## CHAPTER – 5 APPLICATION OF THE STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS

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5.1 Introduction

The contribution of the ILC to the codification and progressive development of international Law in the period since its first session in 1949 has been nothing short of remarkable. The ILC’s Articles on State Responsibility, although taking over 50 years to produce, can rightly be regarded as one of the ILC’s most important contributions to the system of international law.\(^1\) The ILC, however, is not the only body that makes such contributions. International courts and tribunals have increasingly played an important role in clarifying and developing a number of areas of international law, including the law of state responsibility. This Chapter examines the treatment by international courts and tribunals of the law of state responsibility. There is consideration of specific courts and tribunals including the ICJ. Human rights Courts, ICC, International Criminal Tribunal for Rwanda and Former Yugoslavia (ICTR and ICTFY).

Issues of State Responsibility have engaged the attention of both the PCIJ and the ICJ. Issues of state responsibility before the court may be said to have fallen into three broad categories. First, do the actions concerned actually engage the responsibility of the state concerned? Second, if the respondent state is responsible for an international wrong, what is the appropriate remedy? Third and it is a more manifestation, what is the relationship between the law of state responsibility and other applicable substantive law in the particular case?. On 10\(^{th}\) October 2002, in the Court’s Judgment in the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon V. Nigeria) Case*\(^2\), a fourth aspect of the law of state responsibility was very much in focus, although the case principally concerned territorial title.

Since the early 1970’s, the periodic findings on state responsibility that the Court has had occasion to make have been pronouncements handed down against the background of intermittent work by the ILC on state responsibility,\(^3\) recently culminating, of course, in the final impressive and scholarly push to the articles which

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\(^3\) Supra Note 1, See also the earlier work of S.Rosene, *The International Law Commission’s Draft Articles on State Responsibility*, (Dordrecht, 1991)
were the subject of a General Assembly Resolution adopted on 12th December 2001 whether there is a symbiotic relationship to be traced is for others to decide.

Broadly speaking, a crime is an act punishable by law. Law lays down certain rules and other violation is made punishable. International law also lays down certain rules and their infringement is a crime. In national systems such crimes are determined by courts and the accused persons on proof of their crimes are punished. International law has also laid down certain rules, e.g., The Hague Rules for the conduct of war. These rules were violated with impunity during the First and the Second World Wars. The PCIJ was the first regular international judicial organ established in 1921 and it was succeeded by the present ICJ in 1946. But these courts have no jurisdiction to try international crimes. In 1948 another crime, the crime of genocide was created by the Genocide Convention. Thus, genocide also became an international crime. A number of conventions and treaties have since then created international crimes, but there was no court to try the violations of such laws. It was the Rome Treaty of 1998 which has ultimately established a forum as the ICC.

The traditional approach to the criminal justice faces the challenge of balancing multiple goals, usually expressed as deterrence, incapacitation, rehabilitations and retribution, which focus on crime control. In criminological theory, the restorative justice paradigm is often preferred as the principal alternative to retributive Justice. Crime is viewed primarily as a conflict between individuals that results injuries to victims, communities and the offenders themselves and only secondarily as a violation against the state. International Criminal law is often justified in a similar way international jurisdiction is seen as an extension, by delegation, of state power to determine criminal law norms and to punish transgressors. The transformation of the laws of war by the Yugoslavia and Rwanda Tribunals, and the subsequent establishment of the ICC, however, illustrate that international legal development is far more contingent and complex than the relatively simple model used by rational design. Understanding its role in international criminal law provides an opportunity to evaluate the normative implications of the

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judicialization of international relations. It traces the development of the laws of war, and interaction with international criminal law, from the Nuremberg Tribunals\(^8\) though the establishment of the ICC.

Recently, there have been significant developments in the realm of international law in the past few weeks, and in numerous different forums. In the field of international criminal law at the ICTY, the Court decided to grant early release to Biljanaplavsic, a politician who had an instrumental role in the conflict in the former Yugoslavia. She was sentenced to 11 years imprisonment under the terms of plea bargain entered into with the prosecutor in 2003, after pleading guilty to the crime of persecution, a crime against humanity. In a decision on 15-9-2009, the Court granted her early release based on the assessment that she had shown remorse and had shown substantial evidence of rehabilitation. This is a decision that has not been without criticism, as Biljanaplavsic was one of the highest ranking officials to have been convicted by ICTY.

In another case before ICTY, the former spokesperson for the Tribunal, Florence Hartmann was held guilty of contempt of the court and ordered to pay a fine of 7000 Euros. This decision was based on the finding of contempt in accordance with the statute of ICTY, as she had published confidential information from the trial of Slobodan Milosevic in a book authored by her. The chamber also commented on the impact of the release of such confidential information, as the Serbian Government had released the information on the understanding that it would only be used for the purpose of Milosevic Trial. The chamber noted that the release of such confidential information could deter states from cooperating with international courts in the future.

The last development to comment on is the Security Council Resolution 1887 of 24-9-2009, relating to the maintenance of international peace and security, Nuclear Non-Proliferation and Nuclear Disarmament. In this resolution, which was sponsored by the United States, the Security Council called on states to work together to take steps to create a nuclear weapon free world. This included calling on states to adhere to and honour the commitments made under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). It also included a call to states that were not parties to NPT, to accede to it in order to achieve universality of the Treaty. This is particularly interesting from the point of view of the Indian Government stance which has been a

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steadfast refusal to sign up to NPT. It is to be seen how the Indian Government reacts to this renewed call to sign and adhere to NPT.9

In fact, enforcement of responsibility at both levels (State and Individual) remains episodic and unsystematic. The proliferation of normative standards and their characterization as peremptory in nature and *erga omnes* in character does not make their enforcement a smoother process. In fact, the duality of state and individual responsibility for crimes under international law comes to the fore if one looks at the way in which the two forms of responsibility may be enforced internationally. As is known, extant international tribunals have jurisdiction over either states or individuals. The ICJ may pass judgment on disputes between states. Such international criminal tribunals as the ICTY, ICTR and the ICC have jurisdiction over individuals only. It is not infrequent that different jurisdictions are seized with the same set of facts, which may give rise to both state and individual responsibility.10

The risk of conflicting jurisprudence among different international judicial bodies should not be overestimated although it cannot be ruled out. As regards the criteria for attribution of the conduct of a group of individuals to a state, the ICJ had held in the *Nicaragua case*11 that the state must have effective control on the specific activities in the course of which the alleged violations of international law took place.

### 5.2 Role of ICJ

The Primary context is the role of the ICJ in the making of general international law. Sir Hersch Lauterpacht expressed the view that this was a major role of the Court when he published his book on the Development of International Law by the PCIJ (in 1934), which appeared in a revision published in 1958, referring to the work of both the pre-war and post – 1946 courts.12

In the long term the most important role of the Court is no doubt, the peaceful settlement of disputes. But the role of law making has been and remains significant while courts of arbitration may make a contribution; it is the court which, as a mainstream interpreter of general international law has produced the most important

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decisions on state responsibility. Such decisions include the factory at *Chorzow Case*,\(^{13}\) the *Corfu Channel Case*\(^{14}\), the *Nicaragua Case*,\(^{15}\) the *Nauru Case*,\(^{16}\) and the case concerning United States Diplomatic and Consular Staff in Tehran.\(^{17}\) A related issue concerns the relationship between the Court and the ILC. This relationship does not involve any problems and there is a complementary. In its work of codification and progressive development the Commission pays careful attention to all the sources, and especially the jurisprudence of the court. Conversely, as in the *Gabcikovo-Nagymaros Case*,\(^{18}\) the Court will when it sees fit, rely heavily upon the draft articles produced by the Commission, even if these were not yet at the stage of second reading in the Commission.

State responsibility is sometimes seen as a special topic within public international law, and so of course, in some sense, it is. Yet it is a matter or foundation subject, and thus has a quasi-constitutional role. State responsibility after all provides the foundation of the law of treaties and constitutes the most basic part of general international law.

The question debated in the literature from time to time is whether the basis of state responsibility is a fault or a concept of relatively strict liability normally referred to as ‘objective responsibility’, of course, no one doubt that either fault or intention, when proved are sufficient to generate responsibility.

As a matter of positive law the position is clear. Both the practice of states and the preponderance of the decisions of international tribunals adopt the concept of objective responsibility. The small numbers of jurists who favour fault tend to do so because they have misunderstood the reasoning of the Court in the *Corfu Channel Case (Merits)*.\(^{19}\) This misunderstanding arises from the emphasis in the judgment upon the need to prove knowledge on the part of Albania of the existence of the mines in her territorial sea. In fact, in the light of the subject matter, knowledge was the prerequisite of the legal duty of the territorial sovereign to give warning of the

\(\text{13 Factory at Chorzow (Indemnity) Case [1928], series A. No.17}\
\(\text{14 Corfu Channel (United Kingdom. V. Albania) Case, ICJ Reports, 1949, p.4}\
\(\text{15 Supra Note 12, p.14}\
\(\text{16 Certain Phosphate Lands in Nauru (Nauru V. Australia) case, ICJ Reports, 1992, p.240}\
\(\text{17 United States Diplomatic and Consular Staff in Tehran (United States V. Iran) Case, ICJ Reports, 1980, p.3}\
\(\text{18 Gabcikovo – Nagymaros Project (Hungary / Slovakia) Case Judgment, ICJ Reports, 1997, p.7}\
\(\text{19 Supra Note 15}\

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existence of the mines. The Court was not deciding on the basis of an acceptance of some general theory of fault or otherwise.

