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Establishment of the International Criminal Court: The Historical Background

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ABSTRACT

The concept of a permanent International Criminal Court was an idea of intellectuals at one point of time. In 2002, it became a reality when sixty states signed and ratified the Rome Statute. The first verdict of the ICC has created the faith in the minds of the party states; it has proved that the impunity shall not be tolerated at any point of time. After years of debate, the international community has agreed and drafted the Rome statute and made this court a reality. The evolution of the International Criminal Court through ages has meet with many hardships. Such an evolution, learning from the pros and cons of the earlier ad hoc Tribunals, are worth studying. Such a study can shed light to the basic jurisprudence on which the ICC has been built upon. Not only that, after making such a court a reality, it is pertinent to check whether International law, especially International Criminal Law has evolved enough to support such a court. This paper intends to study the evolution of the ICC alongwith a brief study of its structure and function according to the Rome Statute.

In this, the historical perspective of the growth and development of the ICC has been discussed. This paper describes the growth and the stages through which the concept of International Criminal Court has developed. The endeavour has been to discuss the growth of this important branch of international law in different phases to understand the importance of the ICC. All the prominent events relating to the history of the ICC have been referred to. The present paper also contains the comparison of the International Criminal Court with the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for Yugoslavia respectively.

I. INTRODUCTION

The constitution and functioning of the tribunals for the trial and punishment of the war criminals and of the crimes directed against the international community as a whole have been the subjects of primary interest in the development of world organization under the reign of law. Therefore, the idea of International Criminal

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Court is not a new one[3]. However, the historical developments leading to its setting up can conveniently be discussed by way of broadly demarcating the period into two phases the first phase covering the developments till 1990 and the second phase covering the developments from 1990 onwards.

II. THE FIRST PHASE (HISTORICAL DEVELOPMENT TILL 1990)

The first phase covering the developments till 1990 and the second phase covering the developments during the post 1990 period i.e. till the creation of the ICC and further developments as well.

- ***History and Evolution of the Criminal Tribunals***

Even though the impetus to establish an institution to adjudicate international crimes, such as genocide, crimes against humanity and war crimes got much momentum after the two World Wars, the notion of International Criminal Law is by no means a twentieth-century phenomenon. One of the earliest prosecutions for international criminal conduct took place during the fifteenth century, involving a 28 member tribunal of the Holy Roman Empire, which convicted a military commander for crimes his subordinates committed against civilians.[4] This first genuinely international trial for the perpetration of atrocities was that of Peter von Hagenbach, who was tried in 1474 for atrocities committed during the occupation of Breisach[5] Hagenbach had acted on behalf of Charles, the Duke of Burgundy, at a time when there were no hostilities. [6] When the town was retaken, von Hagenbach[7] was accused and charged with many

[3]Gurjeet Singh, "Codification of the International Criminal Law: A Study of the Role and Responsibilities of the International Criminal Court," A Report Submitted to the International Committee of the Red Cross (ICRC), Regional Delegation, New Delhi, June 2003, pp. 1-66, at p. 14. There was a trial and execution of Conradin von Hohenstaufen in Naples in 1262 for initiating an unjust war. For more details, refer to Mohamed M. El Zeidy, "The Principle of Complementarity: A New Machinery to Implement International Criminal Law", *Michigan Journal of International Law*, Vol. 23, Summer 2002, pp. 869-967, at p. 871. Although the origin of war crimes and crime against humanity was already in the Ordinance[3] for the Government of the Army, the burning of houses and the desecration of churches were prohibited in 1386. For further details, refer to G. Schwarzenberger, International Law as Applied by International Courts and Tribunals, University of Toronto Press, Toronto, 1965, pp. 462-66, at p. 64.

[4]Paul D. Marquardt, "Law Without Borders: The Constitutionality of an International Criminal Court", *Columbia Journal of Transnational Law*, Vol. 33, 1995, pp. 60-91, at p. 73.

[5] M.H. Keen, *The Laws of War in the Late Middle Ages*, Routledge, London, 1965, pp. 23-59, at p. 39.

[6] Michele Caianiello and Giulio Illuminati, "From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court", *The Journal of International Law and Commercial Regulation*, Vol. 26, Spring 2001, pp. 407-54, at p. 409.

[7] The Duke of Burgundy (1433-1477), known to his enemies as Charles the Terrible, had placed *Landvogt Peter von Hagenbach* at the helm of the government of the fortified city of Breisach, on the Upper Rhine. The governor, overzealously following his master' s instructions, introduced a regime of arbitrariness, brutality and terror in order to reduce the population of Breisach to total submission[7]. All these violent acts were also committed against inhabitants of the neighbouring territories, including Swiss merchants on their way to the Frankfurt fair. When a large coalition (Austria, France, Bern and the towns and knights of the Upper Rhine)

crimes like murder, rape, perjury and other crimes in violation of "the Laws of God and Man", during his occupation of the town of Breisach and was finally convicted for what present world would define as war crimes and crimes against humanity.[8] Murder, rape, illegal taxation and the wanton confiscation of private property became generalized practices. The value of the case as a precedent for subsequent trials is questionable, as the judges and laws were restricted to those of the allied States of the Holy Roman Empire.[9]

