Chapter – VII
CONCLUSION

The International Criminal Court (ICC) has been symbolized as a move towards post-Westphalian world. State sovereignty and non-intervention has been the characteristic features of the Westphalian system. Under the Westphalian system only states are members of international society and subjects of international law. International law governs relations among states. Individuals have no legal standing before international law. From the perspective international political theory, the ICC signifies the growing importance of individuals in international law.1 The Rome Statute gives an indication as to what extent an individual can be subject of international law. The Rome Statute unequivocally clarifies that certain fundamental human rights of all individuals are protected under international law and those individuals who violate others’ fundamental human rights bear international criminal responsibility. In this way individuals both as victims and offenders are subjects of international law. Despite all the requirements of ratification of the Rome Statute by states, referral of situations by states and rules of admissibility of cases, in the end the ICC will have jurisdiction over natural persons. Unlike the International Court of Justice (ICJ) which exercises jurisdiction in cases of inter-state disputes, the ICC will be dealing with the activities of the persons in their individual capacities.

Hence, the Rome Statute suggests a change at the normative level. Although sovereignty based norms are still too valuable, the human rights norms are increasingly gaining strength and are changing the meaning of sovereignty. In the Rome Statute an attempt has been made to reconcile the two. The Statute establishes an international judicial organ which will not only observe how states treat their citizens but will also react when states fail to protect internationally recognised human rights of their citizens. In doing so, it will hold individuals accountable for violating human rights as well for failing to prevent human rights abuses.

It must be noted that the ICC deals with only one set of criminal activities. It is concerned with only what can properly be called international crimes rather than transnational or treaty-based crimes such as drug-trafficking, money laundering or other organised crimes. The three core crimes (genocide, war crimes and crimes against humanity) within the ICC’s jurisdiction are crimes that are regarded as acts

---

against the international community as a whole. The Preamble of the Rome Statute defines them as “the most serious crimes of concern to the international community as a whole.” These are also the crimes which involve grave violations of fundamental human rights. And these are also the crimes where agents of states are more likely to be involved. Nonetheless, such crimes may also be committed by those like insurgent groups or guerrilla forces which are in *de facto* control of some territory, which keep organised armed forces, or which possess some sort of organisational set up.

The ICC has also been viewed as part of proliferation of international judicial organs. It can be regarded as international community’s efforts to place greater reliance on adjudication in resolving international problems. Even from the perspective of neoliberal institutionalism or regime theory, the ICC represents a genuine development. It represents institutional reform in the atrocities regime. The treaty very clearly sets out proscriptive norms, unambiguously clarifying acceptable and unacceptable behaviour. The institutional framework and the procedural rules established by the treaty ensure better compliance with those norms. It has been regarded as a more efficient and cost effective means to control undesirable behaviour in international affairs. It is cost effective in two ways. First it is cost effective in the sense that it will save states from establishing more ad hoc or hybrid criminal tribunals. The establishment of such tribunals has been a costly exercise that also involved a very cumbersome process of negotiating their statutes, engaging different political actors, electing judges, appointing prosecutor, recruiting staff, appropriating funds, and creating offices, courtrooms and detention facilities. Secondly, the ICC will also save states from using more costly options like military intervention or economic and political sanctions in the wake of large-scale atrocities. Although it is understood that during the initial phase of the ICC such measures may have to be taken against authoritarian or dictatorial regimes to enforce compliance with norms and legal rules. But in the long run the deterrent effect of prosecutions will ensure compliance without coercive measures.

As regards the kind of criminal justice enshrined in the Rome Statute, it is clear that the ICC is based on retributive justice and deterrent. However, the victims of crimes have also found a very prominent place in the Statute, meaning that apart from the offenders, the victims will occupy much attention of the ICC. In the Statute there is no direct reference to transitional justice that stands for non-judicial accountability mechanisms like truth and reconciliation commissions or civil and political sanctions.
against the alleged offenders. Transitional justice seeks to adopt a "middle path" between prosecution and impunity. Such measures are intended to help transitional societies to come to grips with their violent past. They take into account immediate needs of emerging democracies. These measures are particularly important in situations where there are risks that prosecutions may prolong ongoing conflicts causing more human suffering. Such measures are equally relevant for societies deeply divided on ethnic or political lines and where a sizeable number of population are engaged in conflict. In these societies such large-scale prosecutions are neither possible nor warranted.

Although there is no provision in the Statute that seeks to directly address transitional justice, the Rome Statute leaves the matter in the hands of the Prosecutor and the judges. They may consider such non-judicial accountability measures or domestic reconciliation processes as genuine efforts of a given society in dealing with its past. The Rome Statute requires the Prosecutor to refrain from initiating action if he believes that the investigations or prosecutions would not serve the interests of justice. A Chamber may rule any case inadmissible on similar ground. But the job of the Prosecutor will become difficult when amnesty deals are on the table. In the past such amnesty deals were a common practice, whereby a dictatorial regime would step down paving way for democratically elected government in return for guarantees that its members would not be prosecuted in future. This was once regarded as the more politically accepted solution to end bloodshed and to bring peace and democracy. However, amnesty for most horrible atrocities or a blanket amnesty for all is unlikely to cut much ice with the Prosecutor. Neither the Prosecutor nor the judges will be able to accept amnesties for gross violations of human rights. Taking into account the experience gained from the earlier ad hoc tribunals, the most feasible solution before the ICC will be the selection of offenders, concentrating only on those who are most responsible for atrocities while sparing the lower-level offenders. The ICC will focus on those who plan and organize crimes rather than those who actually commit crimes with their hands in the field. In order to prevent the ICC from upsetting the prospects of a peace agreement providing wide-scale amnesties, the Security Council will have to intervene. It will have to defer the case before the ICC.