It can be moved to another aspect of the subject, which is the relationship of responsibility to other areas of international law. Many principles of international Law are concerned with the allocation of powers and relationships which do not generate state responsibility.

A different situation arises when a claim to territorial sovereignty or other jurisdictional rights in the use of coercive measures. Thus in the Anglo Norwegian Fisheries Case, the international court was assured to give a declaration concerning the legal validity of a system of baselines of a fisheries zone. The United Kingdom, as the applicant state, also asked for compensation in respect of arrests of British fishing vessels in the waters regarded as high seas by the United Kingdom. In the course of the oral hearings the issue was dropped. However, it is of interest to recall that, in the context of the proceedings in the Anglo-Norwegian Fisheries case, Norway reserved the right to make a claim for damages against the United Kingdom for the harm caused by a refusal to recognize Norwegian sovereignty and the resulting activity by British Travellers in the Norwegian Fishing Zone.

A particular constraint imposed by the International Court is the refusal to allow applicant states to extend their original claims by amendment of the submissions. Amendment of submissions is a common practice and the distinction between permissible modification of a claim and the formulation of a different claim by amending submissions had led to differences of judicial opinion. In the Temple of Preach Vihear Case (Merits), Cambodia in its final submissions had asked the court to order restitution of sculptures and other objects removed from the temple by the Thai authorities since 1954. The International Court regarded this claim which had not appeared in the application to be implicit in, and consequential on, the claim of sovereignty itself. In a joint declaration in that case judges Tanaka and Morelli expressed a different view and stated that the claim relating to the objects removed from the temple was one ‘having a complete different subject’ to the claim of sovereignty. In the Fisheries Jurisdiction (Federal Republic of Germany V.
Iceland)Case (Merits) the Court set aside the applicant’s claim to compensation for alleged acts of harassment by Icelandic Patrol boats, but this refusal to accede to the request was not based on the view that issue was outside the dispute over which the court had Jurisdiction. The court expressed itself as follows:

The matter raised therein is part of the controversy between the parties, and constitutes a dispute relating to Iceland’s extension of its fisheries jurisdiction. The submission is one based on facts subsequent to the filing of the application, but arising directly out of the question which is the subject matter of that application. As such it falls within the scope of the courts jurisdiction defined in the compromiser clause of the Exchange of Notes of 19th July 1961.24

Thus in the Nuclear Tests Cases the important joint dissenting opinion of judges Onyeama, Dillard, Jimenezde Arechaga and Waldock was much concerned to demonstrate that the essential character of the Australian Claim was that of an action for a declaratory Judgment and consequently it was impossible to reject the applications on the grand that the cases had ceased to have any object in view of the French declaration of a cessation of atmospheric testing.25

At this stage it is necessary to return to the leading cases on state responsibility decided by the Court. It could explain by referring the Corfu Channel Case. This decision provides a very helpful demonstration of the necessary transition from the generalities of the literature to the particular problems of the marshalling of evidence, the standard of proof and the application of the relevant legal principles in particular situations. In the result the Court held that Albania was responsible for the explosions that occurred on 22nd October 1946 in Albanian waters. This decision was consequential upon the court’s conclusion on the law and the facts, which were as follows:

From all the facts and observations mentioned above, the Court draws the conclusion that the laying of the minefield which caused the explosions on October 22nd, 1946, could not have been accomplished without the knowledge of the Albanian Government. The obligations resulting for Albania from this knowledge are not disputed between the parties. Counsel for the Albanian Government expressly recognized that if Albania had been informed of the operation before the incidents of

24 Fisheries Jurisdiction (Federal Republic of Germany V. Iceland) Case ICJ Reports, 1974, p.175, at p.203 (Para 72)
25 Nuclear Tests (Australia V. France) Case, ICJ Reports, 1974, p.253, at pp.312-19
October 22\textsuperscript{nd}, and in time to warn the British Vessels and Shipping in general of the existence of mines in the Corfu Channel, her responsibility would be involved.

The obligations incumbent upon the Albanian authorities consisted of notifying for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based not on the Hague Convention of 1907, No.VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely elementary considerations of humanity, even more exacting in peace than in war, the principle of the freedom of maritime communication, and every state’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states.

In fact, Albania neither notified the existence of the minefield, nor warned the British warships of the danger they were approaching. The Judgment of the Court provides a valuable reminder of the need to avoid generalizing principles and simplistic polarities in the sphere of state responsibility. The significance of focusing upon the precise character of the legal principles and causes of action involved in the individual case appears again in the case concerning Military and Paramilitary Actions in and Against Nicaragua (Merits).\textsuperscript{26}

In this case also the basis of imputability was related to the nature of the particular cause of action, and to the type of evidence available. With respect to the direct attacks on ports and installations and the laying of mines in Nicaraguan internal or territorial waters, these were carried out by United States nationals or by other agents of the United States. The planning direction support and execution of the operations involved United States nationals or foreign agents of the United States. On this basis the imputability of these acts to the United States was held to be established.\textsuperscript{27} In respect of violations of Nicaraguan sovereignty by over flights, the evidence consisted for the most part of admissions in documents submitted to the Security Council and consequently the attribution of responsibility to United States created no difficulties.

Responsibility for the paramilitary activities of the contras directed against Nicaragua from bases in Honduras and Costa Rica involved the Court in significant

\textsuperscript{26} Supra note 12, p.14
\textsuperscript{27} Ibid pp. 45-51 (Para’s 75-86)
distinctions. In particular, the degree of control exercised by the United States was Critical. The Court recognized the partial dependency of the contras upon the United States but concluded that the degree of control exercised by the latter did not have the implication that the acts committed by the contras in and against Nicaragua were attributable to the United States.

The result was that assistance to the contras by the United States, in the form of training arming and financing the contras constituted a breach by the United States of its obligations under customary international law not to intervene in the affairs of another state. In the same way assistance to the contras constituted a breach of the principle of the prohibition of the use of force and infringements of the territorial sovereignty of Nicaragua.\(^{28}\)

In contrast to these determinations, the Court held that the relationship of the United States to the contras was not so close as to render the United States responsible for breaches of humanitarian law committed by members of the contras. It is to be recalled that in the *Tadic case*.\(^{29}\) The UN ICTY, Trial Chamber II, carefully distinguished the Nicaragua case on the facts.

In concluding, it must complete, in summary form, my review of the leading cases. *The Tehran Hostages Case*\(^ {30}\) is important. It confirms the existence of responsibility on the basis of the approval and adoption of the harmful acts of individuals who are not, as such agents of the Respondent State.\(^ {31}\) The case also involved the existence of a closed system of obligations relating to the Vienna Convention on Diplomatic Relations. And finally there is the *Nauru Case*,\(^ {32}\) which related to the complex case of multilateral disputes. This review has been curtailed in certain respects in order to avoid comment on certain very recent proceedings in the Court.

In conclusion, two general observations are called for. In the first place, the law of state responsibility grows on the basis of its application in concrete situations. In this respect the Court’s jurisprudence has been of primary importance. Secondly, there is a nice question, which will no doubt remain unresolved, concerning the balance between the role of the Court, in the context of dispute settlement, as the

\(^{28}\) Supra Note 13, p.17
\(^{29}\) Prosecutor V. Tadic Case, International Law Reports, Vol.112, p.2 at pp.188-200
\(^{30}\) Supra Note 18
\(^{31}\) Ibid Para’s 73-76
\(^{32}\) Supra Note 17
author of declarations of rights, and the court’s role in the context of the implementation of judgments and crisis management. The difficult question of balance arises especially in the sphere of remedies.

5.2.1 Jurisdictional Philosophy

It is needless at this juncture to go back into the details of jurisdictional principle of the ICJ. It is suffice to say that the contentious jurisdiction as its basis and the optional clause would permit the exercise of the jurisdiction only on the national basis that the Jurisdiction is available because the consent has been given for its exercise. Incidental jurisdiction is provided for but its exercise has to be resorted to sparingly. Apart from this there is hardly any justifiable circumstance under the statute for the Court to exercise its jurisdiction.

Nor can the jurisdiction be based on a liberal interpretation. This is the logical outcome of the court’s basis of jurisdiction as enshrined in the statute for consensual basis is the foundation of the jurisdiction of the court. There are a number of decisions of the court substantiating this position. The efforts to broaden the jurisdiction have only been unfructified and they have mainly remained to be dissenting opinions or the views of jurists. It is this philosophy of restricted jurisdiction of the ICJ that has to be taken as the cardinal content of the exercise of the jurisdiction. In fact the ICJ was primarily holding this as the single important consideration for the determination of the competence of court to exercise jurisdiction.

