The relationship between the UNSC and the ICC played a dominant and contentious role at the Rome Statute negotiations (Glasius, 2006: 47–60). There was a large amount of paranoia and anxiety about the possible role of Security Council in upcoming Rome Statute. As a result, proponents of the ICC were concerned that giving the UNSC too much influence over the functioning of the ICC would deeply politicize the ICC's work and place international criminal justice at the whim of the Security Council's five permanent members. In this functional relationship of merger between political and judicial power, it seems that neither should have a dominant position over the other, as the same might inflict harm on the other institution. However it should be taken in to account that both these institutions are not neutral to

[97] See article 23,chapter 5 of the UN Charter.
[98] Article 25 UN Charter.
[99] Article 39 of the UN Charter.
[100] Under Article 42 and 44 of the UN Charter.

the power structure. The Global North has huge stakes in both the Security Council as well as the ICC.

It is important to note that friends of the court[101] were making efforts to make the Court as independent and powerful as possible. Attempts were made to create stronger role for the prosecutor. On the other hand, Security Council members especially the United States, Russia and China opposed an independent prosecutor who, they felt, could handcuff the Council in its role of maintaining and restoring international peace and security (Schabus, 2013:5). It should be understood that the emergence of any new institution attempts to change status quo; in this case the UNSC being an old and powerful institution was registering all possible forms of protest or voices of dissent wherever it felt its position was under threat or was being challenged. However there is no objective evidence which shows the downfall of power of the Security Council with the emergence of the ICC.

The 1994 draft prepared by the ILC left states free on how much jurisdiction they would accept after ratification of the statute and each state could make a declaration, declaring for which crimes it would accept jurisdiction, and for what periods of time (Glasius, 2006:63). The only exception was genocide, for which, as discussed below, a complaint could be brought by state, and accepted by the Court, without acceptance of jurisdiction being necessary (Glasius, 2006:63). In 1996, Human Rights Watch published its own first comprehensive ICC report. It explicitly proposed that no consent from any state should be required and the ICC should have universal jurisdiction. Thus the final version of Article 13 of the ICC statute was surrounded by considerable controversies, and the same as we read it today, was the result of profound compromises and intense bargaining between those that wanted a judicial body completely independent from any political influence, and those espousing the idea of judicial institution subordinated to some form of political control (Aloisi, 2013:148). This separation and independence of judicial body from the politics is just a chapter of magnum opus of politics. In reality, the most powerful states, mainly P-5 wanted to have a court to work under the supervision of the Security Council.

Doudou Thiam's first report on the proposed Court revealed a debate within the

[101] A self constituted body of multiple nations during the negotiation of Rome Statute who sought a strong Court.

commission as to whether the General Assembly or the Security Council was the appropriate organ to refer situations (Schabas, 2010:302). The 1994 Draft Statute made explicit provisions for such referrals. [102] In draft, the ILC broadly discussed the referral mechanism and stated that the Security Council would not normally refer to the permanent ICC specifically targeted to a person. Instead it should refer a situation to which chapter VII of the Charter applies. It would then be the responsibility of the prosecutor to determine which individuals should be charged.

A document that was issued by the United Kingdom towards the end of the preparatory committee's work concluded that there was a general agreement that states should have the power to trigger prosecutions, and that there was also strong support for referral by the Security Council (Schabas, 2010:295). During the time of preparatory work, Ireland agreed that States which are parties to the Statute as well as the Security Council should be able to refer matter to the ICC. [103] This settles the problem of the ability of the Security Council to refer situations to the ICC that would remove the need for individuals or ad hoc tribunals to address particular situations (Dugard, 1997:329-42).

In this regard, it is important to consider the vast power of the Security Council to have a say on trials otherwise Security Council might create new tribunals for the same situation which in result will undermine the legitimacy of the ICC (Dugard, 1997: 340). Therefore in order to avoid this potential clash between the ICC and the Security Council, a position and say has been given to the Security Council at the cost of serious reservation from this disaster. These articles were giving wider consideration to the Security Council. Some argue that the referral to the ICC constitutes in fact a 'poisonous chalice'.[104] Further it is essential to mention that ICC has a restriction on its jurisdiction and cannot try matters before 2002. However, the Security Council does not have any such restrictions but as per Chapter VII of the Charter, it is advised that instead of creating newer tribunals for such cases, it is

[102] Article 23 of the UN Charter.

[103] United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court, Vol-2,p.n 97.

[104] See e.g. M. Kersten, 'Negotiating Peace in Libya: What Happens to Justice?' Blog: Justice in Conflict, 26 July 2011, available online at http://justiceinconflict.org/2011/07/26/negotiating-peace-in-libya-what-happens-to-justice/ (visited 25 March, 2016).

pertinent that it refers these cases to the ICC.

IV.3 UNSC and ICC: Dynamics of Referral and Deferral

The ICC is a product of multilateral treaties. In the past, the UNSC constituted criminal tribunals through its resolutions and asserted its sole proprietorship over such issues. It becomes relevant to revisit and understand why the UNSC did not do so for ICC. There were a series of options available. Perhaps amendment to the UN Charter would be one of the finest options to create ICC. Another possible option considered was resolution of General Assembly which was abandoned because of doubts expressed over "whether such a resolution of a recommendatory nature would provide a sound legal basis for the establishment of ICC, and in particular for the exercise of powers against individuals and whether such an institution could be viewed as a subsidiary organ performing the function established to the General Assembly to the Charter." The UNSC's resolution would be the precedent maker. However, the undesirability under the rule of law, a court established by the executive may have whimsical attitude.

The power of the Security Council to abolish other courts that it had created or influence its work was a serious threat. The final option that was to be explored was the path that was ultimately taken, that of the multilateral treaty. The ILC seemed to have little doubt as it also shared the views of Professor Crawford that the normal way in which institutions and especially judicial institutions are created by legislations. The creation of a new court would not take away the power of the Security Council to constitute a new tribunal. It is possible that serious disputes may emerge relating to the jurisdiction and modus operandi of a situation and both these institutions are competing with each other. In order to resolve this situation it was necessary to incorporate a concurrent power of the Security Council**.**

With the creation of the ICC, whether the Security Council lost its power to create new courts or not is a question that is open to debate but what is certain is that it lost its monopoly over international justice system. Logically speaking, it will be unviable to have the ICC and concurrent jurisdiction of Security Council at the same time. Therefore, many states viewed that creation of the ICC gives a permanent alternative from the ad hoc tribunals and the Security Council instead of creating a new court can

refer a situation to the court.[105] However, maintenance of international peace and security is the primary responsibility of the UNSC. Thus, the logical extension of this power may be exercised in multiple ways which necessarily includes establishment of ad hoc tribunals. This further reiterates the power of the UNSC to create ad hoc tribunals. The judgment of the appeals chamber of the ICTY in the *Tadic* case beyond doubt places the power of the Security Council to establish an ad hoc international criminal tribunal under Chapter VII of the Charter as a measure contributing to the maintenance of international peace. However power to create ad hoc tribunals is very much linked with the referral.

