7.1 Introduction

Prosecution and punishment of criminals is primarily a duty of the States. State as a guardian should conform that security and rights of its people are well preserved under any circumstances. Peace can be maintained in a society if justice is not within the reach of common people. If the justice delivering organs do not function properly or the legal system of a country is not sufficient to protect the rights of its people, that ultimately affect society as a whole.

In the contemporary time, the increased number of armed conflict around the world signifies the lack of fear of prosecution of the perpetrators of crimes against humanity. For a long time, perpetrators of crimes against humanity have brutalized, raped and malmed with impunity. Thus, it becomes equally necessary to have a mechanism ready at the international level to prosecute the perpetrators of crimes in the event that a state would conduct sham proceedings or would not possess the technical means required for proper investigation and trials.

At different points of time the international community has been establishing various military tribunals on temporary basis to prosecute the criminals for crimes committed during a war or an armed conflict. Such tribunals were established for

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particular situations and has limited territorial jurisdiction. So, establishment of a permanent international court to prosecute crimes committed in any parts of the world is a matter of great concern for the international community for a long time. This dream ultimately come true by adoption of Rome Treaty of 1998 which endeavours to lay the foundation for an institution that will “...lift the blanket of impunity that now covers atrocities everywhere”\(^2\). It has codified the existing conventions and standard humanitarian laws like never before. The Statute entered into force on July 1, 2002, after the deposit of sixty ratifications. Currently 122 states are State Parties to the Rome Treaty. Another 31 countries have signed but not ratified the Treaty. Three States namely, Sudan, Israel and United States have informed the UN Secretary General that they no longer intend to become State Parties and as such have no legal obligation arising from their former representatives’ signature to the Rome Treaty.

7.2 The International Criminal Court- ICC (creation, mandate and jurisdiction)

By adopting the Rome Statute of 1998 the International Community established the International Criminal Court whose head office is at Hague, capital of Netherlands. The Preamble as well as Article 1 of the Statute says that the Court shall be complementary to the national criminal jurisdiction. Article 1 of the Statute further says that the Court is a permanent institution which shall have power to exercise jurisdiction over persons for most serious crimes of international concern. The prime mandate with which the Court has been established is to help to put an end to impunity for the perpetrators of crimes and thus to contribute to the prevention of such crime. Along with this the Court shall also influence and prodding domestic

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justice systems to improve their capacity to investigate and prosecute criminals while exercising as a complementary to national court. The National Courts remains the primary venue for trying cases of mass atrocity. A case is admissible in the ICC only when the State with original jurisdiction is “unwilling or unable genuinely to carry out the investigation or prosecution”. The ICC is thus established, to encourage states to prosecute the cases domestically and for that, enhance the State’s ability to carry out investigation and prosecution that meet international standard and thereby strengthen the rule of law of States suffering from violent conflict and instability.

Under Article 5 of the Statute the Court can exercise jurisdiction in accordance with the Statute in respect of crime of genocide, crime against humanity, war crimes and crime of aggression. What constitute genocide, crime against humanity and war

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3 Article 17 of the Rome Statute says,

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

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

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

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

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

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

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

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

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

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”
crimes are given Articles 6, 7 and 8 respectively of the Rome Statute. Constituents of crime of aggression are decided during the Review Conference of the Rome Statute, held in Kampala in 2010 and accordingly it means planning, preparation, initiation or execution of an act of using armed force by a State against the sovereignty, territorial integrity or political independence of another state. It also includes, among other things, invasion, military occupation, and annexation by the use of force, blockade of the ports or coasts, if it is considered being, by its character, gravity and scale, a manifest violation of the Charter of United Nations. Moreover, considering the increasing rate of non-international armed conflict situation in different parts of the world, the Statute also provides jurisdiction of the Court under Article 8(1) over non-international armed conflict situation.

As per Article 15 of the Rome Statute the Prosecutor of the International Criminal Court may initiate investigation *proprio motu* on the basis of information received from individuals or organizations within the jurisdiction of the Court. The Prosecutor may also initiate an investigation on the basis of referral from any State Party or from the United Nations Security Council. In addition, non-Party State may accept the Court’s authority on a case to case basis.