The creation and implementation of rules of international law cannot be beyond the realm of international politics. It must be noted that within international political theory, international law is regarded more as a social process of decision-making,
open to social, moral and political considerations, extraneous to legal rules. This aspect of law making and law implementation in international politics can be seen in the establishment and operation of all the previous ad hoc and hybrid criminal tribunals. The political as well as humanitarian considerations are reflected in the delineation of jurisdictions (territorial, temporal and subject-matter) of different tribunals; selection of applicable law (both substantive and procedural) i.e. treaties, conventions and rules of customary international law on the basis of which trials are to take place; and identification of offenders to be tried. Operational success of these tribunals has been contingent upon political commitment in enabling them to carry out their functions like unhindered access to witnesses and evidence and on-site investigations and in providing them adequate resources and funds.

After the World War II, the victorious Allied forces established the Nuremberg and Tokyo Tribunals to try Nazi and Japanese war criminals respectively. These trials were meant to punish only major war criminals keeping in view their rank and status. The Charters of the tribunals were prepared and the judges were appointed by the Allied forces. The defendants were identified even before the start of trial. However, in the case of the Tokyo Tribunal, the Japanese Emperor was spared because his trial could have been detrimental to the occupation policy of Allied forces in Japan. Both the Tribunals exercised jurisdiction over crimes committed in the context of World War II. The offenders were prosecuted for crimes against peace, war crimes and crimes against humanity. Hence, violations of both *jus ad bellum* and *jus in bello* were criminalised.

It must be noted that apart from war crimes, which had roots in customary law, there was no legal precedent to establish international criminal responsibility for the commission of other two categories of crimes. First time, waging aggressive war against other states was made punishable in international law. As aggressive war, including its planning and preparation, was criminalised, the judges were required to investigate historical events that occurred over many years. Crimes against humanity involved consideration of treatment of a state of its own citizens. While it was recognised that a state’s treatment of its own citizens was within domestic jurisdiction of a state and could not be brought under the scope of international law, Nazis had to be punished for Holocaust inside Germany. On the other hand, the Allies were equally concerned that the inclusion of crimes against humanity in the Charters would establish a precedent whereby one day their own policies in their colonies throughout
the world would fall within the scope of international law. As a result, crimes against humanity were recognised as part of *jus in bello*. A link was established between these crimes and the other two categories of crimes for the Tribunals to exercise jurisdiction. That nexus between crimes against humanity and armed conflict served the purpose of Allied powers in meeting the public demands of punishing Nazis for persecution of Jews while at the same time protecting their own interests in their colonies.

With respect to the legitimacy, both the Tribunals were criticised as victors’ justice or show trials. Law was applied only against one side. Members of the Allied forces were not prosecuted for any one of the war crimes. The validity of the Tribunals was not questioned by the judges. Not all due process guarantees were accorded to the accused. Trials *in absentia* were allowed and defendants were not allowed to appeal the decisions of the Tribunals. In spite of these shortcomings, both the Tribunals made notable contribution in the field of international criminal law. The establishment of these Tribunals led to the development of the principles of individual criminal responsibility under international law. The mere fact that trials were held to punish vanquished despite compete military victory of the Allied forces was an achievement in itself. The losers were not subjected to summary executions.

The other two ad hoc Tribunals (the Yugoslavia Tribunal and the Rwanda Tribunal) have been established by the Security Council. They have been established under Chapter VII of the UN Charter after the Security Council determined that the situations in Yugoslavia and Rwanda constituted threat to international peace and security. Although there were numerous opportunities to set up more criminal tribunals, the Cold War rivalry prevented the international community from doing so. Moreover, many authoritarian regimes flourished under the umbrella of the two superpowers. It was only in the early 1990s that these Tribunals could be established. However, the developments in international law like the adoption of the four Geneva Conventions of 1949, the Genocide Convention of 1948, the two Additional Protocols to the Geneva Conventions of 1977 as well as the International Covenant on Civil and Political Rights of 1966 had a direct influence in the preparation of their Statutes. The territorial and temporal jurisdiction of both the Yugoslavia and Rwanda Tribunals have been linked to geographical locations and time periods of particular conflicts. The subject-matter jurisdiction of the Yugoslavia Tribunal covers grave breaches of the Geneva Conventions of 1949, violations of the laws and customs of war, genocide
and crimes against humanity. Because conflict in Rwanda was non-international, the Rwanda Tribunal’s subject-matter jurisdiction was extended to cover violations of Article 3 common to the four Geneva Conventions and of Additional Protocol II in addition to genocide and crimes against humanity. The Statutes of both the Tribunals enshrine extensive fair trial standards. Apart from the procedural guarantees to the accused, the rules of procedures also take into account interests of victims and witnesses. Gender sensitive provisions have also been incorporated. Further, death penalty is prohibited. Judges represent different legal systems of the world. The offenders to be tried were not identified at the beginning of the trial. The matter was left to the discretion of the Prosecutors. This time the justice has not been one-sided. The Tribunals are required to apply law equally to all parties to the conflict. Moreover, the judges have clarified that they had the competence to determine the validity of the establishment of the Tribunals i.e. whether nor not the Tribunals were lawfully established by the Security Council.