Gustav Moyneir, one of the founders and longtime President of the International Committee of the Red Cross wrestled with many of the same problems which were faced by the then drafters. Gustave Moynier was not originally in favour of establishing a permanent international criminal court. Indeed, in his 1870 commentary on the 1864 Convention concerning the treatment of wounded soldiers, he considered whether an international court should be created to enforce it.[10] However, he rejected this approach in favour of relying on the pressure of public opinion, which he thought would be sufficient. He noted that "a treaty was not a law imposed by a superior authority on its subordinates but only a contract whose signatories cannot decree penalties against themselves since there would be no one to implement them.[11] The only reasonable guarantee should lie in the creation of international jurisdiction with the necessary power to compel obedience, but in this respect the Geneva Convention shares an imperfection that is inherent in all international treaties". Nevertheless he believed that public criticism of violations of the Geneva Convention would be sufficient, "because public opinion is ultimately the

put an end to the ambitious goals of the powerful Duke (who also wanted to become king and even to gain the imperial crown), the siege of Breisach and a revolt by both his German mercenaries and the local citizens led to Hagenbach's defeat, as a prelude to Charles' death in the battle of Nancy 1477. The tribunal's twenty-eight judges whom ordered him to be beheaded were from Alsace, Germany and Switzerland, with a presiding judge from Austria. However, that was surely no more than a curious experiment in medieval international justice was soon overtaken by the sanctity of State sovereignty resulting from the Peace of Westphalia of 1648.

[8] *ibid.* Also see, M. Cherif Bassiouni, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish A Permanent International Criminal Court, *Harvard Human Rights Journal,* Vol. 10, 1997, pp. 1-25, at p. 11.

[9] Simon Chesterman, "Never Again . . . and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond", *Yale Journal of International Law*, Vol. 22, Summer 1997, pp. 299-342, at p. 300.

[10] Christopher Keith Hall, "The First Proposal for a Permanent International Criminal Court," *International Review of the Red Cross*, 1998, No. 322, pp. 320-340, at p. 327.

[11] Several months later, the Franco-Prussian War broke out. The press and public opinion on both sides of that conflict fanned atrocities. Moynier was forced to recognize that "a purely moral sanction" was inadequate "to check unbridled passions". Moreover, although both sides accused each other of violations, they failed to punish those responsible or even to enact the necessary legislation. Therefore, he presented a proposal for the establishment by treaty of an international tribunal at a meeting of the International Committee of the Red Cross on 3 January 1872. His proposal was published in the *Bulletin international des Sociétés de secours aux militaires blessés* (the predecessor of this *Review*), under the title: *Note sur la création d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève.*

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best guardian of the limits it has itself imposed. The Geneva Convention, in particular, is due to the influence of public opinion on which we can rely to carry out the orders it has laid down.[12] The prospect for those concerned of being arraigned before the tribunal of public conscience if they do not keep to their commitments and of being ostracized by civilized nations, constitutes a powerful enough deterrent for us to believe ourselves correct in thinking it better than any other." He also hoped that each of the States parties to the Geneva Convention would enact legislation imposing serious penalties for violations. He was to be disappointed on both counts.

He made a proposal for the establishment of the Permanent International Criminal Court in 1872 to deter violation of Geneva Conventions, 1864[13] in order to bring justice to anyone responsible for such violations.[14] It was proved unsuccessful as it did not mention international criminal responsibility for violations of the Geneva Convention in wars between States. The other reason can be that governments at that time might not have been willing to consider extending jurisdiction much further. Nevertheless, it seemed disappointing that the court would not have had jurisdiction over violations of customary law either during international armed conflicts, or, despite the horrors of the American Civil War a few years before (exemplified by the Andersonville trial) during internal conflicts. Whatever the real case, the draft of Rome Statute was not accepted at that time.

On August 24, 1898, Czar Nicholas II proposed to the diplomatic representatives accredited to the Court of St. Petersburg that the governments of the world should tackle the problems stemming from the arms build-up in recent years.[15] Due to this result, the Peace Conference held in the Hague in 1899 , in which twenty-six countries (of fifty-nine claiming independent sovereignty) participated. Despite the fact that the conference was unsuccessful in reaching an agreement on any general arms limitation, even then the three conventions related to the peaceful settlement of disputes,[16] the laws and customs of war on land, and maritime warfare were adopted.[17]

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[12] *ibid*.

[13]Louise Arbour, "The International Tribunals for Serious Violations of International Humanitarian Law in the Former Yugoslavia and Rwanda," *McGill Law Journal*, Vol. 46, No. 1, 2000, pp. 195- 201, at p. 198.

[14]Michele Caianiello and Giulio Illuminati, *id*., 2001, at p. 411.

[15]Leila Nadya Sadat, "The Establishment of the International Criminal Court: From the Hague to Rome and Back Again", *Journal of International Law Practice*, Vol. 8, Spring 1999, pp. 97-114, at p. 98.

[16] The 1899 Convention for the Peaceful Settlement of International Disputes, with its establishment of a Permanent Court of Arbitration (PCA), is a particularly significant predecessor for the International Criminal Court (ICC), as others have noted.

[17]Leila Nadya Sadat, 1999, at p. 99.

After all these attempts, the Czar Nicholas II of Russia proposed for the establishment of a modern international criminal court in 1898 . A conference was held in the Hague in the Netherlands which was proved unsuccessful. Another Peace Conference held in the Hague in the following year.