As the International Criminal Court is established to put an end to impunity for perpetrators of crimes, it would not prosecute states as abstract entities, but individuals who have committed the alleged crimes. Article 25(2) of the Statute in this regard says that a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute. However, this provision of individual criminal responsibility shall not affect
the responsibility of State under the international law\textsuperscript{4}. This is an important development in the international law. The Court may prosecute any person without any distinction based on official capacity. So official capacity as a Head of State or Government, a member of a Government or Parliament etc. is neither considered as a ground for exemption from criminal responsibility nor constitute a ground for reduction of sentence\textsuperscript{5}.

Another particular feature of the ICC, different from earlier ad-hoc international tribunals, is the treatment given to victims. So long victims participated in the proceedings as witnesses for the prosecutors or for the defenses. While in the case of ICC victims may participate in proceedings even when not called as witnesses. The Court also has power to order reparations to victims, including restitution, compensation and rehabilitation. The ICC has the obligation to take into account the particular interests of victims of violence against women and children.

7.3 Functioning of the ICC

The International Criminal Court has completed 11 years of functioning and during this period the Court has started investigation in eight different countries of South Africa. The Court has initiated proceedings for crimes committed on the territories of Uganda, the Democratic Republic of the Congo (DRC), the Central African Republic and Mali on the basis of the referral of the concerning States. The Security Council of United Nations referred the situations of Darfur, Sudan and the

\textsuperscript{4} Article 25(4) of the Rome Statute.
\textsuperscript{5} Article 27(1) of the Rome Statute says, ‘This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence’ Clause 2 of Article 27 says, ‘Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person’.
situation in Libya to the Court who are not State Parties to the Rome Treaty. On 31 March 2010, the ICC initiate investigation in the situation of Kenya and on 3rd October 2011 on the situations of Cote d’Ivoire proprio motu. Before analyzing the functioning of the Court a short description of the situations of these countries is necessary.

7.3.1 Investigation on situations of Uganda

The ICC started its journey by initiating investigation against Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen, leaders of Lord’s Resistance Army (LRA), a Christian based insurgent groups accused of numerous human rights violations including massacres, abduction of civilians, use of child soldiers, sexual enslavement, torture and pillaging in northern Uganda and neighboring regions since 1987. The matter was referred to the Court by the Government of Uganda on 16th December 2003, a non-state party after accepting the temporary jurisdiction of the ICC under Article 12(3) of the Rome Statute. The Prosecutor of ICC decided to open investigation into this matter on July 29, 2004 and on 8th July 2005, the Court issued its first public arrest warrants for the leaders as mentioned above. However, all of these indictees except Lukwiya and Otti are currently fugitive. Lukwiya was killed in fighting on 12 August 2006 and Otti is said to have been killed in 2007, apparently by Kony. Other three suspects are believed to be either in Southern Sudan or the northwestern Ituri Province of the Democratic Republic of the Congo. The government of Uganda is currently in peace talks with LRA. The LRA’s leaders have repeatedly demanded immunity from ICC Prosecution


in return for end to the insurgency. The government of Uganda says it is considering establishing national tribunal that meets international standards, thereby allowing the ICC warrants to be set aside.

7.3.2 Investigation on situations of Democratic Republic of Congo

The Democratic Republic of Congo was a colony of Belgium during the period of 1885 to 1960. After independence Mobutu became the first President and under his rule the country was known as Zaire. By 1996, following the Civil War of Rwanda, Rwandan Hutu militia forces fled to eastern Zaire and started to use the refugee camps of that area as a basis for incursion against Rwanda. In 1998, Rwanda and Uganda backed rebels overthrew the existing government and with their help Kabila became the President of the country and he changed the name of the country back to Democratic Republic of Congo. However, tensions continues between Kabila and different factions in the DRC and waged a violent war known as Second Congo War which had claimed an estimated lives of five million people of DRC between 1998 to 2003. While most of the atrocities were committed within Congolese borders, forces from other six neighbouring countries also have participated in some way in the strife.