Another view, mainly from third world, is that the Security Council should not have any say and should give its power to create ad-hoc tribunals and refer any matter to the Court. In the case of referral, the Security Council would use the ICC as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e. as a measure contributing to the restoration and maintenance of peace.[106] Therefore, many states believe that presence of ICC ceases Security Council to have the power to refer the case and power to defer the case will politicize the judicial body.[107] It has been repeatedly said that the Security Council set up ad hoc tribunals because at that point in time no judicial mechanism existed to try the extraordinary crimes committed in the former Yugoslavia and Rwanda. Now, however, the ICC exists and the States Parties would have the right to refer cases to it.[108]

It is certainly arguable that the Security Council's powers as defined in Chapter VII extend to the creation of criminal tribunals where necessary as part of an approach to resolving a conflict. But the creation of such tribunals by executive resolution in the exercise of emergency power is less than satisfactory. The principle of legality is of particular significance in criminal cases. It connotes that criminal courts be established on a secure constitutional base (Crawford, 1995:416). It is in this context that the referral and deferral power of the UNSC provides breathing space to the

[105] United Nation Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,Vol. 2,p. 97(Ireland agreed that states parties to the statute as well as the security council should be able to refer matters to the court. The ability of the Council to refer situations to the Court would remove the need for individual or ad hoc tribunals to address particular situations.
[106] Tadic Jurisdictional ruling, op. cit, para. 38.
[107] See, Supra note 40, pp.101-102.
[108] See A/CONF.183/C.1/L.95, 17 July 1998.

voluminous power of the Security Council on the one hand and simultaneously helps to create a court. Thus, its ignorance would be catastrophic. Perhaps overlooking the power of the Security Council may be a serious neglect to the UN Charter itself and gravest violation of the Charter, which may further invite trouble.

Under the Rome Statute, ICC has an independent international legal personality.[109] Rome Statute says it has such legal capacity as may be necessary for the exercise of its functions and fulfillment of its purposes.[110] Therefore, UNSC and ICC are both independent of each other by their respective treaties (Gallant, 2003:553). Independent treaties give source of authority to these organizations. Even at the organizational level, the ICC cannot become party to the UN Charter[111] and UN cannot be party to the Rome Statute. Possibly this means that the Rome Statute could not grant the Security Council any additional powers it did not have, nor limit those it already possessed under the UN Charter.

Therefore, one of the arguments can be made is that as both organizations are free in terms of their structure, budget, and doctrinal basis therefore it cannot interfere in each other's domains as a matter of right. Therefore, referral and deferral to the ICC by the UNSC under chapter VII is a request not a demand.[112]

After the Rome Statute came into being, the ICC and UN entered in to an agreement to facilitate and provide all necessary mutual functional assistance to each other.[113]There is a treaty-based link between the ICC and the UN. There is a relationship agreement between the two, which came into force in 2004.[114] By virtue of Article 2(1) of the relationship agreement, *"the United Nations recognizes the ICC as an independent permanent judicial institution which has International legal personality."* Reciprocally Article 2(2) provides that *"the ICC recognizes the responsibility of the UN under the Charter"*. Articles 2(3) of the agreement states that

[109] Article 4, Rome Statute.
[110] Ibid article 4.
[111] Article 4(1) of the charter limits membership of the UN to "Peace States."

[112] Libya's take during the preparatory work of the Rome Statute.
[113] See Article 2 of the Rome Statute, It says that Court shall be brought in to relationship with the United Nations through an agreement approved by the Assembly of State Parties.

[114] Negotiated Relationship Agreement Between the International Criminal Court and the United Nations, October 2004,ASP/3/Rev.1.

"the UN and the ICC respect each other's status and mandate".

It may be noted, that Article 103 of the Charter is possibly another point of convergence which gives authoritative power to the UNSC's resolution. It says that the obligation under UN charter is primary obligation of the states which bar member states to escape it through local laws.

In this context, although the ICC is not party to the UN Charter and does not have any obligation towards UN Charter, but members of the ICC are parties to the UN. Thus member's obligation towards UN shouldn't come into conflict with the obligations of the ICC for its members. In other words, normative space of UN and ICC cannot operate in different compartments. Both of them have to operate and refuel legitimacy from the fossil fuel of International law and show harmonious existence.

UNSC cannot jeopardize the operation of ICC by putting obligations on the member states of the UN to not cooperate with the ICC (Sarooshi, 2004:108). Since the Security Council's power to create international criminal tribunals has largely been accepted, at least since the Tadic interlocutory appeal in 1995,[115] Security Council referrals, on the other hand, were controversial during the negotiations. Some States, among them particularly India was eloquent and consistent for its critique for the inclusion of the Security Council. Even Mexico[116] did not want the Security Council to be able to play any role at all in the work of the ICC. As far as activation of referral power is concerned, separate Security Council decision is required, which means that the permanent five members can use their veto power to block the decision if they do not agree that the ICC should be prevented from investigating and prosecuting.

In terms of the majority required, Article 27(3) of the United Nations Charter prescribes an affirmative vote of nine members including the concurring votes of the permanent members of the Security Council. Such decisions by the Security Council are legally binding on the ICC as confirmed by the Article 13 of the Statute. The resolution must be grounded in Chapter VII of the United Nations Charter, which essentially deals with enforcement measures in the execution of the Security Council's

[115] Prosecutor v.Tadic, Interlocutory Appeal on Jurisdiction, Case No.IT-95-1-AR72,2 October 1995,paras 26-40, See A/CONF.183/C.1/L.81, 15 July 1998.
[116] See A/CONF.183/C.1/L.81, 15 July 1998.

'primary responsibility for the maintenance of international peace and security' under Article 24(1) of the Charter. The member states of the United Nations have agreed that the Security Council acts on their behalf.

Theoretically, one can argue that the Chapter VII of the UN Charter and Article 13(b) of the Rome statute create a bond between these two organizations. However, there are various factors, which may potentially shape and reshape the relationship of the Security Council and the ICC. The UNSC is made of its permanent and non-permanent members. An understanding of the permanent member states and their positions on the ICC are some of the defining elements of this relationship. In the matter of referral, veto power of any member may potentially decide the fate of any referral and deferral. China, Russia and U.S.A are not members of ICC and their stands on the ICC are not consistent with the existing spirit of Rome Statute e.g. China does not want to give referral powers to the prosecutor of the ICC, Russia has signed it but not ratified it, whereas France and Britain are not only members of the ICC but they strongly support the ICC's functioning. Therefore, the relationship of the Security Council and the ICC as an institution may not give a proper picture unless and until we go beyond the binaries and explore it further.