This basic tenet would have to find its application in every instance of jurisdiction by the court, whether contentious, compulsory, or incidental. In fact, even its advisory jurisdiction cannot be used disguisedly to subvert this fundamental basis of jurisdiction. Thus even in the cases of exercise of incidental jurisdiction of the court, like intervention, the fundamental basis remain unaltered. This is clearly reflected both in the statute of the ICJ and the rules of the court. This limitation also

34 Dr.P.Ishwara Bhatt, *Essay in Law*, The Incidental Jurisdiction of the ICJ, p.118
37 *The Eastern Carelia Case*, (1923), PICJ Ser.B.No.5, p.7
affects the exercise of the jurisdiction of the Court where in the absence of intervention the Court has to give a finding on a dispute between the parties but the decision is likely to affect a third state which is not a party. The argument that the court can still go ahead by delivering its judgment so long as the parties mutual rights are the direct concern of the settlement of dispute irrespective of how the decision is going to affect a third state which has not intervened, is a simplistic assertion of the situation. It requires further analysis of the situation so as to determine whether the decision in that event would not destroy the very consensual basis of the jurisdiction of the Court which is fundamental and therefore of paramount importance. Hence a careful study of the decisions in *Monetary Gold Case* or *phosphate Lands in Nauru* has to logically take into consideration the very foundation of the jurisdiction of the Court and then should seek to analyze them from a perspective of that fundamental philosophy of the Court. The essence of that philosophy has succinctly been summed up by the Court itself in the Monetary Gold Case where the Court observed.

“Whereas in the present case, the vital issue to be settled concerns the international responsibility of a third state, the Court cannot, without the consent of that third state, give a decision on that issue binding upon any state, either the third state, or any one of the parties before it.” Yet, at the same time the court would not be justified in declining exercise of jurisdiction merely because an interest of a third state, not party to the dispute, is going to be affected by its decision.

### 5.2.2 The Genocide Convention

The Genocide Convention is principally concerned with prosecution of individuals who perpetrate genocide. According to Article IX, disputes concerning ‘the interpretation, application or fulfillment of the present Convention including those relating to the responsibility of a state for genocide or for any of the other acts enumerated in Article, III, shall be submitted to the ICJ’. In its February 2007 judgment on the Bosnian Application against Serbia, the Court confirmed that states as well as individuals may commit genocide, furthermore, held that Article IX of the

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38 Supra Note 36
39 ICJR 1992, p.240
40 Supra Note 36, pp.406-407, [ILR]
41 Phosphate Land in Nauru, Supra Note 40, p.261
Convention gives the Court jurisdiction to adjudicate charges by one state that another has perpetrated genocide.\(^{42}\)

It is also possible for the ICJ to exercise jurisdiction over states that are not parties to the Genocide Convention, or those that are but that have made reservations to Article IX, to the extent that such states have accepted the general jurisdiction of the ICJ in accordance with article 36(2) of its statute. There are at least sixteen states that fall into this category, Botswana, Cameroon, Djibouti, Guinea-Bissau, Japan, Kenya, Madagascar, Malawi, Malta, Mauritius, Nauru, Nigeria, Somalia, Surinam, Swaziland and Uganda. The Court could exercise jurisdiction in a case charging one of these states with genocide or violation of one of the other obligations in the Convention that is deemed to constitute customary international law.

5.2.3 Litigation Pursuant to Article IX of the Convention

Fourteen cases have been filed before ICJ, pursuant to Article IX. The First by Pakistan in 1973 alleged that India was breaching the Convention because it proposed to transfer Pakistani prisoners of war to Bangladesh for trial. The case was discontinued following political negotiations. The second, by Bosnia and Herzegovina in 1993, charged the former Yugoslavia (Serbia and Montenegro) with genocide.\(^{43}\) Two provisional measures orders were granted by the court. After failing to obtain the dismissal of the case based on preliminary objections, Yugoslavia filed a cross demand charging Bosnia with genocide. Judgment on the merits was issued in February 2007. In 1999, ten applications under article IX were filed by Yugoslavia against members of the North Atlantic Treaty Organization concerning their conduct during the Kosovo bombing campaign. Two of the applications in which Spain and the United States were respondents, were dismissed summarily. The others were rejected on the merits in 2004. In 2002, the Democratic Republic of Congo charged Rwanda with genocide. The case was dismissed in 2006 based on Rwanda’s reservation to article IX of the Convention. A case filed by Croatia against Yugoslavia in 1999 is still pending.

Arguably, article IX of the Convention does nothing more than give the ICJ jurisdiction for disputes arising between states parties about the ‘interpretation,
application or fulfillment’ of the various obligations that arise with respect to the specific obligations set out in the Convention, that is prosecution, extradition and enactment of domestic legislation. Article IX of the Convention makes explicit reference to state responsibility.

5.2.4 ICJ: Some Suggested Reforms

The end of the cold war between two mutually intolerant ideologies is not the extinction of war. Neither is it the establishment of peace and decrease of conflicts confrontations and disputes in the international society. For obvious reasons, the imperatives of global peace and security demand the strengthening of international law and its institutions because of the increased expectations from them.

One of such international institutions is the ICJ, the principal judicial organ of the United Nations. This Court as well as its predecessor in the past had few occasions to express themselves and hence played a relatively restricted role. There are certain reasons for the ineffectiveness and the minimum use of the services of the Court which includes the consensual basis of its jurisdiction, the reservations attached with the optional clause accepting its jurisdiction, lack of executing power and the absence of execution machinery. Further, the most important and worst affected subject of international law; that is individuals have been excluded from availing the services of the court. Sometimes states deny the international protection, services and other rights to their own subjects, but they have no voice before the World Court and they remain deprived of their due.

As the ICJ is a noble institution of international law, it is useful to have a fresh out look at its organization, structure and procedure so that measures necessary for making the court an effective instrument of peaceful settlement of international disputes and development of international law may be suggested. The Court can contribute more effectively to the development of substantive international law, only when it gets more opportunity to decide the disputes, because every application of law is itself creating a law. To this end the provisions of the United Nations Charter and the Statute of the ICJ which rendered it unutilized or underutilized in the past require re-examination and reflections. Since the constraints of space do not permit a comprehensive in query into all the factors responsible for the ineffectiveness and the

44 W. Michael Reismann, “International Law After the cold war”, AJIL, Vol.84 (1990), pp.859-866
minimum use of the court, the study focuses attention on the issues of jurisdiction, reservations, lack of court’s access to individuals and the lack of binding authority of the court’s decisions.

### 5.2.5 Consensual Basis of Jurisdiction of the Court

The jurisdiction of the court is based on the individual consent of the sovereign states. It is the choice of the states to avail the services of the ICJ. The Court thus gets little opportunity to interpret and apply international law and to dispense justice. It further restricts the court from considering a wide range of topics of international law. It would be in the interest of the international law in particular and the world society in general, that all the states should be under the jurisdiction of the court so that it may have the maximum opportunity to deliberate upon the international law problems and apply the law to the contemporary needs of the participants of the world community. In order that the court may have maximum opportunity to dispense justice, it is necessary that the consensual basis of the jurisdiction of the court should be replaced by the compulsory jurisdiction for all the states.\(^{45}\)

Some might say that this is a utopian suggestion. It is true that the forces opposing compulsory jurisdiction still have the upper hand, but if the International court is to be made effective to face the challenges of the 21\(^{st}\) century, member state of the United Nations will have to invest the court with a general compulsory jurisdiction. The only alternative is a weak, underutilized ICJ with a limited role in the international system.

The automatic compulsory jurisdiction of the court will make it more effective instrument of dispensation of justice. Any aggrieved party will be able to go to the court and seek remedies. The opposite party will be under a duty to appear before the court and take part in the judicial proceeding. The International Court will thus, be just similar to municipal courts in ensuring the quality before law and equal protection of law, the fundamental basis of judicial system.

The consensual basis of jurisdiction of the court amounts to the right of a state to seek judicial redress dependent on the wishes of the opposite party. This choice of the opposite party leads to the imposition to its sovereignty over the applicant state.

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This result of sovereign inequality is the gross violation of the principle of sovereign equality of the states enshrined in the Charter of the United Nations. The compulsory jurisdiction of the court will remove this inequality between sovereign states. The applicant state’s right to get justice from the court will no more is based on the choice of the opposite party. It will firmly establish the principle of sovereign equality and the right to get justice. The result of the compulsory jurisdiction in relation to the Court will be that it will bring greater number of cases before it. The Court will get maximum opportunities to apply international law and to declare what the law is. Thus, the Court will be able to contribute more effectively to the development of international law.

The ICJ, at present, has the full docket of important cases with a variety of new questions of international law and a new group of states. The reforms suggested above will make this business of the court a permanent feature.