Then another Peace Conference was held in 1907. Once again the Czar had issued the invitation, where the United States proposed the meeting, and the Netherlands acted as the host. Forty-four countries sent delegates to the Hague this time, construction of the Peace Palace began, and the Conference concluded successfully with the adoption of thirteen conventions (three of which revised the 1899 Conventions), including Convention (IV) Respecting the Laws and Customs of War on Land.[18] Although the Hague Convention of 1907[19] had done much to codify the laws of war, compliance with those rules was still largely a state and not individual responsibility. Enforcement was primarily through reparations imposed upon a defeated state or through reprisal or retaliation, which tended to escalate the spiral of savagery.[20] The magnitude and barbarity of the crimes committed by Germany and its allies during World War I, however, led to a public disagreement and demand for justice.[21] However, in what appears to have been a generous policy of restraint, the Allies decided to forego the creation of the international court, and to allow the German authorities to prosecute their own war criminals.[22] Therefore, no international trial of Germans accused of war crimes ever took place, and no international court arose out of World War I.[23]

The World War I Era

There have so far been five International Investigative Commissions,[24] four Ad hoc

[18] *ibid*., p. 98.
[19] Hague Convention on the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, T.S. No. 539
[20] Matthew Lippman, "Towards an International Criminal Court", *San Diego Justice Journal*, Vol. 3, 1995, pp. 6-8, at p. 2.
[21] Bryan F. MacPherson, "Building an International Criminal Court for the 21st Century," *Connecticut Journal of International Law,* Vol. 38, 1998, pp. 745-56, at p. 750.
[22]Aryeh Neier, 1998, at p. 33.
[23]Gurjeet Singh, 2003, at p. 8.
[24] The 1919 Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties (1919 Commission); (ii) The 1943 United Nations War Crimes Commission (1943 UNWCC); (iii) The 1946 Far Eastern Commission (FEC); (iv) The 1992 Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate War Crimes and other Violations of International Humanitarian Law in the Former Yugoslavia (1992 Yugoslavia Commission of Experts); and (v) The 1994 Independent Commission of Experts Established Pursuant to Security Council Resolution 935 (1994) to Investigate Grave Violations of International Humanitarian Law in the Territory of Rwanda (1994 Rwanda Commission of Experts).

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International Tribunals,[25] and three internationally mandated prosecutions[26] since 1919. Because all these processes were either institutionally linked or were related by reason to the conflict which gave rise to their establishment, they are best understood through an historical analysis.[27]

Immediately after the end of the First World War, on January 25, 1919, the Paris Peace Conference appointed the Commission on the Responsibility of the Authors of the war and of the Enforcement of Penalties for Violations of the Laws and Customs of War (1919 Peace Conference Commission).[28] The 1919 Peace Conference Commission proposed that an ad hoc tribunal be established to try persons responsible for violations of the laws of war and the laws of humanity.[29] The Commission documented many categories of offenses against the laws and customs of war, including the deliberate bombardment of the undefended places, and attacks against hospital ships by the Germans.[30] This proposal, however, was rejected in favour of adding provisions in the Versailles Treaty for an ad hoc international tribunal to try Kaiser Wilhelm II[31] for "a supreme offence against international morality and the sanctity of treaties."[32]Additionally, the Treaty of Sevres provided for the prosecution of the Turkish war criminals[33] as a result of the

[25]The 1945 International Military Tribunal to Prosecute the Major War Criminals of the European Theatre (IMT); (ii) The 1946 International Military Tribunal to Prosecute the Major War Criminals of the Far East (IMTFE); (iii) The 1993 International Criminal Tribunal for the Former Yugoslavia (ICTFY); and (iv) The 1994 International Criminal Tribunal for Rwanda (ICTR).

[26]1921-1923 Prosecutions by the German Supreme Court Pursuant to Allied Requests Based on the Treaty of Versailles (Leipzig Trials); (ii) 1946-1955 Prosecutions by the Four Major Allies in the European Theatre Pursuant to Control Council Law No. 10 (CCL 10); (iii) 1946-1951 Military Prosecutions by Allied Powers in the Far East Pursuant to Directives of the FEC.

[27]M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court", *Harvard Human Rights Journal*, Vol. 10, Spring 1997, pp. 11-58, at p. 11.

[28]M. Cherif Bassiouni, 1997, p. 14.

[29]Bryan F. MacPherson, "Building an International Criminal Court for the 21st Century", *Connecticut Journal of International Law*, Vol. 13, Winter 1998, pp. 1-49, at p. 2.

[30] M. Cherif Bassiouni, 1997, *id*., at p. 15.

[31]However, even though articles 227-29 provided for the prosecution of the Kaiser Wilhelm II and other members of the German armed forces, none were turned over to the Allied and Associated Powers for prosecution. Instead, the Kaiser remained in the Netherlands where he had sought asylum and other prosecutions were eventually, through agreement with the Allies, heard by the German Supreme Court in Leipzig.

[32] M. Cherif Bassiouni, 1997, at p. 16.

[33]The official inter-governmental Commission established by the Preliminary Peace Conference was called the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties. Its mandate was to investigate and report on the responsibility of those who had initiated the war and those who had violated the laws and customs of war in order to prosecute them. The Commission held closed meetings for two months and conducted intensive investigations. This work was supposed to culminate in the charging of named individuals for specific war crimes. Based on subsequent developments in the administration of the Commission's mandate, however, it is reasonable to question whether the Allies' intentions were to pursue justice or whether they only intended to use symbols of justice to achieve political ends.