IV.4 Referrals: A Case Study

Article 13(b)[117] of the Rome Statute creates statutory space for the UNSC in the Rome Statute. Unlike referrals by state parties and the prosecutor acting under his or her *proprio motu* power, both of which additionally require jurisdiction to otherwise exist through a state's ratification of, or accession to the Rome Statute, the Security Council referral is extremely significant because it also creates jurisdiction[118] Article

[117] Article 13 of the Rome Statute.

[118] If the Court is acting after State Party referral or Prosecutor referral, the provisions of Article 12(2)(a) or (b) must be met for jurisdiction to exist. Rome Statute, Article 12(2) states: In the case of article 13, paragraph (a) [State Party referral] or (c) [Prosecutor referral], 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 f that vessel or aircraft; (b) The State of which the person accused of the crime is a national. Rome Statute, supra note 1, Art. 12(2). Significantly, in the case of Security Council referral under Article 13(b), there is no similar jurisdictional requirement. See Rome Statute, supra note 1, Arts. 12–13

13 (b) of the Rome Statue provides that the Security Council may refer any case to the ICC. This not only empowers the jurisdiction of the ICC but also provides a universal status to the ICC. So referral power has the following three lines of effects:

(i) It invites the Security Council for its share in the criminal justice delivery system.

(ii) It expands the scope of jurisdiction and non-parties also falls under the purview of the ICC.

(iii) It creates an exception to consent which is a primary rider to create obligation or rights for various treaties in international law.

The Security Council does not have extra legal jurisdiction. It is the creation of UN Charter which constitutes fundamental legal text of international law. The UN Charter too gives it an upper hand to reinforce or maintain a legal order and stability in the international sphere. In this context, Article 24 of the Charter says that Security Council has the primary responsibility for maintenance of peace and security and provides that the "specific powers granted to the Security Council" to meet this responsibility under various provisions of the Charter. Further, Article 25 talks about "decisions of the Security Council in accordance with the present Charter." Article 39 says that the Security Council may take action under Chapter VII only to "maintain or restore international peace and security."[119] Article 103 which, in its entirety, reads as follows: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail. This statutory provision was again reiterated in the Lockerbie case that obligations imposed by the Security Council take precedence over obligations under international treaties'.[120]

Due to the political significance and exemplary powers of the Security Council, it was difficult to exclude the UNSC from any role in the upcoming ICC. Therefore, a compromise was reached in an attempt to assuage the concerns of all sides (Glasius, 2006:51). The so-called "Singaporean compromise" was reflected in Article 16 of the

[119] See also UN Charter Art. 24(2).
[120] Lockerbie (Libya v. UK), 1992 ICJ REP. at 15, para. 39.

Rome Statute, which allows the Security Council to defer any ICC investigation or prosecution deemed to be a threat to international peace and security for up to 12 months with power to renew the resolution. At the same time, Spain proposed an opposing amendment to the Singapore proposal whereby a Security Council determination was to be subjected to judicial review by the ICC (Schabus, 2010:327). The United States called it 'unwise' to attempt to constrain the authority of the Security Council by imposing a twelve months condition of validity.[121]

The power, which is deposed, to the Security Council is intended with certain purposes. In other words, the Security Council does not operate in a legal vacuum when adopting its resolutions. Article 39 of the charter is the prospectus of this power.[122] It has been further reiterated in the appeals chamber of the ICTY held in the *Tadic* case: "neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)."[123] It gives legitimate expectation to the international community that the Security Council will exercise these powers in a manner, which will protect them and safeguard their interest. Therefore, the Security Council has to act promptly and referral mechanism recognizes this space of Security Council to refer cases demanding urgency to the ICC which empowers the Security Council to touch territories which are not party to the Rome Statue thus making it universal. In this case, one can say that referral gives space to the Security Council to fulfill its duties enshrined in the UN charter. One can argue that Rome statute is subordinate to the UN charter. However, both are independent international legal personalities.

We cannot deny that Security Council operates on wider periphery with extensive mandate and power. However obligation under chapter VII is free from Rome statute

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[121] UN Doc.A/CONF.183/SR.9, para.30.

[122] Article 39, the key provision in this Chapter, provides as follows: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

[123] Prosecutor v. Tadic , supra note 8, para. 28; see also id., paras. 29–30; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ REP. 16, 54, para. 118 (June 21) (referring to "a situation which the Court has found to have been validly declared illegal [by the Security Council]" (emphasis added)). The latter statement suggests that the Court has, at least implicitly, examined the validity of the Security Council's action.

and fall highest in hierarchy.[124] There is enough scope to discuss what should be the situation where Security Council should use referral mechanism. As far as referrals to the Darfur situation [125]are concerned, the United Nations constituted a committee of inquiry[126], which came out with its report. Based on this report, the Security Council referred the matter to the ICC. In Darfur, it is estimated that millions of people died in a series of continued violence.[127] This is also true about the case of Libya[128] where the Security Council has referred the matter.[129] These were particularly cases of gross human rights violations.

Needless to say that selection of situations should be based on non-preference and objective criteria. It seems that referral criterion has some inherent biasness over others. It gives privileges to the five permanent members to fix the game as per their calculation which in effect gives immunity to the Security Council to save oneself from any such referral. Member states like China and U.S.A are very critical to the ICC.[130] Recently China has blocked a move against North Korea in the Security Council to refer the matter in ICC.[131] Here the Security Council members gain much power without any obligations, which in turn gives them the power to manipulate situations or even use power arbitrarily. So in this context, Chimni's views seem correct that there is an inherent danger that the global capital may use it as a threat in case any governments are using protectionist measures or expropriating the company of any powerful country. On the other hand, a state which is vocal against the first world hegemony may be victimised because of this arbitrary hit and run method (Chimni, 2005).

The Security Council is established under the UN Charter as a powerful organ with discretionary powers; as the Security Council's decisions are discretionary, they are

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[124] Article 103 of the UN Charter.

[125] UNSC Resolution 1593,2005.

[126] UNSC's Resolution 1564, 2004.

[127] House of Commons Library Research Paper 04/51 'Sudan: conflict in Darfur' (23 June 2004) 11. The number of deaths is now believed to be much higher: see Russell Smith 'How many have died in Darfur?' BBC News (16 Feb 2005) http://news.bbc.co.uk/l/hi/world/ africa/4268733.stm\ (22 May 2016).