Kabila was assassinated by his bodyguard in 2001 and was succeeded as President by his son Joseph Kabila, who eventually negotiated peace talks to end the war. In April 2004, the Government of DRC formally referred the situation in the 

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Country to the ICC and in June 2004, the Prosecutor of ICC formally opened an investigation and has charged six people with committing crimes within the jurisdiction of the ICC in DRC. On 17th March, 2006, Thomas Lubanga, former leader of the Union of Congolese Patriotic Militia in Ituri, became the first person to be arrested by the ICC and the first suspect to face the trial at ICC. On July 10, 2012 the Trial Chamber I of ICC convicted Lubanga for war crimes consisting of enlisting and conscripting children as soldiers of the Patriotic Forces for the Liberation of Congo and sentenced to 14 years imprisonment. Now the case is in appeal phase. Other persons, against whom warrant of arrest has been issued are- Germain Katanga and Mathieu Ngudjulo Chui, Besco Ntaganda, Callixte Mbarushimana and Sylevestre Mudaunmura Katanga is currently on trial, Chui is acquitted, the Pre-trial Chamber declined to confirm the charges against Mbarushimana who is currently fugitive, and Ntaganda turned himself in to the US Embassy in Kigali on 18 march 2013, requesting to be extradite to the ICC.

7.3.3 Investigation on situations of Central African Republic (CAR)

Central African Republic has been facing political unrest since independence in 1960. The Country was under military dictatorship for a period of three decades. In 1993, democratic election was conducted under the initiative of United Nations, whereby Ange-Felix Patasse elected as President. However under his rule also the country had faced significant unrest.

In October, 2002, former Army Chief of staff Francois Bozize launched a coup to overthrow Patasse. He succeed in march 2003 and was elected as President in 2005 with French support. During the five month conflict, Patasse enlisted support of troops from DRC and mercenaries from Chad and Libya and these troops
committed widespread human rights abuses, including summary executions, sexual violence, enforced disappearance and looting. The government of the Central African Republic referred the situation in the country to the International Criminal Court on December 22, 2004.

The Prosecutor opened an investigation in May 2007 and on May 2008, Jean-Pierre Berma, the former militia leader and Vice-President of the Democratic Republic of Congo was arrested during a visit to Belgium under a sealed warrant under accusations of war crimes and crimes against humanity committed in CAR. Charges against him confirmed on June 2009 and his trial began on 22nd November 2010 and is ongoing. No other cases and no other public arrest warrant have been issued.

7.3.4 Investigation on situations of Sudan

Darfur region of the African country Sudan has been facing guerrilla conflict from 2003 to 2010. The conflict started by the Sudanese Liberation Army and Justice and Equality Movement to protest the oppression of black Sudanese by the majority Arab Governments. As a response, the Government forces Janajaweed militia have attacked the black Sudanese in the Darfur region. These actions have been described as genocide by a number of governmental and human rights groups.

As Sudan is not a state party to the Rome Statute, the United Nation’s security council passed Resolution 1593 and referred the situation in Darfur since 1st July 2002 to the Prosecutor. In February 2007, Prosecutor announced two men- Sudanese Humanitarian Affairs Minister Ahmed Muhammad Harun and Janajweed militia leader Ali Kushayb as key suspects and accused them for war crimes and crimes against humanity. Allegation against Harun is that he commanded the “Darfur
Security desk” which coordinated the counter insurgency in Darfur and provided arms to the Janajweed. On May 2007, the Court issued arrest warrant for them, but the Government of Sudan claims that the Court has no jurisdiction over this matter and refuses to hand over the suspects. On March 2009, the Court issued arrest warrant against Sudanese President Omar al–Bashir who has been charged by the ICC Prosecutors with masterminding genocide and other crimes during the conflict in Darfur region of Sudan which has left some 200,000 people dead. It is the first warrant against a sitting Head of a State. However, he could not be arrested till date. Others suspects indicted by the Court are Bahar Abu Garda, Abdallah Banda, Saleh Jerbo and Abdel Rahim Mohammed Hussein. Bahar Abu Garda was commander of the United Resistance Front, a Darfuri rebel group, and Abdallah Banda, Saleh Jerbo, leaders of small Darfuri rebel group were accused of responsibility for attack on the African Union’s peace mission in Haskanita voluntarily appeared before the Court.