As regards their legitimacy, both the Tribunals have attracted criticism not only because they have been established by a political organ but also because their operations to a large extent have been under the influence of the Security Council. Seeing that the trials were not taking too long to complete, the Security Council asked both the Tribunals to focus on those most responsible for crimes, leaving trial of lower level offenders to national jurisdictions. The closure of both the Tribunals has been linked with the restoration and maintenance of peace and security in their respective regions, a decision which has to be taken by the Council.

Both the Tribunals faced serious logistical and procedural hurdles. Both were criticised as expensive and inefficient. By 2000 both of them were consuming over 10 per cent of the UN’s regular budget. Despite that there was shortage of funds because of non-payment of assessments by member states. Both were also dependent on states for arrest of suspects and for access to witnesses and evidence. The Yugoslavia Tribunal in particular had to face problems due to lack of cooperation from states of former Yugoslavia. Ever increasing financial costs of running the Tribunals were a major issue before the Security Council. It asked both the Tribunals to complete all the trials by 2008.

Learning from the experience of the Yugoslavia and Rwanda Tribunals, the Security Council decided not to establish more ad hoc tribunals. It was not willing to bear the costs of new tribunals through assessed funding. Mixed or hybrid Tribunals appeared
as an alternative to ad hoc Tribunals. They have been established for Sierra Leone, East Timor and Cambodia. Unlike the Yugoslavia and Rwanda Tribunals, these are located within the societies which have witnessed violence. Hence they are seen to be more responsive to the local sentiments. A mixture of national and international judges constitutes the bench of these tribunals. And they apply both international as well as national laws. The Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers of Cambodia have been established by a treaty negotiated with the UN. The Extraordinary Chambers of Cambodia is yet to become functional. They are mandated to try only a very few accused - those who are most responsible for atrocities - in order to avoid trials running endlessly. The SCSL was expected to try thirteen people, while Extraordinary Chambers of Cambodia are expected to prosecute 10 surviving Khmer Rouge leaders. They are cheap. The estimated costs for full three years operation of the SCSL are $57 million and of the Extraordinary Chambers of Cambodia are $56.2 million as opposed to the Rwanda Tribunal’s $1.2 billion.

However, establishment and operations of such mixed tribunals have posed new challenges. Because they do not enjoy Chapter VII enforcement power, they cannot issue legally binding orders to other states where suspects might be hiding. The lifespan of SCSL is limited to only three years. Its dependence on voluntary funding has caused serious resource problems that once it had to be literally closed down. Further, the pressure to complete trials within three–year deadline might put into question the legitimacy of the SCSL. In the case of Cambodia, the majority will be of domestic judges. This is felt particularly problematic because Cambodian judges lack training in conducting trials for crimes like genocide. Concerns have also been raised over judicial independence in Cambodia. The Special Panel with Criminal Jurisdiction in East Timor is a different case. It is an integral arrangement of a UN peacekeeping operation. Although it has been able to prosecute about 75 people, almost all of them were low-level offenders. All the major offenders were shielded by Indonesia. Moreover, most of the offenders were charged under domestic laws rather than international law, seriously undermining the gravity of offences.

The same political and humanitarian considerations resurfaced when the UN convened the Rome Diplomatic Conference in 1998 for the purpose of establishing a permanent international criminal court. For decades the issue of a permanent international criminal court was pending before the UN. Owing to the Cold War
rivalry and also because of the lack of an acceptable definition of aggression no substantial progress could be made during that period. Nonetheless, after the end of the Cold War and before the Rome Conference, the creation of such a court had been extensively debated in the International Law Commission (ILC) and the Ad Hoc and Preparatory Committees established to consider proposals of the ILC. During Rome negotiations, disagreement prevailed over all fundamental, substantive as well as procedural issues. The negotiations reflected the state of affairs prevailing in international politics.

The Rome Conference witnessed the alignment of states along regional and political groupings or coalitions. The most important was the group of about sixty like-minded states that showed greater determination in working towards the success of the Conference. They favoured an independent and efficient court. The permanent members of the Security Council wanted a strong role for the Security Council in relation to the court. The US wanted the Security Council to play the key role in referring and deferring cases before the court. There were other states like India, Pakistan, Syria, Libya, Iran and Iraq which strongly stood against assigning any role to the Security Council in the statute. In addition, the participants also frequently aligned themselves with the positions of different groups such as the Non-Aligned Movement, the European Union, the Arab group, the African group, and the Latin American and Caribbean group. Despite the presence of several groupings and coalitions, states often took particular positions depending on their individual preferences. On occasions states also associated themselves with different groups taking into account their primary interests. A number of NGOs also actively participated during negotiations. They vigorously lobbied for a strong and independent court which could play a crucial role in preventing grave violations of human rights and in countering impunity for worst kinds of atrocities. They worked in cooperation with the group of like-minded states in raising concerns, in particular, for victims, children and gender related issues.