5.3 The International Criminal Tribunals for Former Yugoslavia and Rwanda

The Victorious powers of the Second World War established two tribunals for the trial and punishment of individuals of defeated states. The Nuremberg and the Tokyo war crimes tribunals though may have certain lacunae; they “represented a watershed in the process towards an effective criminal law regime.” The most important contribution of these trials was shaking the foundation of state sovereignty as a shield against crimes in international law. Piercing the Veil of state entity, the Nuremberg Tribunal observed:

“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

Thus, the international military tribunal at Nuremberg was the first instance in modern international law where individuals were made accountable for international crimes. This principle of accountability evolved by the tribunal was endorsed by the General Assembly of the United Nations in 1946 (G.A. Resolution 95 (1)).

48 41 AJIL 172, p. 221
United Nations also felt the need of an ICC and made efforts in this direction, in 1951 when a committee was established to examine the probability of creating a criminal chamber of the ICJ. It, however, did not succeed. Again in 1953, another proposal was made to establish an independent ICC, but this also did not materialize.

The International community again after more than four decades witnessed atrocities and grave violations of international humanitarian law in the territory of former Yugoslavia. This led the Security Council to take an unprecedented step by establishing an adhoc criminal tribunal for Yugoslavia by deriving its authority from Chapter VII of the Charter. This tribunal was established in 1993 (Resolution 808 of 22 February, 1993). A Similar tribunal was established for Rwanda in 1994 (resolution 955 of 8th November, 1994).

The establishment and practice of the adhoc ICTY and ICTR, have been, and still are, regarded as “Precedents” for the ICC. The practice of these tribunals could further more constitute a source of law which the future court may apply.49

5.3.1 The International Criminal Tribunal for the Former Yugoslavia

The ICTY is the first truly international criminal court to hold individuals accountable for the most serious crimes recognized by the international community. The ICTY was established by the United Nations Security Council in May 1993 to bring to justice those responsible for committing genocide, crimes against humanity and war crimes in the territory of the former Yugoslavia since 1991. The seat of the Tribunal is in The Hague.

In the early 1990’s, after the collapse of the Yugoslav communist regime, political instability and longstanding inter ethnic rivalry combined to cause the outbreak of civil war in Bosnia and Croatia. The greatest suffering fell upon civilians who were regularly the subject of brutal attacks by soldiers, paramilitary groups and police. Most horrifying was the death and destruction affected through the genocidal policy known as “ethic cleansing”. Over 250000 were killed and 1 million displaced as sub-state ethnic forces asserted their autonomy and acted an expansionist aims. In this state of war and violence it was hoped that an international criminal tribunal would assist in the effort to restore peace and security and deter further atrocities.

Only through this mechanism could the perpetrators of the mass human rights violations be held accountable and justice be brought to the victims.

The ICTY has jurisdiction to prosecute individuals for “serious violations of international humanitarian law” namely, grave breaches of the Geneva Conventions of 1949 (Article 2) violations of the laws or customs of war (Article 3), genocide (Article 4) and crimes against humanity (Article 5). The Tribunals jurisdiction is limited to crimes committed on the territory of the former Yugoslavia. While recognition of the successor state of Yugoslavia is a matter of dispute, the geographic area within jurisdiction includes what has become known as Bosnia and Herzegovina, Serbia and Montenegro, Croatia, Kosovo, Macedonia and Slovenia. Jurisdiction ran from January 1<sup>st</sup> 1991 until a date to administration could be handed back to the relevant states.  

The ICTY has concurrent but primary jurisdiction over, other courts both in the former Yugoslavia and around the world (Article 9). This means that domestic courts can prosecute individuals for crimes falling within the Tribunals jurisdiction, but that the ICTY has the power to request national courts stay their proceedings in the interests of international justice, and transfer the accused to the tribunal for prosecution once the tribunal has tried on individual, that individual cannot be tried again on the same charges by national courts (Article 10). However, where individuals have been tried in domestic courts, they may be tried again by the ICTY if the domestic trial did not meet the requisite standards of impartiality and independence or where the charges did not correspond to the crimes within the tribunals jurisdiction (for example a domestic prosecution for multiple courts of assault rather than war crimes). In that event, the Tribunal will take into account any penalty imposed by the national court in determining sentence.

The trial process combines inquisitorial aspects of the civil law system and adversarial aspects of the common law system. Trials are conducted in accordance with the internationally recognized standards of due process contained in the rules of evidence and procedure. However, a trial can only commence once the Tribunal secures the presence of the accused, the statute does not permit trials in absentia. Once an indictment is finalized, an arrest warrant is issued. But in the absence of an “International Police force”, the ICTY is dependent on international co-operation for

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the apprehension and transfer of accused persons. The tribunal similarly requires international co-operation for the collection of evidence, freezing of assets of inductees, the relocation of vulnerable witnesses and the enforcement of orders and sentences. If an accused is found guilty and sentenced, the sentence can be served in countries that have concluded agreements with the ICTY for that purpose. States that have done so include Denmark, Germany, Spain, France, Sweden, Austria, Norway, Finland and Italy.

There is no doubt that the ICTY has made an enormous contribution to international criminal and humanitarian law. Prior to the establishment of the Tribunal, many important legal questions had never fallen for determination or had lain dormant since the Nuremberg and Tokyo Trials. Notable Judgments have addressed the application of the Geneva Conventions, the interpretation of rape as a war crime and a crime against humanity the application of humanitarian law to internal armed conflict, and the clarification of the nature of individual criminal responsibility (especially in relation to superior orders, duress and command responsibility).51

Individuals that have been or are being investigated or prosecuted include those from all the relevant ethnic, political, economic and social backgrounds. By October 2002, 112 individuals had been indicated by the ICTY. Even though the majority of the violence has ended the ICTY continue to administer justice for the victims and survivors of these international crimes. As the on going trial mechanism that holds perpetrators accountable for their actions, the ICTY remains an indispensable part of the effort to bring lasting peace and reconciliation to the war-torn region. Given the fragile peace that currently exists, the residual ethnic tension and the poor judicial and executive infrastructure in the newly emerging states, it is not yet possible to hand to domestic courts and prosecutors the responsibility of carrying out fair, independent and impartial trials of those suspected of committing heinous international crimes.

5.3.2 The International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (ICTR) was established by the United Nations Security Council to prosecute individuals responsible for

51 Ibid p.23
genocide, crime against humanity and serious violations of international humanitarian law committed in Rwanda during 1994. The Tribunal is located in Arusha, Tanzania.

A potent and tragic combination of political instability and longstanding inter ethnic rivalry plunged Rwanda into unprecedented violence in 1994. Between 500,000 and 1 Million Tutsis and moderate Hutus were killed during the genocide complaint, the majority within a three month period. At the time, neither the UN nor any other international coalition intervened. After the violence, many of the perpetrators fled Rwanda and scattered within the region and around the world. Rwanda’s infrastructure, ruined by war, was not able to administer justice in respect of the wide-scale atrocities. It was hoped that the international community, acting through the UN Security Council, could end the impunity and contribute to the process of reconciliation by establishing an international judicial mechanism as part of its efforts to restore international peace and security.

A restorative approach seems needed in all societies that have suffered massive and collective victimization; and must be kept in mind in Rwanda by the ICTR as it implements its overall strategy. Establishment of an international humanitarian law in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring states are focused to punish international perpetrators. Atrocities soon flared up thousands of miles from Yugoslavia. In April 1994, civil war broke out in Rwanda, and by the end of June 800,000 Rwandan citizens were died. Again, the Security Council did nothing to stop the bloodshed. The new Rwandan Government called for the establishment of an ICTY like institution for Rwanda. The ICTR statute was modeled closely on that of the ICTY. It granted the tribunal jurisdiction over the events occurring in 1994 in Rwanda and in “Neighboring States”. This analysis sets out to consider how far the ICTR has fulfilled its objective, which transcends the prosecution and conviction of guilty persons. The contention is that the ICTR still has not made the most of its opportunity to facilitate change.

The ICTY’s current system is a source of misunderstandings, as demonstrated by the reaction of the media and public opinion to the prosecutors’ decision to discontinue proceeding in the cases relating to NATO’S intervention in Serbia. In the ICC system, even together control needs to be exercised by judges over proceedings

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and in particular over investigations, given that victims can participate on their own behalf. Presumptively non-discriminatory and salubrious manner grew exponentially, with scant philosophical reflection or historical depth. ICTR grew out of the response of the UN human rights system, the government of Rwanda that came to power by toppling the genocidal regime made a request to the UN Security Council for assistance to bring those responsible for the genocide to justice. The genocide was not about ethnic identity operating as a constitutive element of Rwandans personal identity. Rather, the genocide was about ethnicity operating coercively as the unwavering, singular expression of good or evil of them.