[128] UNSC Resolution 1970.

[129] UNSC Resolution 1970,2011.

[130] For China Reservation see supra note.10, and for USA see Supra note. 17.

[131] http://www.nytimes.com/2014/03/18/world/asia/china-snubs-uns-north-korea-report. (visited on 16May, 2016)

not always based on legal restoration of peace and security (Simma, 2010:715). One may argue that violations of humanitarian law may constitute threats to the peace which may activate Chapter VII and bring actions like non-forcible and forcible measures. Non-military action under Article 41 is subject to the general limits of Chapter VII, i.e. to the purpose and principles of the organization, to the principle of proportionality, and to the exclusion of measures amounting to binding dispute settlement.[132] Bowett emphasizes that the council's decisions are binding only if they are in accordance with the Charter.[133] Therefore, mechanism carved under Chapter VII is for states. It largely talks about state responsibility; however, after the Pinochet decision there is development of international individual responsibility, which was further strengthened in Belgium vs. Congo case (Chimni: 2005).

IV.5 Deferral: A Matter of Fact or Fate

Under Article 16 of the Rome Statute, the Security Council may also defer an ICC investigation or prosecution.[134] This provision gives unique position to Security Council and creates extreme exceptionality in the Rome Statute. The power to defer an ongoing case is a unique entitlement of the UNSC and creates a distinction among the Security Council, member states and power of the prosecutor. Thus, unlike referral it cannot be exercised by multiple parties namely states and prosecutors. It gives the sole monopoly to the UNSC to control the operationality of the ICC. Possibly through deferral Security Council can put a permanent anchor to the voyage of ICC. In this light it is important for the UNSC to activate this provision with utmost scrutiny and clean hands.

To understand the ambit of Article 16, it is necessary to look at both its text and the understanding that its drafters had while preparing the fundamental framework of Article 16 of the Rome Statute. To take an important limitation, Article 16 is intended to refer to particular instances of investigations and prosecutions. This is clear from the language, which is conspicuously different than that in Article 13(b) (Doria, Hans

[132] On specific limits to economic enforcement measures, see Reisman/stenvick;Starck,pp.227 et seq
[133] Tehran hostage (1980) ICJ Rep 42.
[134] Rome Statute, supra note 1, art. 16., Rome Statute Article 16 states: 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.'

and Bassiouni,2009). The ICC and the UN are entirely separate entities and therefore the Security Council cannot force the ICC to defer its activities per se, it is only through the operation of the Rome Statute that this may occur. The Spanish proposal to limit the unlimited time to a 12 month period was rejected, making it clear that the Statute does not contain a limit on the number of times the Council may request the ICC to defer (White and Cryer, 2011:466).

A Canadian modification on that proposal further restricted the provisions by introducing the twelve-month time limit so that Security Council request would lapse unless renewed. In terms of legal objectionability, where on the one hand the Rome Statute empowered the Security Council to defer the matter; on the other hand it put a condition that deferral will require the approval of 9 out of 15 Council members. Therefore, the exercise of veto by a single member will not allow such a move to be successfully passed. Unanimity of the Security Council on a contrary vote by any of the five permanent members is a challenging condition in its ambit. It is true that Article 16 does not provide for any limitation as to the number of times a request under it may be made in respect of the same case. Theoretically, therefore this deferral may be for an investigation or prosecution to be in accordance to unlimited period (Schabas, 2001:65). Article 16 clearly states that the deferral of a resolution passed by the Security Council acting under Chapter VII implies that there must be a threat to the international peace and security.[135] In effect it appears that the Security Council gives implied consent to the prosecutor to proceed to investigations and trials, otherwise it can legally collectively block its functioning. In effect, the Security Council collectively has veto power over the ICC. Internally within the decision making sphere of the Security Council the decision to initiate prosecution could be vetoed by just one permanent member; however, the Rome Statute gives collective entitlement to the Security Council. Hence it needs at least nine affirmative votes both to refer and defer any matter before the ICC.[136]

There have been cases of misuse of this provision in the past. In this light, the resolutions 1422 and 1487 on the ICC need to be revisited. Perhaps these resolutions constitute serious breach of the provisions of the Charter and ICC itself. In these

[135] See article 39 of the UN Charter.
[136] For deferral 9 affirmative votes are necessary see Article 27 of the UN Charter.

resolutions the Council addressed a general request to the ICC to defer, for a twelve-month period, investigation or prosecution of any case involving current or former officials or personnel from a parent state not a party to the Rome Statute of the ICC, over acts or omissions relating to a United Nations established or authorized operation.

The Security Council also obliged member states not to take any action inconsistent with this request or with their international obligations. While the initial resolution received unanimous support, on renewal it was adopted by only 12 votes to 3. The resolutions were widely criticized by member states for not specifying a threat to the peace as a precondition for Chapter VII action. [137] It is not that there is vacuum as to how to use the provisions relating to the referral and deferral. Statute gives procedural guidance to control referral and deferral and substantive regulations are enshrined in the preamble of the Statute itself. These provisions without any doubt should be read, analyzed and applied with the general body of international law. Thus, international law itself may provide deep insights for the possible application of these provisions. So passing of these resolutions with procedural fairness but contempt to the substantive object and purpose of the Statute indicates political dealing behind the table. Resolution 1422 was designed by USA to provide safeguards to its forces in peacekeeping missions. If the resolution was not passed, USA posed a serious threat to use its veto for all subsequent peacekeeping missions. Under such pressure, a deal was made which essentially hurt the mandate of the deferral system itself.

Spain would have proposed an amendment to the Singapore proposal on similar grounds, whereby a UNSC determination was subject to judicial review by the ICC. Article 16 invites voluminous room for critique; however, we should be aware that there were different interests working against each other in this case. The members of UNSC do not want to share the absolute domain of power with the ICC. Moreover, without taking the confidence of Security Council it will not be legally operational and politically manageable to run a new organization with a completely new legal concept in hand. The Security Council has a wider power and mandate which is independent from the ICC. For functional success of the ICC, incorporation of Security Council is required as it lends wider strength, acceptability, enforcement and

[137] See with regard to SC Res. 1422, UN Doc. S/PV.4568, SC Res. 1487, UN Doc. S/PV.4772.

executionary authority. When a state and prosecutor refers a matter to the Security Council, it cannot have mandate to defer it. Article 16 gives an advantage to the Security Council over others.