Some more controversial issues dealt with the jurisdiction of the court, applicable law, trigger mechanism (referral of cases) and the independent powers of the prosecutor. Other contentious issues included state cooperation with the court, funding of the court, election of judges and death penalty. The issues related to jurisdiction involved the requirement of consent (of which states the court must have consent before it exercised jurisdiction), subject-matter jurisdiction (over which crimes the court should
exercise jurisdiction), and the Security Council’s role in referring as well as deferring cases before the court.

With respect to inherent jurisdiction of the court, many states favoured automatic jurisdiction (i.e. a state becoming party to the statute automatically accepted the court’s jurisdiction) others stood for opt-in/ opt-out or case-by-case basis of jurisdiction. That meant that the court would have required additional declarations of acceptance of the court’s jurisdiction from states parties for each category of crime before initiating proceedings, or the court would have required state party’s consent for each case.

Regarding preconditions to the exercise of jurisdiction, a variety of proposals, suggesting the states whose consent would be essential for the court to exercise jurisdiction, were advocated. These included the territorial state (the state on whose territory crime occurred), the state of nationality of the accused, the state of nationality of the victim and the custodial state (state in whose custody the accused was found). A few like Germany, Belgium and the Netherlands as well as NGOs even suggested universal jurisdiction. Most of the delegations were of the view that the court must be able to exercise jurisdiction if it had the consent of either the territorial state or the state of nationality of the accused. Some of the states like the US and China stood for mandatory consent of the state of nationality of the accused.

With respect to the subject-matter jurisdiction, there emerged a general acceptance for the inclusion of genocide, war crimes and crimes against humanity. Many states also favoured the inclusion of other crimes like terrorism and drug trafficking. Others felt that inclusion of more crimes would overwhelm the court and that national courts were better suited for the investigation and prosecution of these crimes. There was also a wide-spread support for the inclusion of aggression, especially among the members of the NAM. However, an acceptable definition of aggression eluded the Conference. Permanent members of the Security Council as well as many European states were ready to accept its inclusion provided that the power of the Security Council to determine acts of aggression was duly recognized in the statute. Others held that in cases where the Council failed to determine acts of aggression, the court must be allowed to act on its own. In the end the crime of aggression was included but without definition.

For war crimes, some states including India, China, Pakistan, Indonesia, Saudi Arabia, Iran and Iraq opposed extending its definition over internal armed conflicts.
Use of weapons of mass destruction as a possible war crime generated heated debates. Most of the delegations stood for the inclusion of nuclear weapons in the list of prohibited weapons. Permanent members of the Security Council, on the other hand, argued that there was no customary basis of treating use of nuclear weapons as war crime. Recruitment of child soldiers and forcible deportation of civilian population were other contentious issues.

With respect to crimes against humanity, only a few states like China, India and Pakistan were in favour of maintaining a nexus between armed conflict and crimes against humanity. A number of substantive offences were suggested for possible inclusion in the list of crimes against humanity. Latin American states wanted the inclusion of enforced disappearance. Cuba even asked for economic embargo. NGOs strongly argued for expanding the list to include sexual offences.

Regarding trigger mechanism, there was no controversy in granting powers to the states to refer cases to the court. Although many countries waned to grant powers to prosecutor to initiate investigations on its own, others including the US, India, China, Pakistan, Russia and Sri Lanka opposed such *proprio motu* powers to the prosecutor. They expressed concern about the possibility of abuse of power by the prosecutor and the overloading of the office of prosecutor with frivolous complaints. Most of the delegations agreed that the Security Council should be allowed to refer cases to the court in order to obviate the need for more ad hoc tribunals. But proposals allowing the Security Council to suspend proceedings before the court caused controversies. The permanent members of the Security Council felt that the Council be allowed to defer cases before the court in order to avoid interference in its primary responsibility of maintaining international peace and security. There were a few states like India, Pakistan and Iraq that opposed any role for the Security Council vis-à-vis the court. India felt that such interference by a political organ would undermine the judicial independence of the court.

The US strongly argued for the elaboration of the elements of crimes and the rules of procedure and evidence. Others opposed that taking into account the difficulties in integrating criminal laws of different legal systems of the world. It was also felt that excessive codification in these areas would unnecessarily delay the adoption of the statute and greatly restrict the scope of judicial law making.

Finally the Rome Statute was adopted with 120 votes in favour, 7 against and 21 abstentions. The US, Israel, China, Iraq, Yemen, Libya and Qatar voted against the
Statute. India was among the 21 states that abstained. India abstained primarily because it felt that the court was given power to exercise universal jurisdiction upon referral of cases by the Security Council. It claimed that the Statute had violated the fundamental principle of international law by assigning an "illegal role" to the Security Council to bind non-states parties to an international treaty. Further, India wanted the court to exercise jurisdiction only in exceptional cases. It was also concerned with extending the definition of war crimes to include internal armed conflicts and the inclusion of a number of offences within the list of crimes against humanity.