An international justice process that fails to deter individuals with reason enough to value their lives and freedom can only be regarded as meaningless. In giving birth to a new type of legal institution, the Rome Statute created a void in the ability of any existing body of law to precisely convey the nature of the ICC. The court is neither in a direct vertical nor horizontal relationship of state courts, with the result that traditional international or national legal norms do not apply. It is a permanent criminal court whose nearest relatives are the ICTY and the ICTR, both of which, however, are UN bodies that have limited geographical and temporal jurisdiction. The ICTR seems to overlook the fact that is not only prosecution of its inductees that is central to the question of solving the Rwandans situation. There has to be an effort to identify that there are other units, individuals or groups that should be the target of efforts to restore order to the badly fractured society. When Yugoslavia began to spiral into civil war in 1991, United Nations Security Council had emerged from the cold war paralysis of the previous forty years. The reinvigorated council however, proved ineffectual at stopping the bloodshed in Yugoslavia or at halting the atrocities. First and foremost, the Rome Statute allows the ICC only to prosecute individuals for committing genocide, crimes against humanity, or war crimes. Second the ICC operates in compliment to the national courts that are a party to it, meaning that a case is only admissible to the ICC when the state of the accused is unwilling or unable to prosecute the individual. The principle of universal jurisdiction allows for a state to prosecute an individual even though that state may not meet the traditional jurisdictional requirements of international law. Article 7 of

53 Article, 6
the Statute of the ICTY\(^\text{55}\) discusses the conditions for individual responsibility. If the ideal is to facilitate positive social change in Rwanda that brings about reconsideration and the respect for human rights, a system based on ill-thought out symbolic justice or attainable mass retribution must be re-oriented with a more thought-out and creative strategy regarding the structure and operation of the ICTR. It is unable to react adequately to social evils built into the social structure of the Rwandese society. It can be argued that by increasing awareness the ICTR has contributed to the global respect of human rights through its indictments and a few trials.

Unfortunately, the process of reconciliation and the creation of human rights culture in Rwanda cannot be achieved simply by trying those who are responsible for shocking crimes. International humanitarian law is an attempt to restrict the sovereignty of leaders and to hold accountable those in power for violations of human rights.\(^\text{56}\) Despite these potential drawbacks the experience of tribunals demonstrates the important even unique role that international court can serve in the international system. Most importantly international courts can keep international rules relevant to changing conditions. In some cases military commanders may be responsible for war crimes committed by subordinate members of the armed forces or other persons subject to their control. Thus for instance when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. The Trial chambers of both the ICTY and ICTR have addressed the doctrine of superior responsibility and dealt specifically with its application to civilian and non-military superiors. A review of their decisions provides a view of the modern development of the doctrine and some of the specific areas that have been addressed. As to the applicability of ICTY Article 7(3) and ICTR Article 6(3) to civilians the tribunals have determined that superior responsibility applies to both military commanders and civilian superiors in positions of authority. The ICTY and ICTR tribunals provide the first application of the law of superior responsibility to actual cases since the end of World War II.

\(^{55}\) See Article 7.
\(^{56}\) See International Criminal Tribunal for Rwanda
The analysis of the trial and appellate chambers in identifying customary international law with respect to superior responsibility and its application to cases involving both international and internal armed conflict, and to both military and civilian superiors, should prove to be an instructive reference when the ICC begins adjudicating cases involving these issues. Primary importance to the doctrine of superior responsibility is the establishment of Article 28 of the Rome statute, entitled responsibility of commanders and other superiors. The ICTY’s decisions transformed the laws of war by recharacterizing the thresholds needed to trigger the rules on international conflicts and civil wars, by declaring that there is individual criminal responsibility for acts committed in internal armed conflict, and by altering the rules on international conflicts to accommodate internationalized wars rooted in ethnic conflict.

### 5.4 International Criminal Court

In 1994 the ILC adopted a Draft Statute for ICC and recommended to the General Assembly the convening of an international conference of plenipotentiaries to study the draft and to conclude a Convention for the establishment of an ICC. The General Assembly, however, preferred to get the Draft Statute reviewed by an adhoc Committee. This Committee presented its report in September 1995. The statute was also sent to six prefatory committees which took nearly four years and produced a number of points of disagreement. Ultimately, a diplomatic conference convened in Rome adopted the statute of ICC on 17th July, 1998 after significant compromises and opposition by many states including India and the United States.

The Statute of the Court (the Treaty) was to come into force after requisite ratification by 60 states under Article 126 of the statute. After 66 ratifications by the states the statute has come into force from 1st July, 2002. Thus the birth of the ICC is the culmination of four adhoc international criminal tribunals the Nuremberg International Military Tribunal, the Tokyo International Military Tribunal, the Yugoslavia International Criminal Tribunal and the Rwanda International Criminal Tribunal. The first two tribunals were established by the agreements of allied powers of the Second World War and the latter two were the creation of the UN Security council exercising its authority under Chapter VII of the Charter.

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57 Supra Note 53
The ICC has been established as a permanent institution and having the “power to exercise its jurisdiction over persons for the most serious crimes of international concern”. This Court is “complementary to national criminal jurisdictions”\(^{58}\). The Court has been established at The Hague (Netherlands). The court may exercise its functions and powers on the territory of every state party and by special agreement on the territory of any other state.\(^{59}\)

Despite the weak doctrinal and political bases for the tribunal’s lawmaking, the historical record suggests that states appear to have accepted, even embraced, if states have codified the tribunal’s revision of the laws of war into the treaty governing the ICC. States codified these developments in the treaty governing the ICC. The fact that the Rome Statute follows the Nuremberg philosophy that men, not abstract entities commit crimes against international law is not in doubt. Article 25 of the Statute entitled ‘Individual Criminal Responsibility’\(^{60}\) explicitly declares that the Court shall have jurisdiction over individuals and that person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute. A traditional move from the domestic to international level would see states being punished for breaching the morality of the society of states. However, criminal law requires not just for certain actions to have taken place but also for the perpetrator of the acts to have had a particular state of mind or intention. Nothing in domestic criminal law allows us to conceive of states as having mensrea as it is a psychological property that can only be held by an agent with a mind.\(^{61}\)

5.4.1 Rome Statute of the International Criminal Court

As in other international treaties, states which become parties to them have certain obligations to fulfill under the Rome treaty, states party to it has two fundamental obligations; the first is complimentary and the second is full cooperation.

The Rome Statute’s preamble and Articles 1 and 17 provide that states, not the court have the primary responsibility for bringing those responsible for genocide,
Application of the State Responsibility before International Judicial Institutions

Crimes against humanity and war crimes to justice. In the preamble, they affirm that ‘the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by international cooperation’. Determine ‘to put an end to impunity for the perpetrators of these crimes’ and recall that ‘it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.’ Paragraph 10 in the preamble emphasizes that court ‘shall be complementary to national criminal jurisdictions’. Article 1 repeats this statement and Article 17 provides that a case is inadmissible when it is being or has been investigated or prosecuted by state, unless that state is or was unwilling or unable genuinely to carry out the investigation or prosecution.

Therefore not only do states have the primary duty to bring to justice those responsible for crimes under international law but the court will be able to act when states are unable or unwilling to do so. This means that for the Court to be able to be an effective complement to state in carrying out justice for the crimes under its jurisdiction, states need to fulfill their responsibilities. They must enact, then enforce national legislation which provides that these crimes under international law are also crimes under national legislation which proceeds that these crimes under international law are also crimes under national law wherever they have been committed, no matter who has committed them or who is the victim. An effective implementing legislation will demonstrate that the state is aware of its primary responsibility under international law to ensure accountability for the crimes and will make certain that national courts will undertake the tasks. This is why the court is referred to as the ‘court of last resort’ because it is only when all remedies have been exhausted at the national level that the court may intervene.

Once the Court has determined that it may exercise jurisdiction in accordance with the principle of complementarities, under Article 86, states parties agree to ‘co-operate fully with the court in the investigation and prosecution of crimes within the jurisdiction of the court’. This obligation means that states parties must ensure that the prosecutor and the defense can conduct effective investigation in their jurisdiction, that their courts and other authorities provide full co-operation in obtaining documents, locating and seizing evidence, locating and protecting witness and arresting and surrendering persons accused of crimes by the Court. In addition to
these statutory obligations, states also should cooperate with the Court in the enforcement of sentences by making detention facilities available for convicted persons.62

For the state cooperation to be truly effective, it will be necessary for the states to educate the public and to train judges, prosecutor’s law enforcement and lawyers on the scope of state obligations.

The state has also to sign and ratify the Agreement on Privileges and Immunities of the Court (APIC) which allows the prosecutor and other court personnel to do their work within the territory of the state. Article 48(1) of the Rome Statute provides that ‘the court shall enjoy in the territory of each state party such privileges and immunities as are necessary for the fulfillment of its purposes’. Because the court is independent of the United Nations, it has to undertake separate agreement with states just like what is provided for in the UN charter which gives UN personnel the privilege and immunity when they conduct their work in member state territories.

With regard state obligation to implement the state has to enact and enforce laws to enable it to effectively exercise its duty to fully cooperate with the Court. In the experience of many states parties that have gone through this process, it is not enough to declare that all the provisions of the ICC treaty shall apply to national law or will form part of the national law. They found it necessary to adopt specific laws that provide concrete ways and procedures to implement cooperation with the court.