However, given the earlier background of Security Council to use veto power and power to constitute ad hoc tribunals, it seems quite reasonable to incorporate deferral mechanism for Security Council. In fact, before the emergence of ICC, ad-hoc tribunals were running under the shadow of the Security Council. They derive their legitimacy from the Chapter VII of the UN charter. At any point Security Council could have changed, modified and altered the working of ad hoc tribunals by merely passing another resolution. However, this is not true in the case of the ICC. In many ways deferral mechanism is a progressive step because it undermines the arbitrary power of the Security Council. We should distinguish and make a logical comparison with deferral and veto. In veto, only one vote is enough but for deferral, it should have nine affirmative votes. This is seen in the case of Sudan where despite the willingness of seven members of the Security Council to defer the matter they were unable to gather nine affirmative votes to reach a political solution. Therefore, for all practical purposes, deferral mechanism has construed the veto power of Security Council in more accountable manner. It somehow undermines and regulates wider discretionary powers of the Security Council in the domain of legal transparency and accountability.

Deferral seems to be a privilege but it is difficult to practice. However, it's possible misuse shows its effects on the commitment for justice. Deferral is possibly a point to move form legal trials to political solutions. This involves ICC for the peace and justice debate. It gives space when trials create counterproductive results for justice i.e. when society is divisive and judgment may further lead to possible violence (Schabas, 2010:331). Therefore it should be used to serve the interest of justice and its political use may have serious potential to undermine the legitimacy of the ICC.

IV.6 Power of Judicial Review and Independence of the Court

Judicial review is a process through which the judiciary reviews the acts of the executive. Essentially, judicial review is a process in domestic legal systems operated through their constitutional provisions and much later it was transplanted into the

international legal system. However there have always been problems around the identification of executive, legislature and judiciary at the international sphere. Unlike domestic systems, international law seems less structural, in fact it represents complex processes of law making, adjudicating and enforcing which do not fit into the classical division of the organ of the states. Judicial review develops a constitutionalist model for assessing the legitimacy of international law that takes the commitments underlying constitutional democracy seriously (Kumm, 2004:907). There can be functional interpretations of reviews of the decisions of a body without identification of its character but this process itself manifests power. The decisions of who will be the reviewer and who will be reviewed are in fact highly political acts.

When one speaks about the judicial review and independence of the ICC, one needs to understand a global constitutional structure where power is subjected to certain conditions so that it does not overpower other sets and operates in a manner which ensures smooth functioning of the other formal material like rules, statute, resolutions. It must ensure that rules must reflect transparency and accountability. Further in effect, substantive material like victims' rights, citizen's demand for justice, inclusive model to participate in the justice delivery mechanism.

Through judicial review, judicial bodies ensure the efficacy of rule and check arbitrary acts. In this respect it is important to note that the power of the UNSC in the Rome Statute and in the Charter creates space for possible misuse unless there are enough checks and balances put in place. As it has been famously said, that power has a tendency to corrupt and absolute power corrupts absolutely. In this respect it is important to mention that discourse of law is not based on possibilities but admits real cases. In the past there have been multiple cases wherein Security Council resolutions have produced results which in effect have created serious breaches of human rights. The Security Council appears to be immune to the UN Charter system because ICJ is a part of the UN and it has been unsuccessful in checking the acts of the UNSC. This situation needs to be revisited for many reasons. The powers of the Security Council are not divine and are designed by human agencies. However, there is strong belief about their legitimacy and validity. However, third world countries are critical about the power and functions of the Security Council since it does not represent countries from Africa, leading to there being serious reservations and reasons to revisit the

unbridled powers of the Security Council.

The role of the Security Council with respect to the ICC is considered as bone of problems for many countries. Many countries feared that ICC may jeopardize their interests and view themselves as potential target. However so far, with some exceptions it is difficult to question the role of UNSC with respect to the ICC. Still leeways are open where UNSC can possibly misuse this provision. Under the current scheme the Security Council can effectively block not just prosecutions but also investigations for an indefinite amount of time; this is impediment to the independence of the Prosecutor and the ICC. ICC and the UNSC may have different role and constitutive instruments but it needs to ensure purposive constitutional goals of the International law. In this process, ICC needs to be recognized as an important source of legitimacy of Security Council action, and the other way around. A coordinated relationship between the ICC and the Security Council, would engage mutual political and moral benefits for both governing institutions. The cooperation between these two institutions would create an effective response to humanitarian crises.

In *Lockerbie* case, ICJ held that it cannot judicially review the Security Council's resolution,[138] as Security Council and ICJ are parts of the same organization.[139] However, ICC and UNSC are enjoying independent relationship from each other. In the past, the ICJ has refused to undergo judicial review of Security Council's resolutions. Due to this, despite many fundamental flaws or show of power games by the UNSC, it appears that the juridical legal omnipotence of the Security Council's resolution is the final word. In this context, it is important to understand that both ICC and the Security Council represent substantial representation from the North. So it seems that such interpretation produces status quo.

However, the view that Article 39 is a discretionary competence, the exercise of which is not reviewable by the Court, is at least doubtful. As for any organ established by an international treaty, the assumption is that the Security Council is bound by the provisions of the Charter. This doesn't exclude the possibility that the Council may

[138] Questions of interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incidentsut Lockerbie (Libyan Arab Jamahirya V. United States of America), Provisional Measures, order of 14 April 1992,ICJ Reports 14.

[139] See Article 92 of the UN Charter.

have been granted discretion in the application of some of the provisions of the Charter (Martenczuk, 1999:541).

However same situation is applicable for the ICC and it is toothless before Security Council which creates the situation of paradox. In other words, whether Security Council resolutions could be reviewed by the ICC is a tricky question. In a sense, it becomes complicated and sounds more of a political matter than legal to ascertain the power of UNSC. Courts have power to review something which is coming from chapter VII of the UN Charter. Judge Weeramantry concluded in *Lockerbie* case that the decision under chapter VII of the charter is entirely within the discretion of Security Council.[140] In his dissent from the majority opinion in Lockerbie case, Judge Schebel examined the drafting history of the Charter and the jurisprudence of the ICJ, and stressed that the ICJ did not possess power of judicial review and in particular could not overrule and undercut decision of the Security Council based on chapter VII of the charter.[141]

According to Article 24 of the UN Charter, the Security Council is charged with the primary responsibility of maintenance of international peace and security. If any resolution passed under Chapter VII is under consideration then one needs to understand that serious interests are involved. Article 39 is the key to the chapter VII. It is a wider issue whether elements of Article 39 like if Security Council decides certain things to be threat to peace, is judicially reviewable. Some scholars say that council decisions are conclusive (Akhurst, 1997:219). However, positivist interpretations of the Charter and body of rules will only ensure implementation of rules by the procedure established by law. It fails to even consider its obligation towards due process of law and rule of law. Rule of law is not an obedient servant of the codified laws. In fact it comes through equity and employment of natural law and most of the time it stands beyond the black letter of law. With this consideration in mind we should see Spain's proposal to make an amendment to the Singapore proposal whereby a Security Council determination was subject to judicial review by the Court.[142] With respect to the Security Council, Libya was using the language of