The Rome Statute entered into force on 1 July 2002. From a purely legal perspective, the Rome Statute is an instrument of criminal law. It prohibits and provides punishment for grave violations of human rights and humanitarian law. Most of the punishable acts provided in the Rome Statute were already prohibited either under customary international law or in widely accepted international treaties. But in the past, human rights treaties did little more than to enunciate proscriptive norms. At the most international criminal law as distinct from international human rights law and humanitarian law was present in rudimentary form. It was applied rarely and selectively. What was also clearly lacking was a proper enforcement mechanism. The ad hoc tribunals reflected adhocism in the enforcement of international criminal law. The prevailing extradite or prosecute system as a means to enforce international criminal law remained almost dysfunctional. The Rome Statute does well in filling a gap in international law. The Rome Statute marks an achievement in transforming those proscriptive norms in the form of definitions of crimes and bringing them together in a single treaty which were earlier scattered in a variety of treaties and in the rules of customary international law. Further, as an international judicial organ to enforce international criminal law, the ICC is neither created by the victor states nor by the Security Council. Its jurisdiction is not linked to any particular conflict. The ICC is the result of a treaty negotiated by states over which it will have jurisdiction. Its permanent structure is meant to ensure consistent and coherent application and interpretation of law.

In many respects, the Rome Statute is akin to domestic criminal law. All the definitions of crimes, general principles of criminal law and procedural rules are elaborated in great detail in the Statute in accordance with the principle of specificity as required in criminal laws. They are further supplemented by two separate
instruments – the Elements of Crime and the Rules of Procedure and Evidence – prepared by the Preparatory Commission after the adoption of the Rome Statute. Because it is an instrument of international criminal law rather than criminal law and also because it is a treaty, the Rome Statute contains provisions related to jurisdictional competence of the ICC vis-à-vis jurisdiction of national courts, and procedures of state cooperation with the ICC. Although detailed codification is seen as an essential requirement of criminal laws in accordance with the principles of legality and specificity to ensure standards of fair trial, lengthy texts in the Rome Statute as well as their elaboration in the Elements of Crimes and the Rules of Procedure and Evidence are also intended to restrict the prosecutorial and judicial discretion. In particular they are aimed at limiting the scope of judicial law-making. During negotiations, all states, although at varying degrees, showed particular concerns with sovereignty. As a result, the Rome Statute represents a curious blend of sovereignty based norms and criminal law norms. Although, states have been given primacy in punishing offenders, the ICC has been assigned the role of a supervisor in assessing whether or not states are fulfilling their obligations emanating from the treaty. Only when the states are unable or unwilling to prosecute, the ICC is required to intervene in accordance with the principle of complementarity.² It is worth noting that the ad hoc Tribunals established by the Security Council enjoy primacy over national jurisdictions.

The jurisdictional competence of the ICC has been linked with the territorial state and the state of nationality of the accused. Nevertheless, the Statute does not allow opt-in/opt-out basis of jurisdiction implying that the states ratifying the treaty automatically accept the ICC’s jurisdiction. Furthermore, unlike the Statute of the ICJ, states after becoming parties under the Rome Statute are not required to submit special declarations recognizing compulsory jurisdiction of the ICC. In addition, the Prosecutor has been empowered to initiate investigations on his own. To prevent abuse of power by the Prosecutor, his decision to initiate investigation on his own is subject to confirmation by the Pre-Trial Chamber. It is notable that the Statute does

² The principle of complementarity is one of the basic principles of the Rome Statute. It has emerged as a solution in reconciling states’ concerns with sovereignty and their international obligations to punish violators of human rights. The principle of complementarity defines the relationship between the ICC and the national courts. It requires that the first preference must be given to national authorities to investigate and prosecute crimes falling under the ICC’s jurisdiction. Only when states are unable or unwilling to do so the ICC is required to exercise jurisdiction. The principle of complementarity also applies to those states which are not parties to the Statute.
not allow states to make reservations while ratifying the Statute. However, a very cumbersome amendment procedure has been provided that will make it extremely difficult to make substantive changes to the Rome Statute. It is clear that in several situations the ICC’s jurisdictional reach will cover nationals of non-states parties. If crimes falling under the Rome Statute are committed in the territory of a state party by the nationals of non-states parties, the ICC will have jurisdiction over nationals of those non-states parties. If situations are referred to the ICC by the Security Council, the ICC will have jurisdiction irrespective of whether crimes are committed in the territory of non-states parties by the nationals of non-states parties.