However, there are basic elements that have to be incorporated in national laws to enable states to exercise their obligations and to ensure that the national laws are consistent with international law, particularly with the provisions of the Rome Statute, for example, defining crimes, principles of criminal responsibility and defenses. The legislation should provide that the crimes in the Rome Statute and other crimes under international law are also crimes under national law.

Also, there should be provisions that would ensure elimination of bars to prosecution. For example, no amnesties, pardons or similar measures of impunity by any state should be recognized. There should be no immunity for any officials.

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including heads of states from prosecution. Fair trials should be ensured, without
death penalty.

The process of drafting the implementing legislation requires the participation
not only of the ministries tasked to work on the draft for adoption by the parliament
but the broadest section of the people, the lawyers, the women, the children, the
indigenous peoples, especially the victims and their families. This process will
guarantee that all obligations are included in the legislation and in the actual
implementation, will ensure support for the state’s commitment to international
justice. The establishment of the ICC is considered a milestone in the long history of
humanity’s search for international justice and peace. We in Asia look forward to
work hard to make our own governments to ratify, to be part of this movement for
international justice. We owe it to our people to ourselves the dignity we all deserve.

The Statute of the ICC can also be examined from various angles. Considered
as a contribution to international treaty law, the statute strikes the commentator as a
text that is markedly different from other modern multilateral treaties. Article 8 lays
down emphasis on war crimes which are ‘committed as part of a plan or policy or as
part of a large scale commission of such crimes’. At both the ICTY and ICTR, this
would have been a useful qualification to avoid prosecutions of isolated atrocities,
which do not pose a threat to international order as much as atrocities which are
committed as, part of a plan or policy or on a large scale. ICC also to deal with all
sorts of international crimes, including those of lesser gravity, it would soon be
flooded with cases and become ineffective as a result of an excessive and
disproportionate workload. To a certain extent, this has already occurred at the ICTY
and has necessitated the withdrawal of indictments of minor individuals in the
political military hierarchy. It is therefore quite appropriate that the ICC should
intervene only when national institutions fail to do so. One of the merits of the ICC
statute is the role assigned to the victims of atrocities. Article 15(3) provides that,
‘victims may make representations to the pre-trial chamber, in accordance with the
rules of procedure, and evidence’ regarding the reasonableness or otherwise of
proceeding with an investigation. In particular through a prosecution by the ICC states
will lose prosecution freedoms like the ability to determine specific charges witnesses
to be called, and evidence to be presented. A second class of relationships between the

63 Article 8 of the Statute
ICC and states arise where the state in question is unable to undertake investigations or prosecutions of international crimes. Such inability may stem from civil war, the collapse of domestic institutions or a lack of resources and expertise. It is hoped that the assembly of states parties will appreciate the urgency of the matter, and that the states will agree to undertake all necessary reforms.

5.4.2 Impact of the Statute on Third States

The Statute of the ICC confers jurisdiction of the Court over natural persons. A person who commits a crime under Article 5 is made criminally liable and responsible for punishment. Thus, the nationals of those states which have not ratified the treaty are nonetheless within the jurisdiction of the Court. Under the rules of international law, states have power to exercise jurisdiction over nationals of other states if they are within its territorial jurisdiction. But under the present statute nationals of third states come within the jurisdiction of ICC when they are referred to it. The United States has vehemently opposed this provision because its nationals can be charged with crimes resulting from forcible interventions abroad or lawful peacekeeping operations. A recent example is the commission of war crimes and human rights violations by the US forces in Iraq. Mindful of such jurisdiction, the United States has concluded more than 25 agreements with other states to prevent the prosecution of its nationals.

5.5 Human Rights Courts

Broadly speaking human rights may be regarded as those fundamental and inalienable rights which are essential for life as human being. Human rights are the rights which are possessed by every human being, irrespective of his or her nationality, race, religion, sex, etc. simply because he or she is a human being. Human rights are thus those rights which are inherent in our nature and without which we cannot live as human beings. Human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents, and our conscience and to satisfy our physical, spiritual and other needs. They are based on mankind’s increasing demand for a life in which the inherent dignity and worth of

64 Article 25  
65 See, Roger Normand: “America’s Criminal Occupation”, The Hindu, Delhi, 26th June, 2004  
each human being will receive respect and protection. Human rights are sometimes called fundamental rights or basic rights or natural rights. As fundamental or basic rights they are the rights which cannot, rather must not, be taken away by any legislature or any act of the government and which are often set out in a constitution.\(^{67}\)

Since human rights are not created by any legislation, they resemble very much the natural rights. Any civilized country or body like the United Nations must recognize them. They cannot be subjected to the process of amendment even. The legal duty to protect human rights includes the legal duty to respect them.\(^{68}\)

It is also important for the judiciary to earn respect for their role in upholding human rights. They must do this by performing their functions in a way that is ever respectful of the human rights of those before them. By their lives and professional work, judges must exhibit an attitude respectful of human rights and there by earn the acceptance of their role as defenders of such rights. The greater the integrity of the judiciary, the more likely will be the success of its role in defending and upholding the human rights of those who come before the courts.

5.5.1 Role of Courts in Protecting Human Rights

In a properly functioning court system, someone whose human rights have been violated may turn to a court of first instance, or a trial courts.\(^{69}\) If the case is heard before a court and the complaint’s grievances are still not satisfactorily remedied, aggrieved may appeal the trial court’s decision and go through an appeals process that may lead to persons case being heard before a court of last resort, such as a constitutional court or Supreme Court. If any complaints are not satisfactorily resolved and aggrieved has exhausted all domestically available legal remedies,\(^{70}\) he may attempt to have his case admitted to an international court such as the Inter-American Court of Human Rights or European Court of Human Rights (In states with corrupt, defunct, or functionary nonexistent legal systems, or in instances where national courts are unwilling or unable to take a given case, domestic remedies may

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\(^{67}\) J.E.S. Fawcett, *The Law of Nations*, (1968), p.15  
\(^{68}\) Lauterpacht, *International Law and Human Rights*, p.152  
\(^{69}\) Black’s Law Dictionary defines a trial Court as “(a) Court of original jurisdiction where the evidence is first received and considered”. A trial court may also be termed a “Court of first instance, instance court, (or) court of instance. BLACK’S LAW DICTIONARY, Court (8th Ed. 2004)  
\(^{70}\) International human rights courts, such as the Inter American Court of Human Rights and European court of Human Rights, generally will not hear cases until all remedies or claims have been exhausted i.e., pursued to the full extent in the litigant’s home country.
be exhausted without to case ever being admitted to a court). It should be noted, however, that due to the small number of legitimate international courts and the large number of cases submitted to such courts, the probability that the case will be taken by an international court is extremely and prohibitively low.

As regards international implementation, states have collective responsibility under article 1 common to the Geneva Conventions to respect and to ensure respect for the conventions in all circumstances. A key role is played by the office of the High Commissioner for Human Rights which are primarily responsible for the overall protection and promotion of human rights. The office aims to enhance the effectiveness of the UN’s human rights machinery, to increase UN system wide implementation and co-ordination of human rights, to build national, regional and international capacity to promote and protect human rights and to disseminate human rights texts and information.

5.5.2 Regional Level Human Rights Court

The work of regional human rights courts and commissions established under the main regional human rights treaties in Europe, the America and Africa is a distinct feature of International Human Rights Law (IHRL), with no equivalent in International Humanitarian Law (IHL).

The European Court of Human Rights is the centerpiece of the European System of human rights protection under the 1950 European Convention. The main regional supervisory bodies in the Americas are the Inter American Commission on Human Rights and Inter American Court of Human Rights. The African commission on Human and Peoples Rights is the supervisory body established under the 1981 African Charter.

(a) European Court of Human Rights

The European Court of Human Right (ECHR) was established by the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, concluded under the aegis of the Council of Europe, with the task of supervising, along with the European Commission of Human Rights, set up in 1953, the observance of the rights and freedoms listed therein.

The impetus from the adoption of the 1950 European Convention came from the atrocities committed in Europe before and during the Second World War and the
desire to bring the non-communist countries of Europe together within a common ideological framework, stressing individual civil and political freedoms and rights, as opposed to communist ideas.

After a slow start (it started functioning only in 1959 and a modest number of submission were received until the end of the 1960s), the ECHR has eventually grown into one of the largest, most accomplished and exemplary international judicial bodies. Unlike in the cases of many other forums, compliance with the ECHR’s judgments is common, exerting a deep influence on the laws and social realities of member states. The record of the ECHR is impressive not only in comparison with those of the two other regional human rights courts, for which it is a paradigm, but also to that of all other international judicial bodies. As a matter of fact, after the ECJ, the ECHR has decided the largest number of cases, developing the most extensive jurisprudence in the field of the protection of human rights. Of all international judicial bodies, the ECHR is the only one which has successfully undergone a major overall, bearing witness to the vitality of the institution and its significance for member states. While the world court, with the transition from the PCIJ to the ICJ, has also undergone a similar rejuvenation, the magnitude and import of the metamorphosis experienced by the ECHR is unmatched. This warrants distinguishing between the old court and the New Court, officially born on November 1, 1998.