[140] Ibid. P. 176 Justice Weeramentary dissenting opinion.
[141] Lockerbie,preliminary objections(Libya vs united kingdom) supra note 4, disso pp. President Schwbel ,p.n at 7-13.
[142] UN Doc.A/CONF.183/C.1/L.20.

request to engage ICC. There has been as yet no judicial interpretation of Article 16. It is possible to conceive an issue arising where, despite a Security Council resolution invoking Article 16, the prosecutor attempts to proceed. For example, the prosecutor might challenge the validity of a Security Council's resolution, arguing that it was not a valid application of chapter VII of the Charter of the United Nations. (Racsmany, 2002:385)

Indeed, in the *Tadic* case, the Appeals Chamber of the ICTY squarely rejected the decision of the trial chamber that the Security Council's determination under Article 39 was a non-justifiable political question that could not be subject to judicial review. In this regard, Amnesty International suggests that it is the role of the ICC to decide whether Article 16 has been properly triggered; thereby, it would not be directly judging whether the Security Council has properly acted under Chapter VII. Therefore, Security Council decision under Chapter VII is subject to judicial review. However, what are the criteria for the judicial review and in which manner judicial review can be initiated is a question of debate. The Security Council is creation of treaty, and may not overstep the bounds of that treaty. The Security Council is a delegate of the discretionary powers of its member states. Therefore again we can put a check on the power of Security Council under the Rome Statute where ICC considers that respective resolutions breach the purpose, principle of UN charter and Rome statute that case ICC can judicially review the decision of Security Council.

In addition to this Art.119 of the ICC Statute provides for the power of the ICC to determine itself the scope of its jurisdiction. Expressing the competence de competence principle, if interpreted restrictively, the power of verifying the jurisdiction should cover also the cases mentioned in Art.16 of the Statute. The first case involving Art.16 is connected with Resolution 1422(2002) that granted immunity to the members of armed forces participating in the operations established or authorized by the UNSC who are nationals of the States not parties to the Statute. Security Council is unable to implement chapter VII measures by its own means, and, therefore, it often makes use of other organs or entities for this purpose. The Security Council, as any other organ of an international organization, enjoys powers only in so far as they are conferred on it by or implied in the constituent instrument of the organization.

Thus, the range of powers of the Security Council under chapter VII of the Charter is determined by article 39 to 42 will be subject to *jus cogens*, principle of proportionality, principle of limited power etc. It cannot act *legibus solotus* (unbound by law). Any discretionary power of the Security Council must be derived from these specific authorizations and cannot be presumed. In theory, the Court can rule on the legality of the referral itself, refusing to proceed on the basis of a resolution that does not, in substance, indicate that the council is acting under chapter VII. If the Court can control the validity of Security Council's action at the time of referral, there is no good reason why it cannot do the same at a subsequent stage. It does not confer jurisdiction. It seems to be presumed that the ICC may exercise jurisdiction anywhere to the extent that the Security Council authorizes the exercise of jurisdiction. The necessity of the provision was also questioned on the ground that no similar priority was given to the Security Council. It is not only desirable but of utmost requirement that selectivity of this situation should be based on non-preference and objective criteria.

It is subjected to Charter and wider rule of international law. According to the principle of constitutionality, organizations have a fundamental obligation to secure the lawfulness of their actions and decisions and, inevitably, reviews to determine whether their decisions are in conformity with their constituent instruments must be carried out. This rule is equally applicable to the Security Council. *Jus cogens* is another rider on the limit on the Council's power. It can't violate *jus cogens* and seek legality of action at the same time. Further judicial review ensures possible misuse and manifestation of power by the UNSC. It is high time to assert the rule of law and negate the tendency of might is right.

Even the UN Charter gives space for the judicial review and the only thing missing is the willingness to do so. Since permanent members represent substantial real power, their effects are also reflected on neutrality of laws. The Security Council has wide discretionary powers however; it does not have absolute power. Intention of the parties, the scope of objective and purpose, the ambit of its expressed powers, the historical background are necessary riders for the exercise of legal powers of any organization, and such acts should not violate *jus cogens*. The UNSC, just as any other organ of an international organization, enjoys powers only in so far as they are

conferred on it by or implied in the constituent instrument of the organization. It shall respect purpose and principle of any organization. The Security Council has to respect the principle of proportionality (Simma, 2010:711).

IV.7 Conclusion

Law is the combination of the primary and secondary rules. These rules create structural operational space for law. Although it is debatable matter to identify classical space of executive, legislative and judiciary in the domain of international law, it does not mean that international law is exceptional to such process. Attempt to find a relationship between the UNSC and the ICC is possibly a link to identify power structure in international law. In this process relationships which have legal effects have been revisited multiple times. Similarly the relationship between the Security Council and the ICC invites many contestations. It is not the relationship of body and soul but at the same time it is close to each other that one's success fulfills others purpose. Over the years, the Security Council has emerged as a strong institution not only legally but politically as well. It gets regular media coverage and is one of the international organizations whose decisions have direct or indirect impacts on people's lives.

On the other hand, the ICC is a relatively newer organisation and there has been genuine anxiety about the prospect of international crimes where judges belonging to different nationalities will judge or investigate altogether different cases. It does invite curiosity but it also deals with serious questions in the account books of the nation's diary. However, the establishment of the ICC has opened new chapters and an era in itself. But over the years ICC gets jurisdiction on two cases namely Sudan and Libya through UNSC's resolution. Hence it has effect but at the same time there are many situations where Security Council has failed or either misuses the power it has been given by the Rome Statute. In this context it seems that judicial review is a functional necessity.

The Security Council is a political body, with wide discretionary powers, but that discretion is granted to it by a legal document i.e., the UN Charter.[143] Article 39 of the UN Charter gives authority to the Security Council to take cognizance of such acts

[143] Conditions of Admission of a state to Membership of the United Nations, ICJ Rep.1948, 57 at 64.

which are a threat to the peace, breach of peace and act of aggression. In this context, criminal justice is one of the issues which constitute therapy to the breach of peace and threat to the peace and act of aggression. Without the respect of criminal justice system, no society can enjoy peace. The Council may exercise its right to perform its obligation through ICC as a useful tool for its responsibilities under chapter VII.