From the standpoint of substantive criminal law, the Statute does well in extending criminal responsibility for crimes committed during internal armed conflicts and a variety of offences such as enforced disappearance, deportation, torture, persecution, apartheid, slavery and sexual offences. It also does not recognize the traditional nexus between crimes against humanity and armed conflict in order to prosecute those accused of crimes against humanity. General principles of criminal law clarify that official capacities of individuals do not have any meaning before the ICC. They do not recognise immunities from prosecution usually granted to heads of states, heads of governments and other government officials. However, the scope of the Rome Statute is not broad enough to cover terrorism which has now become the greatest menace to humanity. Moreover, the definitions of crimes contain higher thresholds that create obstacles in the actual exercise of jurisdiction by the ICC. For instance, the threshold for crimes against humanity requires that the prohibited acts to constitute punishable offences under the meaning of the Statute must be “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Similarly, the threshold for war crimes requires that the ICC is to have jurisdiction over “war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”

Again from the standpoint of procedural criminal law, the Statute is commendable in enshrining international human rights standards. A synthesis of adversarial criminal procedure of common law system and inquisitorial criminal procedure of civil law system, the procedural rules of the ICC conform to all standards of a fair trail. The accused has been accorded a number of due process guarantees. The Statute gives full consideration to equality of arms between the Prosecutor and the defence. The role of the Prosecutor is very crucial in this regard as he is to act both as an adversary during
trial and as an “administrator of justice.” It is his duty to give equal regard to incriminating as well as exculpatory evidence during investigations. Trials in absentia are not allowed. The accused is assumed innocent until proved guilty. The onus is on the Prosecutor to prove guilt of the accused beyond reasonable doubt. The accused cannot be compelled to testify or to confess guilt. He also has the right “to remain silent, without such silence being a consideration in the determination of guilt or innocence.” He is entitled to raise defences, to cross-examine witnesses and to present witnesses and other evidences. The Statute also provides him the right “to be tried without undue delay.” Further he has to be provided legal assistance free of cost if the “interests of justice so require.” Apart from the accused the procedural rules also protect rights and interests of victims and witnesses. The concerns and views of victims can be presented at any stage of the trial. The Statute also provides for Victims and Witness Unit and the Trust Fund for the benefit of victims. The ICC is entitled to award repartitions to victims.

But such procedural rules do not carry much weight where states are reluctant to cooperate with the ICC. States enjoy full discretion in withholding any information which, they believe, would prejudice their national security interests. The procedural rules also impose limitations on the jurisdictional reach of the ICC over nationals of non-states parties even when it has over-all jurisdiction over any given situation. In order to have custody of any national of a non-state party who enjoys diplomatic immunity under international law or who is member of a guest armed force serving in the host state pursuant to an international agreement, the ICC will be required to first obtain the consent of that third state. The ICC can do little than to refer any issue of non-compliance to the Assembly of States Parties or to the Security Council. The Assembly of States Parties and the Security Council will have to look for a political solution to compel a recalcitrant state to cooperate with the requests and orders of the ICC. A solution in this regard may involve political and economic sanctions or in extreme cases even militarily defeating an authoritarian regime. In any case a determination of non-compliance by the ICC will have significant implications. It may adversely affect the reputation and moral standing of a non-cooperative state in other international forums.

The Rome Statute has also taken into account concerns of major powers militarily engaged in different parts of the world. In order to avoid undermining the authority of the Security Council in the determination of an act of aggression, the crime of
aggression has been included in the Statute as a core crime but without definition. The inclusion of crime of aggression without definition has a special significance. It signifies international community's firm stand against violation of territorial integrity and political sovereignty of states. On the other hand, it also signifies the influence of major powers in international politics. Further, privileged position of major powers within the Statute can be seen in differential treatment to war crimes in the Statute. General principles of criminal law provide more defences like the defence of property and defence of superior orders to those accused of war crimes than to those accused of committing any other crime. Nuclear weapons, land mines and blinding laser weapons are not included in the list of prohibited weapons. A state ratifying the Statute is allowed to withhold the ICC's jurisdiction over war crimes for an initial period of seven years.

Most important of all, the Security Council is allowed to refer and defer cases before the ICC. For both referring and deferring matters before the ICC, the Security Council is required to adopt a resolution under Chapter VII of the UN Charter. This means that the Security Council will have "to determine the existence of any threat to the peace, breach of the peace, or act of aggression." When a case is referred by the Security Council, the ICC does not require the consent of any state, whether state party or non-state party to exercise jurisdiction. In this manner, the Security Council will be able to empower the ICC to exercise jurisdiction over crimes committed on the territory of a non-state party by nationals of a non-state party. The Security Council may defer an investigation or prosecution by the ICC for a 12 months period. The request for deferral may be renewed every 12 months.

It must be noted that whatever may be the nature of ICC's relationship with political actors, it cannot do away with them. As the ICC lacks a force of its own, it will be dependent on states to discharge its duties. Without doubt it will need the strong arm of the Security Council. As most of the international crimes occur in highly politically charged atmosphere, the ICC will require much greater international cooperation from political actors. Chapter VII enforcement powers of the Security Council are of special significance because decisions taken under its authority will be binding on all UN member states, even when they are non-states parties. If a request is made by the Council to cooperate with the ICC in the investigation or prosecution of any given case, all states will be under an international obligation to comply with the orders and requests of the ICC. All the requests for assistance made by the ICC pursuant to a
referral by the Security Council will have the effect of legally binding orders for states parties as well as non-states parties.