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massacre of over a million Armenians by the Turkish authorities.[34]

However, no international tribunal was ever established to prevent such massacre in future. Neither an attempt was made to punish the perpetrators. Moreover, Kaiser Wilhelm was given sanctuary in the Netherlands and the allies consented to the trial of the Germans accused before the German Supreme Court sitting in Leipzig.[35] Out of the 896 Germans accused of war crimes there, a revised list of 45 of the most serious offenders was reduced, by unavailability of custody, to 12 defendants, half of whom were acquitted on the basis of lack of evidence and defences such as superior orders, while the remainder received light sentences. Only twelve were tried; and of the twelve, only six were convicted. The Turks received amnesty for their crimes by the Treaty of Lausanne[36] which replaced the Treaty of Sevres[37] which did not contain any provisions on prosecutions, but rather had an unpublicized annex granting the Turkish Officials Amnesty.

As the Allies were concerned about the stability of Turkey and eager not to alienate the new Turkish ruling elite which was partial to the western powers, Turkish officials were given impunity for war crimes. At that time, the Bolshevik Revolution of 1917 which toppled the strait regime was causing concern in England and France. Turkey, on the border of the new communist regime, and the controlling power over the Bosphorus and Dardanelles strait, through which the Russian Navy would have to transit to reach the Mediterranean from the Black Sea, was needed in the "western camp". Political concerns, thus, prevailed over the pursuit of justice.[38] The trials outraged the French and Belgians, but the British refused to push the matter and no further Allied action were taken. An even greater lack of commitment met attempts to prosecute atrocities committed by the Ottoman Government against Armenians prior to and during the First World War.[39]

The investigations and prosecutions were established to appease public demand for a response to the tragic events and shocking conduct during armed conflicts. Despite public pressure demanding justice, investigative and adjudicating bodies were established for only a few international conflicts. Domestic conflicts, no matter how

[34]Michele Caianiello and Giulio Illuminati, "From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court", *The Journal of International Law and Commercial Regulation*, Vol. 26, Spring 2001, pp. 407-54, at p. 411.
[35]*ibid*., p.16
[36]Treaty with Turkey and Other Instruments, July 24, 1923 (Treaty of Lausanne), reprinted in Vol. 18, *American Journal of International Law*, 1924.
[37] M. Cherif Bassiouni, 1997, at p. 17.
[38]*ibid.,* p. 18**.**
[39]Louise Arbour, *id.*, 1999, p. 210.

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brutal, drew even less attention from the major powers of the world, whose political will has been imperative to the establishment of such bodies.

In the first phase, the negotiations were going on and there was no clarity about establishment of the Permanent International Criminal Court. The development process actually started in the second phase that is the World War II era.

- ***The World War II Era***

In the second phase, the most recent effort to establish the International Criminal Court began in 1990, when upon the initiative taken by Trinidad and Tobago, the UN General Assembly asked the International Law Commission to further work on establishing an ICC, with added jurisdiction to try cases of drug trafficking also.[40]

- ***The Leopzig Trials***

The second overarching context for the Nuremberg trial was the development of its legal ideas.[41] During the First World War era, the wrong example was set. In the Leipzig trials, the German courts were allowed to try their own nationals and where war and punishment clauses had been integrated into the terms of the peace treaty. Competing ideas were of course in play about what were the correct lessons to be drawing from the World War I. The narrowness of this span may be worth highlighting when we consider the lessons of Vietnam.[42]

The International Law Association adopted a statute for an International Criminal Court in 1926,[43] as did the International Association of Penal Law in 1928. Both drafts envisaged that the court would be a division of the Permanent Court of International Justice and both proposed the trial of States as well as individuals. Neither draft was officially considered.[44]

Judge Megalos Caloyanni, the eminent Greek jurist who served in several cases of the Permanent Court of International Justice as judge *ad hoc*, also drew the attention of the Academy of International Law at The Hague in 1931 to the danger of losing an opportunity for the international society to protect itself while yet there was time.

[40] For further details, see: Bryan F. MacPherson, 1998, pp. 745-56.
[41] One might go as far back as Augustine and talk about the development of conceptions of just and unjust wars, or look at Grotius's writings on the laws of war, meaning rules about battlefield practices and treatment of prisoners.
[42] Elizabeth Borgwardt, "A New Deal for the Nuremberg Trial The Limits of the Law in Generating Human Rights Norms", *Law and History Review*, Vol. 26, Fall 2008, pp. 679-800, at p. 682.
[43]Leila Sadat Wexler, "The Proposed Permanent International Criminal Court: An Appraisal", *Cornell International Law Journal*, Vol. 29, 1996, pp. 665-722, at p. 665.
[44]*ibid*., p. 670.

Judge Caloyanni accordingly pleaded for the establishment of permanent penal jurisdiction for international crimes "because repressive law and sanctions have always been the preventive and protective methods for every collective society, great or small".[45]

The idea was revived after the assassination of King Alexander of Yugoslavia in 1934. In 1937, a Convention was opened for signature on the creation of an International Criminal Court that would try persons accused of an offence established in the Convention for Prevention and Punishment of Terrorism. Because the proposed court's subject matter jurisdiction was so limited and relatively well-defined, it avoided many of the objections raised to earlier proposals. Nevertheless, the Convention was signed by 13 nations including France and the USSR and because of the events leading up to the outbreak of the Second World War it never entered into force.[46] However, its application was limited to the cases of the terrorism. It was optional and contemplated criminal responsibility of individuals only. Nevertheless, "it marked a decisive turning point in the history of contemporary public law[47]." The Convention and the Protocol never came into force. Indeed the only state to ratify was India. However, the Assembly of the League of Nations pronounced the plan as a 'premature'[48] one.