The relationship between the ICC and the Security Council forms fundamental core of the international criminal justice system. The Rome Statute and the UN Charter are independent documents. ICC gets its limbs not only from the Statute but it needs support from the Council as it has heavy foot print in the international law and in the Charter system. Keeping this reality in view is a prerequisite to involve UNSC in the functioning of the Court. However this relationship is also shaped by political factors. It seems that the script of this relationship is written with the ink of post cold-war era. It enunciates an order which empowers the stake of UNSC in the criminal justice system in multiple ways. But drafters of the Charter never intended for it to have decisive role in the ICC. It needs to be mentioned that the Charter nowhere touches on individual responsibility but seeks to fix state responsibility. The basic language in which Charter operates seeks to establish a dialogue among states and in case of breach and rupture, or to fix it state responsibility. How far individual responsibility reflects the intention, object and purpose of the Charter is a matter of serious public deliberation.

Legitimacy is the acceptance of legal order by the people with free consent. In today's world, at least at procedural level, legitimacy is a wider socio-legal phenomenon for any organization. In this respect, every organization has a legal base which not only shapes the personality of the organisation but also maps out the functioning of the organisation. However, constitutional documents do not give legitimacy to the acts of such organizations. The perceptions of illegitimacy may thus arise either with failure to use authority effectively or due to abuse of such authority. (Caron, 1993:77) Similarly, the ICC and the Security Council are legal organisations and the Charter and Rome Statute give birth to these respective organizations. But, for the wider acceptability ICC and Security Council have to develop amicable relationship. It has been one of the prominent institutional desire and necessity of United Nations to have an ICC to take forward the legacy of

Nuremberg and Tokyo tribunal to eliminate the culture of impunity, and establish the norms and culture of accountability.

Deferral and referral powers of the Council are touching wider issues of national and international law. It appears that the Court has jurisdiction to objectively assess such situations and render justice based on law. However, it gives UNSC a political body to act as legal body in case if it refers and defers any matter. Due to which ICC has universal jurisdiction but involvement of UNSC in this manner has created unacceptability for ICC among some of the third world countries.

In this respect, it is important to note that Charter does not have structural mechanism to try some one for his/her individual criminal responsibility. Chapter VII was written in a fashion which seems to be tilted towards state responsibility and creation of Court gives a certain, predictable and rule based consistent platform to address the culture of impunity in this world. Where cooperation between these two institutions will increase each other's effectiveness provided it should not be used for political ends. Thus, the Security Council and the ICC should work in close nexus to strengthen the interest of effective, objective, predictable and perpetual criminal justice in the world.

CHAPTER V

CONCLUSION AND RECOMMENDATIONS

"The conscience of humanity is like that of a dying man. All his sins invade his mind in his last hour, when he/she is powerless to repair them." (Wilt, Vervliet, Sluiter and Houwink, 2012: 257)

This sentence from Raphael Lemkin's unpublished autobiography captures the essence of criminal justice of our era. The condition of the International Criminal Justice system is like a boiling frog. It is a reference to an anecdote which basically describes the phenomenon of a frog being slowly boiled alive. Initially a frog is placed in water, it has the opportunity to jump out, but if it is placed in cold water that is slowly heated, it will not perceive the danger but enjoys the slow heat and finally when it perceives the danger it is too late as it is cooked to death. The story is often used as a metaphor for the inability or unwillingness of people to react or be aware of threats that occur gradually. This metaphor is equally suitable for conscience of the international community during or before the occurrence of core crimes. In this context it is relevant to revisit summer Olympic Games of 1936 which was held in Germany. By this time Nazi had started its agenda of massacre. It had designed substantial policies and infrastructure for upcoming holocaust. But no state boycotted the Olympic Games. In fact, states did their best to control the entry of German Jews seeking asylum. Due to which even potential escapists from the Nazi regime could not escape and were forced to become victims of genocide. However, after the WWII good sense prevailed and victorious powers proceeded to punish perpetrators of wars. Thus unfortunately Lemkin's emotional and painful statement proved to be factually correct.

In today's time concept of human rights is a universal phenomena. The relationship between the human rights and international law reinforces each other. It is safe to assume that the ICC is another extension of human rights institutions. In this context, it becomes important to highlight that the 'element of crimes' under the Rome Statute covers the broad range of human rights issue under the purview of the ICC.

The litmus test for the ICC is to differentiate how it is not a mere extension of Nuremberg and Tokyo tribunal. It is only then the ICC will evolve to prove its credentials in Global South. In contemporary times, the supplementary apparatus of ICC like UNSC, ICR, Complementarity, R2P etc. are marking its presence in the domain of international law. At the same time, the role with respect to the ICC is becoming divisive. In this context, the growth of international law led by the question of sovereignty of nations, North- South relationship, the distribution and production of wealth , space for TNC (Transnational capitalist class/international community), and the question of democracy are relevant questions for the ICC. However, if the justice is constitutive of the above mentioned actors, then such questions are hard to ignore. The ICC can no longer afford to be isolated.

From human rights lens, which often coerced from Global North perspectives, the third world has poor records. Particularly, wider narratives carry the impression that the cultural spaces of third world countries have contradictions with current human rights regime. On the other side, the Global North appears to have sanitized the image. The Global North definition of democracy manifests this sanitization in the form their biased interpretation of rule of law, human rights, and the like. Such manifestation gets the imprint in the internal structure of ICC and other relevant international law.

With this background, this research is an attempt to understand the ramifications of the ICC on the Global South. Ever since the inception of ICC in 2002, the accused being targeted belong to the third world countries. However, there are similar situations in some part of Global North and in particular the leaders' role in those regions equally creates space for human rights violation. Ironically, there are many friendly countries of North in the Global South whose role equally demands judicial intervention. Nonetheless, the diplomatic and political condition shakes hands with the perpetrators and the ICC merely becoming a mute spectator.

1. The ICC carries its operation in the name of international community. It is nothing but an abstract entity. But what is international community and how is it constituted conceals more than what it reveals. It often coincides with TNC of the international economic laws. However, the fact is that the international community reflects the genes of Global North. This leads to adverse outcome in the ICC. Given this, it is to

be noted that the Global North has appropriated the language of international community in such a way so as to give universal identity and territory to the ICC. This leads to an ultimate interpretation which suggests that the North enjoys perpetual immunity from ICC, thereby making Global South as the exclusive subject of ICC.

The Rome Statute is tilted selectively towards civil and political rights. It thus emerges as an institution that criminalizes the breach of individual human rights. But it does not include the second generation rights into its institutional purview. Further, we should be mindful of the fact that the violence in the society comes with respective social and legal fractures in the nation. In such a scenario, prosecutorial trial may widen the trust deficit. Instead, transitional justice may provide healing to the pain. But, there are opposing views against political settlement. A rhetoric in Global North calls for trial of all kinds of atrocities. However, the world should be precautious of the fact that the ICC should give leeway to political settlement provided it is fair and consensual, and does not give impunity to serious offenders.