However, Chapter VII enforcement powers will have exactly the opposite effect where the Council decides not to cooperate with the ICC. It may do so if it feels that the interference by the ICC may endanger a peace agreement reached after difficult negotiations between different warring factions. The Council may intentionally promote peace agreements between different parties to a particular conflict that would explicitly or implicitly provide amnesty to perpetrators of worst crimes. A Security Council's decision in this regard is especially disturbing for states parties to the Rome Statute who are also the member states of the UN. They will be required to accord priority to the decisions of the Council because obligations under the UN Charter supersede all other international obligations. Moreover, such states parties will also be under legal obligation to ensure that activities of the ICC conform to the decisions of the Council. There is also another possibility that unwilling to intervene militarily in situations of large-scale violence and armed conflict, the Security Council may prefer to simply put the matter before the ICC. This is more likely to happen where interests of major powers are not directly at stake. Armed intervention requires immense human and material resources. Fear of casualties of service men is another reason for doing so. Hence, in these situations the Council will be using the ICC as a scapegoat.

Further, being part of international order, the ICC is expected to work hand in hand with other international organizations notably the United Nations. The ICC has already entered into a relationship agreement with the UN. Both have agreed to cooperate and consult each other and to respect each other's mandate and responsibilities. The stated goals of both the organs include promotion of peace. The ICC is intended to aspire for international peace in its own way by ending the culture of impunity, by deterrence and by preventing atrocities. The deterrent effect of the ICC has already become evident. It has been reported that leaders and military commanders of authoritarian regimes across the world have become cautious and have started analyzing the possibility of being prosecuted by the ICC. They have also realized that they cannot go beyond a point. Even when their states are non-parties, the situations may still be referred to the ICC by the Security Council if atrocities committed at their command cross the limits. There is a strong possibility that they will soon start bringing changes in their policies that promote ethnic hatred and violations of human rights. It is also important to note that ICC will also help in
promoting international peace by revealing truth and recording correct history. It will open before the eyes of the world the horrible deeds of those leaders who were once highly regarded by their followers. Its judgments and decisions will be made public. It will thus stigmatize those leaders as well as their policies of hatred and violence. It will ensure that ideologies that advocate persecution on religious, racial or ethnic grounds, hatred and violence do not occupy any moral space.

However, it is also clear that the ICC has a much narrow mandate in comparison to the UN. When the root causes of violence are well entrenched ethnic divisions, poverty and hunger, the ICC will not be able to do much. It will be the responsibility of the UN. In many cases, distributive justice rather than retributive justice will solve the crime problem.

Nevertheless, 99 states have ratified the Statute as of now. So many ratifications in such a short period show significant political commitment towards the ICC. Except Asia, the ICC has received support from all other regions. In Asia only a few states have ratified it. The Statute also does not have the support of few important countries like the US, China and India. Among these two are the permanent members of the Security Council. A lack of moral, political, material and financial support from them may pose great hurdles for the ICC in discharging its duties.

As international law operates within the dynamics of international politics, states have adopted different strategies either to undermine or to support the ICC. The European Union's firm commitment towards the ICC has ensured that the ICC does not lack adequate financial and material resources. The EU has also launched a ratification campaign to inspire states from different regions to ratify the treaty. The US, on the other hand, has made all possible efforts to undermine the Statute and to secure immunity for its citizens from the jurisdiction of the ICC. The ICC has become a great irritant in trans-Atlantic relations. One must not also undermine the role played by the NGOs - agents of civil society - during the negotiations as well as in the ratification campaign after the adoption of the Statute.

Taking into account the presence of the US troops across the globe and their active militarily engagement in some parts of the world, the US feels particularly vulnerable that the members of its armed forces and government officials are likely to become targets of politically motivated charges in the ICC. It does not want the ICC, keeping in view that the US policies are bitterly criticised in some regions of the world, to
pronounce on its foreign policy objectives, and militarily strategies and tactics employed during combat.

The US threatened to veto UN peacekeeping operations if its service men were not granted exemption from the ICC’s jurisdiction. It placed peacekeeping operations against the ICC and asked other members of the Security Council to make a choice. As a result, immunity from the ICC’s jurisdiction was granted to members of armed forces of non-states parties engaged in UN authorised peacekeeping missions for full two years. The US has also entered into bilateral immunity agreements with a number of states (states parties as well as non-states parties) to prevent surrender of its citizens to the ICC. A special law American Servicemembers’ Protection Act (ASPA) has been enacted that authorizes the US government to take all possible measures to rescue members of its armed forces from the jurisdiction and custody of the ICC. The US has also warned other states that it would cut off their military and economic aids if they fail, after becoming parties to the Rome Statute, to provide guarantees for the protection of US citizens from the reach of the ICC. The US opposition to the ICC has acquired special significance in the backdrop of world wide condemnation of abuse of prisoners of war and civilian internees in Iraq by US soldiers. Human rights organisations like the Amnesty International link ill-treatment of prisoners with higher authorities in the US. It has been alleged that prisoners were ill-treated in the full knowledge of higher authorities including the Secretary of Defence.