Later in 1925, the Inter- Parliamentary Union tentatively adopted a draft to this effect at its Washington Conference prepared by one professor Vespasian Pella. Another draft was prepared for the International Law Association by one Dr. Bellot and adopted at its 34th Conference held at Vienna in 1926. Similarly, the International Association for Penal Law, at its meeting held in Brussels in 1926, also adopted a resolution for the setting up of an international jurisdiction for the punishment of certain violations of the law of nations[49]. All these drafts were later deposited officially with the Secretary- General of the League of Nations[50].

- ***The League of Nations***

While the process of the negotiation of the Peace Treaties was still in progress, and

[45]Arthur K. Kuhn, "Editorial Comment: International Criminal Jurisdiction," *The American Journal of International Law,* Vol. 41, 1947, pp. 430-433, at p. 432.
[46]Gurjeet Singh, 2003, pp. 1-66, at p. 9.
[47]Vespasian V. Pella, "Towards An International Criminal Court", *The American Journal of International Law,* Vol. 44, 2001, pp. 35-68, at p. 38.
[48]Gurjeet Singh, 2003, pp. 1-66, at p. 11
[49]*id*.
[50]Arthur K. Kuhn, 1947, pp. 430-433, at p. 432.

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before the failure to implement the various provisions allowing for international prosecution of Central Power defendants had become apparent, there were calls for the creation of a permanent international criminal court. Most notably, as early as 1921, the Advisory Committee of Jurists, appointed by the Council of the League of Nations to draft a constituent statute for the Permanent Court of International Justice, recommended that consideration also be given to the creation of a "High Court of International Justice."[51]

In the ensuing Committee discussion, members of the Committee were unable to reach unanimous agreement to support the President's proposal. The discussion indicates the nature of the opposition to a permanent international criminal court that ultimately prevailed throughout the inter-war years. While all the Committee members could accept that international crimes had been and would be committed, they could not agree on the appropriate way to deal with those crimes.

One recurrent objection to the proposal was the argument that individuals are not the subjects of international law and so could not be tried before an international tribunal applying international law. A second, related objection was that the envisaged jurisdiction *ratione materiae* of the tribunal went beyond the existing international law. While there was no doubt that a corpus of war crimes was well accepted in international law, the same could not be said of crimes committed in times of peace and the principle of *nullum crimen sine lege*[52] was fundamental. One member of the Committee also argued that the crimes a High Court would be asked to deal with would invariably be political "the jurisdiction of the Court would be a danger to the sovereign rights of States, perhaps even a menace to peace" and, therefore, not likely to meet with the approval of the League. In a unanimously acceptable compromise, the Committee recommended that the League consider the President's proposal.[53]

In 1937, the League actually adopted the text of a Convention for the Creation of an International Criminal Court which was opened for signature and ratification by member States of the League.[54] The Council of the League had passed a Resolution in 1934 establishing a Committee for the International Repression of Terrorism in the

[51]Timothy L.H. McCornack, "Selective Reaction to Atrocity: War Crimes and the Development of the International Criminal Law," *Albany Law Review*, Vol. 60, 1997, pp. 681-716, at p. 708.
[52]No Crime in case there is no law.
[53]Timothy L.H. McCornack, 1997, pp. 681-716, at p. 710
[54]Benjamin B. Ferencz, *An International Criminal Court: A Step Toward World Peace - A Documentary History and Analysis*, Oceana Publications, New York, Vol. 1, 1980, at p. 112.

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wake of the assassination of King Alexander of Yugoslavia. The Committee had met in several sessions to discuss initiatives for collective responses to the problem of terrorism. General agreement was reached on the need for an international convention for the prevention and punishment of acts of terrorism, but not on the means of punishing those responsible for terrorist acts.[55] One proposal was for the creation of an international criminal court with jurisdiction over offences against the new convention. While there was some support for this concept, there was also substantial oppo sition.[56]

By the time hostilities in World War II had erupted, it is evident that the international community remained divided on the desirability and likely efficacy of a permanent international criminal court. In spite of the lack of consensus, however, it is also clear that the concept of individual culpability for the violation of an international crime was much more widely accepted than it had been prior to World War I. Furthermore, the adoption by the League of Nations of the Convention for the Prevention and Punishment of Terrorism demonstrated a willingness to extend the content of international criminal law beyond the context of armed conflict. These factors, combined with the widespread frustrations and dissatisfaction with the lack of effective war crimes trials after the conclusion of World War I, paved the way for the international responses to the commission of atrocities during the course of World War II[57]. The International Military Tribunal concept took a shape of reality almost at the end of the World War II.

- ***The International Military Tribunals***

At the end of the Second World War, the International Military Tribunal (IMT) was established. The IMT was set up to try only the major war criminals, while the bulk of the task was left to internal criminal jurisdictions. It reflected another form of the complementarity principle, and the significance of cooperation with national criminal jurisdictions. Actually during the Second World War, the Allies noticed and started discussion on setting up of mechanisms for addressing the ongoing atrocities to stop it in future. In the document of the St. James Declaration of 1942 and the Moscow Declaration of 1943, the Allies tried to resolve and prosecute war crimes, and by 1945, their intention to establish an international military tribunal obviously became evident. Although these declarations were given considerable publicity however, they

[55] *ibid.*, p. 113.
[56] Timothy L.H. McCornack, 1997, at p. 719.
[57] *id.*

failed to produce any demonstrable deterrent effect.[58]