Some Notable Cases

Ireland. V. U K

In December 1977, the Court ruled that the government of the United Kingdom was guilty of “inhuman and degrading treatment”, of men interned without trial, following a case brought by the Republic of Ireland. The court found that while their internment was a interference of the convention rights, it was justifiable in the circumstances, it however ruled that the practice of the five techniques and the practice of beating prisoners constituted inhuman and degrading punishment (Article 3) in violation of the Convention, although not torture.

Refah Partisi. V. Turkey

In Upholding the Turkish constitutional court’s dissolution of the welfare party (Refah partisi) for violating Turkey’s principle of secularism (by calling for the

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71 (1978) ECHR, Ser A. Vol. 25
72 Refah (The welfare party) and others. V. Turky, 13th February 2003, pp. 29-49
re-introduction of religious law) the Court held “that Sharia is incompatible with the fundamental principles of democracy”. The Court justified the breach of the appellant’s rights by reasoning that a legal regime based on Sharia would diverge from the convention’s values, “particularly with regard to its criminal law and criminal procedure, its rules on the status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts”.

**Chechnya Case**

Since the Russian military invaded Chechnya for the second time in 1999, the court agreed to hear cases of human rights abuse brought forward by Chechnya civilians against Russia in the course of the second Chechen war, with 31 rulings to date as of June 2008 (including regarding the cases of torture and extrajudicial executions.  

In 2007, the Court ruled that Russia was responsible for the killings of a human rights activist Zura Bityeiva and her family. Bityeiva herself had filed a complaint against Moscow with the court in 2000 for abuse while in detention, in the second case from Chechnya, but she was murdered in 2003 before the ruling was issued. Other case ruled against Russia included the deaths (or presumed deaths after years of forced disappearance) of Ruslan ALikhadzhyev, Shakhid Bayasayev, Nura Luluyeva and Khadzhi Murat yandiyev, the case of the indiscriminate bombing of Katryurt, and some of the deaths during the Novye Aldi massacre. As of 2008, the Court has been flooded by complaints from Chechnya, what the human rights watch called “the last hope for the victims”.

**Appleby. V. U K**

This 2003 case involved balancing the right of freedom of speech against the rights of private property owners. The issue was whether shopping centers in new towns, by assuming the functions of traditional high steets, must also assume the responsibility of serving as a public forum. The Court considered but declined to follow the decision of the Supreme Court of California in the landmark case *Robins*.  

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73 Chechnya: European Court Last Hope for victims, France, EU, should use rulings to end abuses, Human Rights Watch, June 9, 2008  
75 Russia convicted in Chechnya killings, Islam online, June 22, 2007
V. Prune yard shopping center (affirmed by the U.S. Supreme Court in Prune yard Shopping Center. V. Robins (1980).76

(b) Inter-American Court of Human Rights

The Inter-American Court of Human Rights is an autonomous judicial institution. The Court was established in 1979 with the purpose of enforcing and interpreting the provisions of the American Convention on Human Rights. Its two main functions are thus adjudicatory and advisory. Under the former, it hears and rules on the specific cases of human rights violations referred to it.

In Velasquez Rodriguez Case77

Regarding the detention and disappearance of a Honduran student the Court decided that the Honduran Government was responsible for violation of Articles 4, 5 and 7 of the Convention and therefore Honduras was unable to pay compensation to the student’s family.

The Court further emphasized that the Convention unlike other international human right treaties, including the European Convention, confers on private parties the right to file a petition with the Commission against any state as soon as it has ratified the convention (Article 44 of the Convention). By contrast, before one state may institute proceedings against another state, each of their must have accepted the commission’s jurisdiction to deal with inter-state communications (Article 45). This structure indicates the overriding importance the Convention attaches to the commitments of state parties, vis-a-vis individuals which can be readily implemented without intervention of any other state.

In view of the above observations, the Court concluded that viewed in this light and considering that the Convention was designed to protect the basic rights of individual human beings irrespective of their nationality, against states of their own nationality or any other state party, the Convention must be seen for what in reality it is a multilateral legal instrument of frame work enabling states to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction.

76 Appleby. V. United Kingdom (2003) ECHR. 222
77 (1989) 28 ILM 291
(c) African Court on Human and Peoples Rights

The African Court on Human and Peoples right was established as a legal entity by a Protocol to the African Charter on Human and People’s Rights. This protocol was signed in June 1998 in Ouagadougou, Burkina Faso, by the African Heads of State. The court came into being only on 25 January 2005, with the ratification by fifteen member states. Its seat is in Arusha, Tanzania. There are two ways of taking legal action involving the African Court on Human and People’s Rights through direct seizure, and through indirect seizure. To date, the African Court did have the opportunity to deliver only one judgment in a concrete case of human rights violations.

Direct Seizure of the African Court on Human and People’s Rights

A direct legal complaint before the African Court on Human and Peoples Rights against a signatory state of the protocol is possible by other state parties, the African Commission on Human and People Rights and African Inter-Governmental Organizations. It is also possible for individuals as well as for those NGOs having an observer status at the African Commission on Human and People’s Rights. They can plead before the court if and only if the state concerned, signatory of the protocol, has made a declaration under article 34.6 of the protocol that authorizes this procedure. As of November 2009, only Burkina Faso has made a declaration under Article 34.6, out of the 25 states having ratified the protocol 1998.

In checking the admissibility of a complaint, the Court has to assure that the state has actually made a declaration under Article 34.6, assure that all possible remedies have been exhausted at the national level, and if appropriate, refer to procedure back to the national level, including assisting the victims in their proceedings and assure that, no request has been deposited to another supranational body designed to the protection of Human Rights in a similar affair.

Indirect Seizure of the African Court on Human and People’s Rights

In the case of violations of human rights, individuals and NGOs having an observer status at the African Commission on Human and Peoples Rights may take legal action before the court in an indirect way, even if the state concerned has not made a declaration under Article 34.6 of the protocol.

They can, as a matter of fact, present communications before the African Commissions on Human and People’s Rights. There is no possibility for the state
concerned to prevent such communications. The Commission can decide to bring the issue before the court. The conditions for such communications would be the same as shown above under “Direct Seizure”.

In December 2009, the African Court delivered its first judgment. In the matter of Michelot Yogogombaye V. the Republic of Senegal\(^7\), the applicant, a Chadian National, wanted to prevent the government of Senegal from conducting the trial against the former Chadian head of state, Hissene Habre, asylumed as a political refugee in Senegal since 1990, in Dakar. The Court decided that it lacked jurisdiction to hear the case as Senegal had not made the declaration under Article 34.6 of the protocol granting individuals the opportunity to institute cases directly before the Court.

### 5.5.3 Human Rights Court in India

One of the objects of the protection of Human Rights Act 1993 as stated in the preamble of the Act is the establishment of human rights courts at district level. The creation of human rights courts at the district level has a great potential to protect and realize human rights at the grassroots.

This act provides for establishment Human Rights Courts for the purpose of providing speedily trial of affiances arising out of violations of human rights. It provides that the state government may, with the concurrence of the Chief Justice of the High Court by notification, specify for each District a Court of Sessions to be a Human Rights Court to try the said offences. The object of establishing of such courts at district level is to ensure speedy disposal of cases relating to offences arising out of violation of human rights.

The act refers to the offences arising out of violations of human rights. But it does not define or explain the meaning of “offences arising out of violations of human rights”. It is vague. The act does not give any clear indication or clarification as to what type of offences actually are to be tried by the human rights court’s no efforts are made by the central government in this direction. Unless the offence is not defined the courts cannot take cognizance of the offences and try them. Till then the Human Rights Courts will remain only for namesake.


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Even if “offences arising out of violations of human rights” are defined and clarified or classified another problem arises in the working of the Human Rights Courts in India. The problem is who can take cognizance of the offences. What the Act says is in each district one sessions court has to be specified for trying “offences arising out of human rights violation”. It is silent about taking of cognizance of the offence. Sessions Court of the district concerned is considered as the Human Rights Court under the criminal procedure code. 1973, a sessions judge cannot take cognizance of the offence. He can only try the cases committed to him by the magistrate under section 193 of the Cr. P.C.

The Situation in Respect of the Human Rights Courts under the Protection of Human Rights Act 1993 is not different

Apart from the above, the special court will face yet another question whether provisions of section 197 of Cr.P.C. are applicable for taking cognizance of the offences under the protection of human rights act 1993. In most of the cases of violation of human rights it is the police and other public officers who will be accused. The offence relate to commission or omission of the public servants in discharge of their duties. Definitely the accused facing the trial under the act raise the objection. There is plethora of precedents in favour of dispensing with the applicability of section 197 of Cr. P.C. on the ground that such acts (like the ones which result in violation of human rights) do not come within the purview of the duties of public servants. But there is scope for speculation as long as there is no specific provision in the Act dispensing within the applicability of section 197 of Cr. P.C.