7.3.5 Investigation on situations of Kenya

On 27th December 2007, a general election was held in Kenya where the incumbent President Mwai Kibabi from Party of National Unity (PNU) and Raila Odinga from Orange Democratic Movement (ODM) were the leading candidates. Though early indications showed that Odinga was likely to win the election, however result announced showed that Kibabi had been re-elected and he was sworn in as President. Odinga rejected the result. Protest and demonstration followed clashes, mainly along the tribal lines, from where both the persons belong started, and within a period of six weeks more than 1,000 people were killed and more than 500,000 were displaced from their homes. Violence continued until a peace deal for power sharing was agreed upon between Kibabi and Odinga under the mediation of former United
Nation’s Secretary General Kofi Annan whereby Kibabi would remain as President and Odinga would take over the newly created office of Prime Minister.

On March 2010, after the Government of Kenya failed to investigate and prosecute the crimes committed during post election violence, the International Criminal Court decided to step in and ultimately started investigation *propio motu* on the situations of Kenya. The Court accused President Kenyatta and Deputy President Ruto, who were both senior political figures at the time of the post election violence for crime against humanity including murder, forcible population transfer, and persecution. President Kenyatta is also accused of responsibility for rape and other inhumane acts including circumcision and penile amputation carried out by the Mungili, a criminal gang allegedly under his control. On April 2011, six accused appeared before the ICC. The Court confirmed charges against Kenyan President Kenyatta, Vice-President Ruto and Radio presenter Joshua Arap Sang for initiating violence in 2007.

On September 5, 2013 the Kenyan Parliament voted to pass a motion seeking to withdraw from the Rome Statute of the ICC. However, if Kenya proceeds with withdrawing, it will not affect the current cases, which according to the Statute must proceed. Thus, Kenya would still have an obligation to co-operate with ICC in relation to existing cases.

7.3.6 Investigation on situations of Libya

Libiya’s civil war begins on February 2011 between the forces loyal to Colonel Mummar Gaddafi and those seeking to oust his government. The war was preceded with peaceful protest in Benghazi escalated into a rebellion that spread across the country and established an interim government namely the National
Transitional Council. The United Nations Security Council by passing a resolution referred the situation of Libya to the ICC for investigation which is not a party to the Rome Treaty. Subsequently by another resolution authorized member states to established and enforce a no-fly zone and to use all necessary measures to prevent attacks on civilians. On September 2011, the National Transitional Council overthrow the Gaddafi’s government declared liberation of Libya and ended the war officially on 23 October 2011. Gaddafi was captured and killed by a militia group as he was trying to flee to neighbouring Niger in the aftermaths of war.

On June 2011, the ICC Pre-Trial chamber issued warrants of arrest for Mummar Gaddafi, his son Saif Al Islam Gaddafi, Libiyan Government Spokesman and Abdullah Senussi, Director of Military Intelligence for alleged crime against humanity and war crimes. However, Libya refused to surrender the suspects, arguing they should be tried in Libya for crimes committed during the whole of Gaddafi’s rule. Thus a political and legal tug of war is going on between the Libyan government and ICC on the matter of exercising criminal jurisdiction over perpetrators of crimes during Libiyan civil war.