IMT was operated in a subsidiary manner. In the Moscow Declaration of 1943,[59] the three main Allied Powers declared that the German war criminals should be judged and punished in the countries in which their crimes were committed (that is, according to the principle of territorial jurisdiction). Only "the major criminals, whose offenses have no particular geographical localization," would be punished "by joint decision of the Governments of the Allies." This Declaration was referred to in the London Agreement of August 8, 1945 establishing the Nuremberg Tribunal (IMT). Thus, it can be concluded with a positive note that the IMT judged only twenty-two accused criminals, of whom nineteen were declared guilty and three were acquitted, was due to the recognition of the role of national criminal jurisdictions.[60] This was also a step towards the criminal jurisdiction and in 1946 Nuremberg Trial came into existence which is also considered as a predecessor of the International Criminal Court.

- ***The Nuremberg Trial***

The principle of individual accountability for the war crimes was affirmed by the Nuremberg principles in 1946. Efforts before the pre Nuremberg trial happened in the United Nations was to create an International Criminal Court were set aside while the international community set out to define the term 'aggression'. The General Assembly defined 'aggression' as 'the use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations.' The definition of aggression is followed by the illustrations in the General Assembly Resolution of 1974 which loudly proclaims that a war of aggression is a crime against international peace and gives rise to international responsibility.[61] The General Assembly Resolution defined aggression as necessarily being the act of state and described the specific actions of one state against another, which constitute aggression. In its work on the Draft Code of Crimes against the Peace and Security of Mankind, the International Law Commission, echoing the Nuremberg Tribunal, also concluded that individuals could be held accountable for acts of aggression. The Commission indicated the

[58]Theodor Meron, "Reflection on the Prosecution of War Crimes by International Tribunals", *American Journal of International Law*, Vol. 100, July 2006, pp. 551-585, at p. 555.
[59]The Triparte Conference at Moscow, October 19-30, 1943, reprinted in International Conciliation, No. 395, 1943, at pp. 599-605.
[60] Mohamed M. El Zeidy, "The Principle of Complementarity: A New Machinery to Implement International Criminal Law", *Michigan Journal of International Law*, Vol. 23, Summer 2002, pp. 869-967, at p. 871.
[61]Gurjeet Singh, 2003 at p. 49.

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specific conduct for which individuals could be held accountable-initiating, planning, preparing, or waging aggression and that only those individuals in position of leadership who order or actively participate in the acts could incur responsibility. Its definition focused on individual accountability rather than on the rule of international law, which prohibits aggression by a State.[62] However Aggression has been defined in the Rome statute at review conference held at Kampala in 2010.

- ***Steps to Prevent Germany from Starting the Third World War***

A wave of terror violence developed in Europe during the two world wars, mostly in connection with nationalist claims in the Balkans. As a result, in 1937 the League of Nations adopted a Convention against Terrorism to which an annexed Protocol provided for the establishment of a special international criminal court to prosecute such crimes. India was the only state that ratified it, and, as a result, it never entered into effect. As a matter of facts, the basic tenets of international law pertained only to states prior to the Nuremberg trial, as individuals were not the proper subjects of international law.[63] Therefore, the foundation of the proposed court individual criminal responsibility was clearly at odds with the Pre-Nuremberg tradition. However, international law following the Nuremberg, witnessed a change in the thinking regarding the rights, the obligations and the duties of the individual and the state in the international context.[64]

Following the end of the Second World War, the Allied Powers adopted the London Charter[65] in 1945.[66] It may be appropriate to mention here that a *Congress International Du Mouvement National Judiciaire Francais* which was composed of jurists from 22 countries, including France, the U.S.S.R., the U.K. and the

U.S.A., met in Paris on 24-27 October 1946 and unanimously adopted a resolution recommending that "the punishment of crimes against humanity should be provided for in an international code and that an international criminal jurisdiction should be set

[62]*ibid*., p. 50.
[63]Concerning the Barcelona Traction, Light and Power Company, Ltd., *Belgium* v. *Spain*, 1970 International Court of Justice, at p. 231.
[64]Henry T. King and Theodore C. Theofrastous, "From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy", *Case Western Reserve Journal of International Law*, Vol. 31, Winter 1999, pp. 47-95, at p. 49.
[65]After World War II, crimes against peace, war crimes, and what became known, with the London Charter of August 8, 1945.
[66]Sharon A. Williams, "The Rome Statute on the International Criminal Court: From 1947-2000 and Beyond", *Osgoode Hall Law Journal*, Vol. 38, 2000, pp. 297-324, at p. 301.

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up as soon as possible." [67]

Similarly, the Permanent International Committee for the Study of the Punishment of Crimes Against the Law of Nations, which met at Luxembourg on 14-16 May 1947, also recognized that "the diversity of the methods of repression in various countries responsible for the prosecution of war crimes under domestic law makes it clear that it would be desirable to now assign the trial of war criminals to a permanent international criminal jurisdiction, where not only judges from the countries who were victims of the aggression would sit, but also judges from the neutral countries and even perhaps from the countries of which the accused are nationals." This suggestion was a progressive step towards the creation of the International Criminal Court as it suggested the concept of involvement of the countries where the atrocities have been committed.