2. The current international criminal justice system is premised upon the Rome Statute which seems to be closer to the neoliberal model of governance. It requires a huge economic might to have a case being tried at The Hague. It creates lucrative job prospects for people and further engages academia of north. The obvious outcome of this is that the third world lawyers and academia are highly underrepresented in international justice system. Needless to mention here that, the rule of law and the principle of fair trial demands that the trial involving the third world nations should be the part of economic responsibility of the ICC. This will in turn respect the idea of equitable representation and effective inclusion at the ICC.

3. In this context, it needs to be highlighted that the rule book of Rome Statute operates as a satellite to the image of ‘sacrosanct state’. Here, the democracy is the base on which international rules are supposed to function. However, in today’s time, democracy has been reduced to the procedural processes in large part of the world. ICC too works in top down model. Its language is limited. The rules of the engagement are confined to certain technocratic jargons often diverged from social and political reality of the ground. The Court must ensure representative character so that plurality of opinion and independence of the system can be maintained.

4. Individual criminal responsibility is the reflection of the atomization of the international law. It needs to mention that state is an abstract entity and in order to commit itself against international crimes some sort of organization is required. International crime is the ultimate reflection of a series involving fugitives an every level and conspiring against the universal peace. In other words, international crimes may be a collective act. The role of individual may be decisive in committing the crime but the larger organizational support system under which such crime is committed gets amnesty. Exemplifying through the prism corporate functioning and its growing might, sometimes even more than some nation-states; it is seen that they involve themselves in heavy terrorism financing. They even go to an extent of prolonging the ongoing conflict. Say for example, the availability of ISIS oil may provide huge profit to the entities which manage its supply and delivery chains. In effect, such corporate entities, at times, want to prolong conflict situation so that they can carry on their profit cycle. The same is true for arms dealers. The corporate entities may not be directly participating in the hostilities but their supply of money capacitates recruitment of mercenaries who may commit war crimes. In this context, the Rome Statute needs to be creative enough to evolve and enlarge its modus operandi to fix corporate criminal liability.

This leads to two broad interpretations:

i. The process of targeting only the ‘individual’ highlights suppression of state responsibility.

ii. In international trade and economics, State responsibility still gets ultimate expression.

The idea of punishing the individual can have negative consequences. Criminalizing the individual may render emotional satisfaction to the victim but this is a very narrow approach. Such exemplary punishments may create divide in the society having far reaching consequences. In fact, punishments have failed to register any significant deterrence.

5. Complementarity is the convergence point of national and international criminal jurisdiction. It ensures ICC’s transition with the national jurisdiction. At the same time, the Rome Statue gives wide discretionary powers to the ICC to decide the place

of trial and label the state's criminal justice system as an inefficient body. In many ways, ICC functions as a superstructure over the state judicial system. The two cases are important. First, it may give power to state to refer cases against opposition to the ICC thus there is possibility for its misuse by state. Second, the other possibilities arise in case of referral by the UNSC. There are no authoritative and conclusive guidelines to know the status of complementarity in case of referral by the UNSC. Thus, it gives authority to the ICC which may led to the homogenisation of the domestic laws.

Responsibility to protect is a moral and ethical doctrine. However, its application makes it problematic. In this respect, R2P seeks to intervene in countries territory and oust the regime so that international community may prevent the happening of the grave crimes.

6. The relationship between the UNSC gives another significant dimension to the power of the ICC. UNSC is the protector and trustee of the Charter system. The United Nations and ICC, both are independent institutions, but, in purposive sense, they are interdependent institutions. Successful fulfillment of their objectives goes to help each other. We need to be conscious of the fact that the Court is a legal body whereas UNSC operates politically with vast powers to dispose. A free hand to the UNSC with respect to the ICC may further undermine the purpose of the Court and harm the interest of Global South. There are objective evidence to show how UNSC has violated the pith and substance of the Rome Statute. In this context, the involvement of UNSC should be a subject matter of the judicial review so that whim, caprice or political bargaining is ruled out. It is important to note that there is one narrative which says that creation of the ICC has reduced the power of the UNSC to exercise its vast power with margin of discretion. UNSC's veto power is severely challenged. In order to pass any referral and deferral, nine affirmative votes are required, where non permanent members may show their strength of their numerical unity. However, on ground, the facts and figures counter and give opposite impression. In this respect, it is important to note that the third world countries have always demanded the democratization of the UN system and there are many movements to question the power and privileges of the UNSC. In this respect, the ICC's recognition of the UNSC in the justice delivery system gives regards to the

power of the UNSC. However, it gives space to critique, such as it reinforces post WWII status. It is important to mention that Security Council resolution is different from the referral power of the prosecutor and the states. In this case, it may bring the case from non- member States. Thus, it creates fear among the Global South about the dominance of Global North.

The protection of life and liberty is the signature tune of law. To ensure safety and well being of human beings the prevention of atrocities is a precondition to establish the rule of law. Thus establishment of the ICC is a progressive act. However, the ICC is emerging as central agency at the cost of appropriation of power of nations. Thus, the ICC undermines the sovereign rights in a significant manner which is ultimately going to affect the Global South. Thus ICC lacks substantive and procedural attributes of democratic governance.

Following conclusions can be drawn from my research in this dissertation:

i. The sovereignty of the third world and the working of ICC shows clear clash of interests. This is consequential of that fact that, ICC is predominated by the Global North.

ii. Human rights occupy the central space under the Rome Statute.

iii. ICC and the UNSC give legitimacy and reinforce each other to expand its influence and power.

iv. The Court holds policy questions and attempts to homogenize state's political power to grant amnesty and create laws to reduce punishment.

Recommendations

In the backdrop of this discussion the following recommendation are worth considering:

1. ICC should be receptive and responsive towards its critique from the Global South.
2. The power of UNSC under chapter VII of the UN Charter may derail the work of the ICC. There is a need to review the power of referral and deferral of the UNSC.

3. The might of corporate entities play a significant role in absolute disrespect for human rights. The cognizance of such human rights violations should be tackled by the ICC without any further delay.
4. There should be a review process for the ‘element of crimes’ under the Rome Statute. It should include terrorism, drugs trafficking, money laundering, and bid rigging. A due consideration should be given to first and second generation rights in the overall jurisprudence of ICC.
5. There is a need for social and cultural inclusion from the Global South in every intricacy of the administration of international criminal justice. This will in turn do away with widening trust deficit within international community for the ICC.

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