7.3.7 Investigation on situations of Cote d’Ivoire

Cote d’ivoire has been suffering political crises and violence since 2002 which reached the boiling point after the Presidential election in 2010. In this election the incumbent President Laurent Gbagbo was proclaimed the winner, which was vehemently opposed by his opponent Alassane Ouattara who was also recognized as legitimate winner by the UN and international community. This opposition led to a military offensive in the capital Abidjan by Ouattara’s forces ending with the capture of Gbagbo on 11 April 2011. Eight month latter, Gbagbo was transferred to the
International Criminal Court accusing him as indirect co-perpetrator of crimes against humanity allegedly committed in Cote d’ivoire between December 2010 and April 2011. Around 3,000 civilians died and over one million fled during post election violence. Gbagbo was presently in the Hague where he is held and waiting for a decision from the Court on whether he goes on trial.

7.3.8 Investigation on situations of Mali

Tuareges, a nomadic tribe of the northern Mali have rebelled against the countries Government since independence of the country from France in 1960. In 2006, an agreement was signed between the government and the rebel group whereby the government committed to develop the northern Kidal region and to grant local people better participation in the decision making process. However, the government failed to implement the accord and that led in January 2012 the rebellion reappeared with greater intensity. The rebellion was organized by the National Movement for the Liberation of Azawad (MNLA) and fueled by fighters from Libya after the fall of Muammar Gaddafi and launched attacks the Malian garrisons. Subsequently, other armed group also come forward to help MNLA to seize the North, and on April 2012, MNLA announced the independence of Azawad.

A UN report estimated the total number of “core combatants” of the armed groups in the northern Mali around 3,000 adding that insurgents were actively recruiting and had “relatively sophisticated equipments obtained from Libya and from Malian Stock"\(^{10}\). These groups involved in transnational criminality which include trafficking of drugs and arms, abduction and holding of western hostages in Mali and the neighbouring country like Niger and Mauritania. According to UN Office for the

Coordination of Humanitarian Affairs, by February 2012, more than 1,20,000 persons had been displaced by the conflict, including 60,000 internally and an equal number to neighbouring country\textsuperscript{11}.

On July 2012, the government of Mali has referred the situation of northern part of the country to the Prosecutor of the International Criminal Court. The ICC started investigation on January 2013.

\textbf{7.4 Preliminary investigation by the ICC}

Besides these eight situations, several other situations are also under “preliminary examinations” of the ICC. Situations in Afganistan, Colombia, Guinea, Georgia, Honduras, Korea, Nigera, and Palestine are under such preliminary investigation. The Court has closed preliminary investigation regarding Iraq and Venezuela on 9 February 2006 and held that no investigation would be initiated because necessary requirements had not been met.

\textbf{7.5 An analysis of functioning of the ICC}

The International Criminal Court during the 11 years of its journey has completed proceedings against eight persons. Among these persons charges against four, namely Callixte Mbarushimana of DRC, Bahr Idriss Abu Garda of Sudan, Henry Kosgey, Mohammed Hussain Ali of Kenya have been dismissed, three persons namely Raska Lukwiya of Uganda, Saleh Jerbo of Sudan has died before trial and charges against one namely Francis Muthaura has been withdrawn by the Prosecution before trial.

\textsuperscript{11} Returns, \textit{“some 1,20,000 forced from homes by Mali clashes-UN}, Feb. 22 2012, available at http://www RETURNS.COM ARTICLE/2012/12/22/MALI-DISPLACED-IDAFL5E8DMA2E2012/20222, last visited 10 February, 2013
At present 24 proceedings are going on in the Court. Among them, ten are at large as fugitives, four have been arrested, but are not in the Court’s custody, four are in the pre-trial phase, another four are at trial, one is appealing his sentence, and one individual’s acquittal is being appealed by the prosecution. As of October 2013, the Court's first trial, the Lubanga trial in the situation of the DRC, is in the appeals phase after the accused was found guilty and sentenced to 14 years imprisonment. Trial of Germain Katanga and Mathieu Ngudjolo Chui concluded in May 2012 and presently in appeal phase. On March 27, 2013, the Appeal Chamber has rejected an appeal by Katanga’s defense objecting to a possible change by the Trial Chamber II to his alleged criminal responsibility. The decision regarding Mr. Katanga is pending. Mr. Ngudjolo Chui was acquitted and released. However, the Prosecutor has appealed the acquittal. The Bemba trial regarding the Central African Republic is ongoing with the defence presenting its evidence. Trial of William Ruto and Joshua Sang regarding the situation in Kenya, began on 10 September 2013. There is another trial in the Kenya situation which is scheduled to begin in November 2013, namely the Kenyatta trial. Pre-trial chamber has confirmed charges against Abdullah Banda of Sudan, and the trial scheduled to begin in May 2014. The decision on the confirmation of charges in the Laurent Gbagbo case in the Côte d'Ivoire situation is pending after hearings took place in February 2013 and the decision was adjourned to give the Prosecutor more time to present compelling evidence. The confirmation of charges hearing in Bosco Ntaganda case in the DR Congo situation is scheduled to begin in 10 February 2014.12