The World Federation of United Nations Associations, in a communication to the United Nations, recommended, "An International Criminal Tribunal was set up to try cases of genocide."[68] Similarly the Second Conference of the International Bar Association, held at The Hague on 16-21 August 1948, submitted to its Symposium on International Penal Law, the question of the procedure to be applied for the arrest, trial, judgment and punishment of persons charged with offences under international criminal law. The symposium unanimously voted a resolution calling for the creation of an international criminal jurisdiction. The International Conference of the Red Cross held in Stockholm on 20 -30 August 1948, by its Resolution No. 23, directed the International Committee of the Red Cross to proceed in its work on the question of punishment for violations of humanitarian conventions. The Committee drafted a variety of projects that, *inter alia*, contemplated the possibility of an international court to take cognizance of such crimes. The 37 th Inter-Parliamentary Conference which met in Rome on 6-11 September 1948, in a unanimous resolution stated that "the collectivity of States must adopt as soon as possible an international criminal code and create an international criminal court for the punishment of crimes against peace, war, crimes and crimes against humanity, including in particular the crime of genocide." This resolution was communicated to the United Nations.[69] Accordingly on December 9, 1948, the UN General Assembly adopted a resolution

[67]For further details, see: *Revue International De Droit Penal*, 1948, Nos. 3-4, at p. 384.
[68]See: *UN Document No.* A/C.2/81, March 1, 1948.
[69]Gurjeet Singh, 2003, at p. 9.

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reciting that "in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law" and thereby invited the International Law Commission to study the desirability and possibility of establishing such a judicial organ, in particular as "a Criminal Chamber of the International Court of Justice." Further, in approving the Universal Declaration of Human Rights on 10 December 1948, the UN General Assembly endorsed a principle of the greatest import for the codification of international criminal law: that of *nullum crimen sine lege, nulla poena sine lege.*[70]*The*

- ***Tokyo Trial***

In 1946, a similar international military tribunal was established in Tokyo to prosecute major war criminals in that theatre of operations.[71] At the Tokyo trials, 11 states sat in judgment of 25 individuals. Twenty-eight indicted, but two died and one became seriously ill before the trial. All 25 were found guilty (7 were given death sentences, 16 life, one 20 years, and one 7 1/2 years in prison). The trial began on May 3, 1946, and ended more than two years later on November 12, 1948. Other trials were also conducted by military commissions.[72] It seems evident that individual accountability for crimes of state is an integral part of any adequate conception of a just world order.[73]

The Nuremberg and Tokyo trials were prosecuted by the victorious Allies against the Nazi and the Imperial Japanese conduct.[74] The offences were not applied to the Soviets, who also committed pre-arranged "acts of aggression" in their invasions of Poland and the Baltic States, and whose treatment of ethnic or national minorities could well have been considered to fit any definition of "crimes against humanity." Nor were they applied to the bombing of Dresden, Tokyo, Hiroshima, or Nagasaki, or to other Allied conduct including treatment of prisoners and submarine warfare. The offences were drafted to apply only to the defeated enemies.

The Nuremberg and Tokyo trials were established in order to protect the future generations from war crimes. The Nuremberg and the Tokyo legacy is not a glass half-full or half-empty. It is indeed many containers of different sizes and shapes, some

[70] Jelena Pejic, "Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness," *Columbia Human Rights Law Review,* Vol. 29, 1998, pp. 291-308, at p. 295.
[71]M. Cherif Bassiouni and Chistopher L. Blakesley, *id*., 1992, at p. 154.
[72] Duane W. Layton, 1986, pp. 56-72, at p. 58.
[73]Richard Falk, "Telford Taylor and the Legacy of Nuremberg", *Columbia Journal of Transnational Law*, Vol. 37, 1999, pp. 693-716, at p. 716.
[74] Christopher L. Blakesley, "Obstacles to the Creation of a Permanent War Crimes Tribunals," *Fletcher Forum of World Affairs*, Vol. 18, Summer-Fall 1994, pp. 77-102, at p. 80.

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empty, some full, some somewhere in between. We can say that if we have not suffered the tragedies, it might be because of the Nuremberg (and Tokyo trials). If Nuremberg did nothing else, that is indeed a worthy legacy.[75]

- ***Role of the UN General Assembly***

In 1947, the International Law Commission was set up by the United Nations General Assembly and it was given the mandate to formulate the Nuremberg Principles, to prepare a Draft Code of Offences against the peace and security of mankind and "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes". The International Law Commission concluded that to do so was both desirable and possible. As a result, in 1950 the UN General Assembly established a Committee on International Criminal Jurisdiction to prepare a concrete proposal for such a court. A Draft Statute was submitted in 1951 and amended in 1953. The 1953, the Draft Statute was not accepted because of a failure to have consensus on a definition of "aggression." This is not surprising in the context of the cold war, in that an international criminal court mandated to include aggression as a crime was seen as a threat to national sovereignty and security. The General Assembly did adopt by consensus a definition of aggression in 1974,[76] which has been again drafted during the Kampala Conference in 2010. It shall practically be enforceable from 2017 onwards and after having 60 ratifications in total.

III. THE SECOND PHASE (FROM 1991-2000)

The second phase comprises the creation of the ICTY and ICTR. This chapter shall also describe the draft submitted by the International Law Commission and the drafts prepared by the Preparatory Committee till the drafting of the Rome Statute. It also mentioned the creation of the International Criminal Court.