The object of establishment of such courts at district level is to ensure speedy disposal of cases relating to offences arising out of violation of human rights. Unless the law makers take note of the above anomalies and remove them by proper amendments the aim for which provisions are made for establishment of special courts will not be achieved.

(a) Judicial Acceptance of Human Rights

India is one of the members of the United Nations. The Charter of the United Nations lays down special stress on the fundamental human rights. Article 51 of the Constitution of India directs the state to make endeavour to “foster respect for international law and treaty obligations”. The Charter of the United Nations and
various resolutions, declarations, covenants and conventions on human rights form the corpus of international law and India is party to most of the human rights treaties.

To give authoritative interpretation of the Constitution is the task of the higher judiciary. The highest judicial organ of the state is the Supreme Court of India and the interpretation given by this Court is the highest authority and, therefore, binding on all authorities in India.\(^79\) As a result of various declarations, conventions, charters, covenants and resolutions, international human rights norms have come into existence. International law, however, does not become a part of Indian law unless incorporated by parliamentary legislation. Therefore, the application of international human rights norms in national jurisdiction is dependent on incorporation of these norms in municipal system. Where such human rights have been incorporated into Indian law, the courts have no difficulty in enforcing them. For example, the protection of Human Rights Act, 1993 gives recognition to the rights of life, liberty, equality and dignity of an individual embodied in the international covenants. India is also a party to conventions on Elimination of All Forms of Discrimination, 1966, Suppression and Punishment of the Crime of Apartheid, 1973, Prevention and Punishment of the Crime of Genocide, 1948, Elimination of All Forms of Discrimination against Women, 1979, and Rights of the Child, 1989.\(^80\)

The Supreme Court of India has taken into consideration the international instruments of human rights into domestic law via fundamental rights. Thus, in *Nilabati Behara . V. State of Orissa*,\(^81\) the three-judge Bench of the Supreme Court invoked Article 9(5) of the International Covenant on Civil and Political Rights 1966, in awarding compensation in a case of custodial death. In this case the government of India had made a reservation for not accepting the obligation of payment of compensation. The court, however, held that this reservation was irrelevant because compensation could be awarded for public wrong which involved infringement of a citizen’s fundamental right to life under article 21 of the constitution of India.

Similarly, in *Vishaka . V. State of Rajasthan*,\(^82\) the case involved the right of a woman who had been raped by some village leaders because of her work against child marriage and dowry. The court placing reliance on the basic statement of principles of

\(^79\) The Constitution of India, 1950, Article 141
\(^80\) Protection of Human Rights Acts, 1993, S. 2(1) (d)
\(^81\) (1993) 2 SCC 746: AIR 1993 SC 1960
\(^82\) (1997) 6 SCC 241
the independence of the judiciary in Lawsia Region 1995 and taking support from Articles 11 and 24 of the Convention on Elimination of All Forms of Discrimination Against Women, 1979 laid down guidelines on a woman’s right to work and her working environment.

In Chairman, Rly, Board. V.Chandrima Das, a woman tourist of Bangladesh was raped in the Railway Guest House (Yatri Niwas) by the employees of the railway. The petition on her behalf was filed by an advocate of Calcutta High Court. The Supreme Court held that “our Constitution in part III guarantees all the basic and fundamental human rights set out in the Universal Declaration of Human Rights, 1948 to its citizens and other persons, i.e., aliens” and that the Court will apply international human rights norms while interpreting national constitutions.

In Guruvayoor Devaswom Managing Committee V. C.K.Rajan, the court said that it will not hesitate to invoke international conventions on human rights to protect group rights of people. It is not only the “first generation” and the “second generation” human rights which have been accepted and applied by the Indian Court, but the “third generation or solidarity right” has also been recognized. In N D Jayal. V. Union of India, a three-judge Bench of the Supreme Court has accepted the right to development as an integral part of human right.

The constitution of India does not expressly provide for the right of privacy. But the Indian judiciary has traced this right in Article 21 of the Constitution. In District Registrar and collector, Hyderabad. V. Canara Bank, the Supreme Court has invoked Article 12 of the UDHR, 1948 and Article 17 of the International Covenant on Civil and Political Rights, 1966, in upholding the right of privacy.

The Indian Supreme Court has followed two lines of reading in support of applying international human rights norms in its domestic jurisdiction. Firstly, the fundamental rights which are guaranteed by the Constitution can be interpreted in the light of international human rights norms, since these norms indicate the current accepted view of the content of the various fundamental rights of part III of the Constitution of India. Secondly, the court has also said that international covenants

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84 Ibid. at p.997 (AIR)
declaring universal fundamental rights can be used by the courts as a legitimate guide in developing common law.\(^{89}\)

### 5.6 Conclusion

International courts and tribunals have increasingly played an important role in clarifying and developing a number of areas of international law, including the law of state responsibility. Issues of state responsibility have engaged the attention of both the PCIJ and the ICJ.

One may conclude, therefore, that we are in a period marked by judicial confidence and activism. The court has rightly rejected a restrictive approach to its judicial function in the context of the issuance of declaratory judgments and has rightly rejected a narrow view of the relationship between such declaratory judgment and statements of legal consequences for the parties. Accordingly, it is clear that such judgments constitute a rather wider category than would be the case for domestic courts. The responsibility of a state for the decisions of its courts arises only when all adequate and effective means of challenge to a decision which exist within the national court system and which are reasonably available to the alien complaining of the decisions have been exhausted.

The ICJ, at present, has the full docket of important cases with a variety of new questions of international law and a new group of states. The reforms suggested above will make this business of the court a permanent feature.

Unfortunately, the unproblematic move from domestic to international criminal law suggests that international criminal law will not prevent future atrocities as the necessary societal conditions are not present, and the nature of international crime differs so considerably from that of domestic crime. Within a broader institutional and legal framework, international courts have the ability and expertise’s to take principles negotiated and developed by states and increase their precision and applicability of contemporary circumstances.

The establishment and practice of the \textit{adhoc} International Criminal Tribunals for the former Yugoslavia and Rwanda, have been, and still are, regarded as ‘precedents’ for the ICC. The practice of these tribunals could furthermore constitute

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\(^{89}\) Justice Sujata Manohar, \textit{“The Enforcement of International Human Rights: Norms by Domestic Courts”}, \textit{Law and Justice}, pp. 11, 14 Vols. IV-VII
sources of law which the court may apply. The practice of the adhoc Tribunals indicates that the law as applied does not always meet such criteria as accessibility, and foreseeability or “fair warning”. This particularly appears where the tribunals determine and apply rules of customary international law, a concept that itself is not clearly defined in international law.

Furthermore, the tribunals have themselves formulated and developed the elements of the crimes, and of individual and command responsibility, for the purpose of establishing what the prosecutor would have to charge and prove, in order to find an individual person guilty and convict him or her. As this had not been done by the drafters of the statutes of the tribunals, this task has been left to the tribunals. The tribunals have established their own set of rules and procedure and evidence, for the elaboration of which they had received a mandate. The elaboration of elements of crimes and conditions of individual criminal responsibility could be regarded as belonging to the judicial functions of these tribunals.

A wide majority of states participating in the Rome Conference decided that aggression would be part of the crimes falling within the jurisdiction of the ICC. Unlike the two adhoc tribunals for Yugoslavia and Rwanda, the ICC is a permanent international criminal court established by its founding treaty. It has been endowed with international legal personality and, although it is an independent judicial institution, the drafters of the ICC Statute wished it to be related through an agreement with the U.N. This is desirable because the Security Council plays a significant role in referring cases to the Court and there is, further, a need to assert the council’s absolute authority over issues concerned with international peace and security, and this maintain coherency in that field.

The Court was intended to be established by treaty. States conclude treaties and decide what obligations they impose upon themselves. In the context of a treaty, states naturally act as “legislators” of the instrument. A subordinate role for the Court in the context of the Rome Statute follows from the nature of the treaty making process. Considerations of sovereignty are a political reality, especially with respect to criminal jurisdiction that, moreover, could very well concern individual perpetrators directly linked to a state organization in view of the character of the nature of the crimes included in the Statute of the Court.
In spite of voluminous writings on human right, both national and international, human rights hanker for becoming central concern of justice and governance. While noble Laureate Amartyasen highlights “freedom” as the essence of human rights, Justice J.S. Verma, locates it is the ‘dignity’ of human being. The principal emphasis on human rights has hitherto been on civil and political rights and scant care has been shown for “survival rights” also known as third generation rights. Justice Verma pleads for a set of appropriate reliefs and remedies to make human dignity an issue in constitutional governance. He pleads that the human rights agenda for the 21\textsuperscript{st} Century, at least for India, should focus on distributive justice, inclusive democracy involving all sections with substantive equality, gender justice, poverty eradication, sustainable development and human resource development.