These data do not express a very success functioning of the Court. Till date no person could be convicted by the Court. However, there are many factors which

obstruct the smooth functioning of the Court which should be taken into consideration while analyzing the functioning of the Court. The ICC being an international organ, very much dependent on the action taken by other actors such as its State Parties, international organizations and civil society group. As the Court has not its own police or military force for executing its orders, it has to rely on national government, which is often lack of will or capacity. In many cases it appears that Governments have assisted the ICC in exchange of exemption of their own political officials. In such cases, generally negotiation took place between the prosecutors and local officials for over a year before these states agreed to any referrals. The ICC in return of the co-operation from the State Party has avoided pursuing criminal cases against the officials of the country. The cases of the DRC and Uganda, particularly exemplify this phenomenon. The ICC has till date avoided pursuing criminal cases involving Congolese or Ugandan officials despite the various atrocities committed by these forces against their own people. On the contrary, the court has started prosecution against militants from Lord’s Resistance Army (LRA) of Uganda; a mission that greatly benefits Ugandan President Museveni who has also been engaged in 25 years of civil war with this rebel group. Similarly prosecution and arrest of Bemba Gombo while investigating the situations of CRA has been controversial in the DRC. It is said that the ICC’s mandate perfectly suits President Joseph Kabila of the DRC as Bemba Gombo is his most prominent political opponent, and thus allowing Kabila to secure his hold on power. Thus, some observers see the prosecution of Bemba Gombo by the ICC as politically expedient for President Kabila.

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“Doctrine of Sovereign immunity” a principle of international law also creates obstacles in exercising power by the ICC. This doctrine says that heads of foreign states or government officials or department of foreign states cannot be brought before courts of other states against their will. The House of Lords in England in the famous *Pinochet* case\(^{14}\) denied immunity to Pinochet in his capacity as a former head of State of Chile. However, their Lordship held that if he had still been an acting head of State, he would have enjoyed immunity from prosecution as per International Law. The International Court of Justice in the *Arrest Warrant* case\(^{15}\) held that Belgium had violated international law by issuing a warrant of arrest against DRC Foreign Minister (Mr. Yerodia) on charge of crimes against humanity and war crimes committed in the DRC in that it (Belgium) has failed to respect immunity from criminal jurisdiction which the minister enjoyed under international law before national court. In a close contradiction to this rule of international law, the Rome Statute says that all State parties are obliged to take necessary measures to enforce the ICC’s indictments and otherwise support its work. Article 27 of the Rome Statute provides that the Statute applies to all persons without distinction based on official capacity and that immunities which may attach to official capacity under national or international law shall no bar the Court from exercising jurisdiction. Where a State Party fails to follow through on its obligation to the ICC, the Court may make a finding to that effect and refer the matter to the Assembly of the State Parties, its governing body. Thus the State Parties of ICC are facing dilemma of these conflicting obligations to execute the orders of the ICC. This situation is made more complicated by Article 98 of the Rome Statute which says that the Court may not proceed with a request for surrender

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14 Pinochet Case (No. 3), 1997 2WLR 824, at 905
15 Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo vs. Belgium) 2000 ICJ Rep.3.
or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person unless the Court can first obtain the co-operation of that third state for the waiver of the immunity.