Although during the Rome negotiations, India and the US were in opposite camps in opposing the ICC. After its coming into force both have joined hands and have entered into a bilateral immunity agreement. Albeit for different reasons India shares concerns with the US over ICC’s jurisdiction over nationals of non-states parties. Although, the US efforts to undermine the ICC have drawn criticism from across the world, some of its concerns seem to be genuine. From the realist perspective, the sole superpower in a unipolar world has launched war against terrorism. Militarily weaker EU is increasingly relying on international organisations and adjudication to resolve international disputes. The US has the ability and the willingness to carry forward its campaign against terrorism. It cannot allow an international organ to constrain its activities in hunting terrorists and extremists across the globe. On the other hand, its European allies have been reluctant in spoiling their hands in this dirty war.

As regards legitimacy and acceptability of the ICC, much will also depend upon the proper functioning of its organs. The institutional framework of the ICC is already in
place. As different organs of the ICC have started interacting, its organisational structure will gradually come into effect. All the judges elected to the ICC are of international repute. It is also commendable that seven female judges are included on the bench of the ICC out of a total strength of 18 – an achievement worth noting. The Office of the Prosecutor has been engaged in consulting experts of international criminal justice to guide the Office on major policy issues. It has also been engaged in coordinating efforts with national judicial structures for effective implementation of the principle of complementarity. The US is right in claiming that the Prosecutor enjoys very broad powers in taking crucial decisions related to investigations and prosecutions. In effect he is going to be the single most important authority to activate the machinery of the ICC. Although proper checks and balances among different organs are maintained under the terms of the Statute, the Prosecutor “sits at a critical juncture in the structure of the [ICC] where the pressures of the law and politics converge.”

Ultimately a decision on whether or not to prosecute and whom to prosecute rests on the Prosecutor. As individuals and other groups are not allowed under the Statute to refer cases to the ICC, they will certainly expect the Prosecutor to initiate action on their behalf. They may also try to bring influence on his decisions with the backing of human rights organisations. Further, the Prosecutor will also have at its disposal the massive machinery of the UN. He has already clarified that the energies of his Office will be directed against those who bear the greatest responsibilities for crimes. He has also noted that investigations by his Office will be part of collective effort paying full regard to other international initiatives to end violence as well as local reconciliation processes.

Selection of alleged offenders to be prosecuted by the ICC will remain one of the most crucial issues. For the sake of legitimacy, it is important for the ICC to apply law equally to all parties to a conflict. The ICC must not be perceived as targeting a particular community or a group. More at the normative level, apart from direct (prosecution by the ICC) and indirect (prosecution by national courts in accordance with the principle of complementarity) enforcement of international criminal law, the Rome Statute will have significant impact on national laws. The Rome Statute, the judgments and decisions of the ICC, complaints before the ICC and even the daily

---

3 Allison Marston Danner, “Enhancing the Legitimacy and the Accountability of prosecutorial Discretion at the International Criminal Court,” American Journal of International Law, Vol. 97, No. 3, July 2003, p.510
activities of the ICC are certainly going to influence the legal and judicial processes at the national level, even in the non-states parties. The norms enshrined in the Statute will infiltrate national boundaries with the development of the jurisprudence and case law of the ICC.

This study has tested the following hypotheses:

1. As a functioning institution, the Court may be still-born because of the severe impairments both on account of lack of agreement on its scope and jurisdiction among states in Rome and on account of many countries not becoming party to the Statute.

2. Notwithstanding limitations, the Court has the critical mass of mandate in its favour to begin functioning on a modest scale so that it gradually develops its effectiveness in response to the changing needs of the international community.

On the basis of research findings of the study, the first hypothesis stands basically disproved while the second one has been proved. It is true that neither during the Rome negotiations nor after the coming into force of the ICC, there has been an international consensus on some of the major issues related to the jurisdiction and scope of the ICC. In spite of the absence of an international agreement, the ICC has already obtained considerable international support. Ninety nine states have already ratified the Statute. The Statute's ratification by almost all the European states means that the ICC will not lack crucial financial and material resources during its initial period.

When the Statute was adopted there was little hope that the ICC would so soon become a reality. Contrary to expectations, the ICC has not only come into existence, it has also become almost fully operational even in the face of active opposition of the sole superpower. Four situations have already been referred to it. Three situations have been referred by the States Parties and one by the Security Council. A referral by the Security Council indicates emergence of political consensus among major powers. It should also be noted that all the four situations are from the African region. It is understood that for the time being, the ICC's activities will concentrate on Africa. Asia is another region which has witnessed large scale atrocities and grave violations of human rights. Although the Rome Statute enjoys far less support in this region, it is felt that in due course of time when the international community will come to fully
realise the potential effectiveness of the ICC, the Rome Statute will attract more states from this region. It must also, however, be noted that without adequate support from the Asian region and the US, the ICC remains a para-universal institution. The future success of the ICC depends on its universal character. To be truly meaningful in coming times, the ICC has to bring Asia and the US into its fold and to pay full regard to fair representation of different geographical regions and principal legal systems of the world in the composition, administration and institutional set-up of the ICC.