ICC’s arrest warrant against Sudanese President Omar Al Basir and other Government Officials have not been executed till date due to such contradictory international laws. Under international law Basir as a Head of State would ordinarily be entitled to immunity from the exercise of criminal jurisdiction, including immunity from arrest by foreign states. On the other hand, Sudan, the member states of ICC as well as the member States of UN are also under obligation to arrest and surrender the President and other officials to ICC as the matter was referred to the ICC by the Security Council Resolution 1593. Further, in July 2009 at the 13th Summit of Head of States, the African Union passed a resolution prohibiting its member countries from co-operating with the ICC arrest warrant against Basir. In July 2010, the Union reiterated this decision. In early June 2012, the organization again called upon the Court to drop its case against Sudanese Leader. Here also, many countries of AU are also state parties to the Rome statute and as such subject to the decisions of both organization. But there is no clear way of legally reconciling these competing obligations\(^{16}\).

Sometimes it appears that ICC’s involvement has hindered the pursuit of a peace negotiation between the insurgent groups and the Government. For example, ICC’s arrest warrant against the leaders of Lord Resistance Army of Uganda considered to be a crucial factor in bringing the insurgent group to the negotiating

table in 2006 for peace talk with the Ugandan Government. Though, in the subsequent years the Government and the LRA Leaders reached several other significant agreements, including a ceasefire, now-a-days threats of ICC prosecution turns into main obstacle on the final peace deal as the LRA leaders has repeatedly demanded that the ICC arrest warrants be annulled as a pre-requisite to a final agreement. Here, the main problem is that, there is no clear mechanism for the court to withdraw the warrant on its own initiative. Moreover, the Ugandan Government would be ‘in breach of its obligation as a State Party to the Rome Statute’ if it refused to surrender the indictees in order to secure a peace agreement. The Security council could use its power under Article 16 of the Rome Statute to request a deferral of the investigation or prosecution for a period of 12 months, in the interest of peace and security. In this respect also the members who are strong supporters of the Court are of the opinion of giving real consideration of this proposal17.

The main obstacles before the International Criminal Court is that the court lacks universal jurisdiction to make it a truly global institution. Except the 122 State Parties, the ICC has nothing to do for the crimes committed in other 71 countries unless a non-State Party through a formal declaration invite the ICC to exercise jurisdiction or the Security Council refers the situations in such countries to the ICC. The list of non-State Parties of ICC includes many powerful countries of world such as Russia, China, USA as well as India. Thus, beyond serious crimes conducted on the territory of a State party or involving a State Party’s nationals, the ICC’s ability to intervene is seriously hampered. Further referral by UN Security Council depends on the wish of five permanent members of UN.

7.6 Relevance of International Criminal Court in India

At the Rome Conference in 1998 where the Rome Statute for establishing the International Criminal Court was formally adopted by 120 countries, India along with 20 other countries, abstained from voting on the same. Even since after a period of more than 15 years there is no indication of becoming a state party to the Statute by the Government of India. The main objection of the Government of India for becoming a state party to the Rome Statute is that it impinges on the sovereignty of India. The Government of India argued that ICC’s inherent jurisdiction to decide whether a State has acted in a manner that is consistent with justice, impinges on the sovereignty of the State. Government of India sought to restrict the jurisdiction of ICC to truly exceptional circumstances—only in situations of a total breakdown of legal machinery and not when there is political unwillingness to prosecute the offenders. In his statement at the Conference on the ICC on June 16, 1998, India’s Additional Secretary to the United Nations, Mr. Dilip Lahri said that, “ICC should be based on the principles of complementary, state sovereignty and non-intervention in internal affairs of States, and that its Statutes should be such as to attack the widest acceptability of States, with State consent as the cornerstone of the ICC’s jurisdiction18.

This stand of India is well supported by some episodes in India’s recent history that weave themselves into tales of impunity as well as government of India’s unwillingness to prosecute the offenders. The anti-Sikh riots that raged for three days following the assassination of the Prime Minister, Mrs. Indira Gandhi, on 31 October 1984, whereby thousands of Sikhs people were targeted and killed, the extra judicial execution and disappearance of innocent civilians in the years when army operations

were conducted in different States of North-east, Punjab, Jammu and Kashmir etc. to curb militancy. State targeted violence against Muslims in Gujrat, in avowed retaliation for burning of a train carrying Hindu Pilgrims from a site of political contest in Ayodhya in Uttar Pradesh are some examples among others that reveal the culture of impunity that rooted in political compromise and expediency. Although these episodes could not constitute a case for the ICC as they occurred before the ICC came into existence, the government of fear that such culture of impunity may call for interference by the ICC in future if the Government of India would have sign the Rome Statute.

The second point of discontent on the part of the Government of India for signing the Rome Statute is the inclusion of “armed conflict not of an international character” in defining ‘war crimes’ in Article 8 of the Rome Statute. The Government of India thinks that on signing up the Rome Statute, India would immediately come under ICC jurisdiction for violation under common Article 3 and crime against humanity during non-international armed conflict. The Government of India has ratified the Geneva Conventions, 1949 and has also enacted Geneva Convention Act, 1960 to implement the provisions of the Convention in India. But the Government has decided to overlook the Common Article 3 to the Geneva Conventions in its domestic legislation and also in Supreme Court rulings. The Government argued that at no point has the situation in India met the threshold required for the application of Common Article 3. India considers the conflict beset with her as domestic affairs, if above the ‘law and order’ level but certainly below that of non-international armed conflict.

Various reports of different commissions appointed by the Government of India and various international neutral agencies reveal the large scale human rights
violations in different parts of North-east India and in Jammu and Kashmir, under the umbrella of immunity provided by the Armed Forces Special Power Act which confers wide power to the Government armed forces to do anything whatever they want even to kill a person on mere suspicion during an operation. But, for the last more than 55 years not a single army or paramilitary officer or soldier has been prosecuted for the violation committed during an operation. Judiciary in India which is very much active in other aspects, has failed to its duty in the context of such conflict situations by overlooking “judicial guarantee” as required by the Common Article 3. So, there is fear in the mind of the Government of India that on signing the Rome Statute it would immediately come under the jurisdiction of ICC jurisdiction for violation of Common Article 3 and crime against humanity during non-international armed conflict.

Thus, the Government of India, by maintaining a reasonable distance from the Rome Statute permits to continue the culture in immunity in her area for any type of crimes committed in armed conflict situations. The Supreme Court of India cannot be said to be unable to prosecute the perpetrators of crimes in conflict areas as that of the judiciary of other countries where ICC interferes. Many principles of ICC has already been a part of Constitution of India. The fact is that the Government of India is unwilling to prosecute any body whether government armed forces or surrendered leader of insurgent groups for any crimes committed by them upon the innocent civilians. In such situations, the ICC which may be the last resort for the people of such areas make irrelevant by the Government of India by not signing the Rome Statute.
7.7 Concluding Remarks

In conclusion one thing may be point out that so long the ICC lacks universal jurisdiction to make it a global institution, it will not be easy for the Court to reach its core mandate i.e. to put an end to impunity. As an international institution the ICC completely dependent on State’s co-operation for access to crime scenes, victims, official records, witness protection, enforcement of arrest warrant and securing witness attendance in Court etc. Thus future success of the Court and its ability to prevent the commission of serious war crimes will depend upon the support and cooperation it receives from government and especially from those of the most powerful nations. Besides, a highly effective arrest mechanism at the International Criminal Court may help the Court in its better functioning. It will check the culture of escaping from the arm of international justice.

After eleven years of existence the International Criminal Court is well placed to move ahead, having worked out many of its practical and procedural kinks. It is clear that international crimes are prevalent and unlikely to be ended in the foreseeable future and thus the ICC is a needed institution. So, the international community may think for amendment of the Rome Statute to remove factors that obstructs the smooth functioning of the Court as discussed above.