The International Committee of the Tribunal for the Yugoslavia and Rwanda (ICTY)

Another important factor which helped in the creation of the permanent International Criminal Court was the situation in the former Yugoslavia,[77] in particular in Bosnia

[75]Duane W. Layton, 1986, pp. 56-72, at p. 61.
[76]Sharon A. Williams, at p. 304.
[77]During World War II, almost 1.7 million Yugoslavs lost their lives i.e., about ten percent of the total population. The largest number was of civilians. At one death camp 100,000 people were murdered. Not even a single criminal trial was followed. There were a number of revenge murders with the privileges of impunity

and Herzegovina, including reports of mass killings, systematic detention, and rape of women and so-called "ethnic cleansing," necessitated immediate action after the World War II.[78]

On 22 February 1993 , the UN Security Council decided that an international tribunal should be established for the prosecution of persons allegedly responsible for committing such crimes since January 1991. The report of then Secretary-General Boutros Boutros Ghali on 3 May 1993 recommended that immediate action on an ad hoc basis was needed and that the tribunal should therefore be established by a decision under Chapter VII of the U.N. Charter. This measure was taken to maintain or restore international peace or security, following the determination of the existence of a threat to the peace, breach of the peace, or act of aggression and it was, therefore, effective immediately. It bound the member states to take whatever action was required. On 25 May 1993, by resolution 827, the Security Council established the Tribu nal and endorsed the thirty-four article statute annexed to the UN Secretary General's report.[79] The precedent of the former Yugoslavia Tribunal facilitated the establishment by the United Nations Security Council on 8 November 1994 by resolution 955 , acting again under Chapter VII of the ad hoc International Criminal Tribunal for Rwanda.[80] Despite opposition from the Rwandan Government, the International Criminal Tribunal for Rwanda was established in Arusha, Tanzania in 1994.[81] The main objective of the ICTR was the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994. The Tribunal parallels[82] the forum set up the previous year by the Security Council to deal with similar offences in the former

[78]Richard Goldstone, "Exposing Human Rights Abuses - A Help or Hindrance to Reconciliation?", *Hasting Constitutional Law Quarterly*, Vol. 22, Spring 1995, pp. 607-619, at p. 610.
[79]SC Res. 827, UN SCOR, 1993, Special Supp., UN Doc. S/25626.
[80]Susan W. Tiefenbrun, "The Paradox of International Adjudication: Developments in the International Criminal Tribunals for the Former Yogoslavia and Rwanda, the World Court, and the International Criminal Court", *North Carolina Journal of International Law and Commercial Regulation*, Vol. 25, Summer 2000, pp. 551-588, at p. 551.
[81]*ibid*., p. 52.
[82]However, both the tribunals were different from each other in subject matter jurisdicti on as Rwanda suffered an internal armed conflict, whereas the former Yugoslavia experienced elements of both internal and international armed conflict. Although the Security Council provided for a separate six-judge trial chamber for the Rwanda prosecutions, the five-judge appeals chamber and the Prosecutor's office are shared by the two tribunals. For further details, see: William A. Schabas, "Justice, Democracy, and Impunity in Post-Genocide Rwanda: Searching for Solution to Impossible Problems," *Criminal Law Forum*, Vol. 7, 1996, pp. 523-548, at p. 531.

Yugoslavia.[83]

The major obstacles in the way of establishing an Individual criminal liability were many and out of it the most prominent were the concept of sovereignty to an international tribunal, nationalistic pride in the superiority of domestic criminal law, reticence to participate in establishing another international institution, problems of obtaining consensus on subject matter jurisdiction, applicable substantive and procedural criminal law rules, issues relating to recognition and the enforcement of judgments and the cost.[84] One of the reasons may be that of the access to the atrocities by television cameras and journalists, [85] and moreover, the events that took place in Europe.[86]

As time went on, the impression of the Tribunal's worthiness grew, and international and local pressure led to fuller cooperation by national governments; as a result, a greater number of senior government officials and military commanders were held responsible. Slobodan Milosevic is the most obvious example. Among those being tried or awaiting trials are President Milan Milutinovic, senior generals, and chiefs of staff of the armed forces and the security service. Nevertheless, the ICTY remains on the whole at the mercy of the national governments in the Balkans in apprehending many defendants. However, the higher profile of defendants who have surrendered or been sent to The Hague in recent years shows that the Tribunal is gaining legitimacy in the halls of the United Nations and in the regions within its ambit. Such legitimacy both enables the ICTY to focus on the leaders and give strength to its successor courts.[87]

The ICTR got off to a slow start, due to governmental corruption, inefficiency, ill will, and general opposition to its existence. Nevertheless, the ICTR has made every effort to meet its charge of establishing peace with justice in Rwanda by eradicating impunity. The fact remains that Rwanda is now and has been at peace since the establishment of the ICTR.[88]

The need of the hour is world peace, yet national and international criminal courts offer only punishment and retribution in response to inhumane violence. These courts

[83] William A. Schabas, 1996, pp. 523-548, at p. 532.
[84]Susan W. Tiefenbrun, 2000, pp. 551-588, at p. 552.
[85]Richard Goldstone, "Exposing Human Rights Abuses - A Help or Hindrance to Reconciliation?", *Hasting Constitutional Law Quarterly*, Vol. 22, Spring 1995, pp. 607-619, at p. 616.
[86]*id.*
[87]Theodor Meron, "Reflection on the Prosecution of War Crimes by International Tribunals", *American Journal of International Law*, Vol. 100, July 2006, pp. 551-580, at p. 559.
[88]Susan W. Tiefenbrun, 2000, pp. 551-588, at p. 553.

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are, however, properly guided by rational justice rather than by revenge.[89]

The International Law Commission Draft

The International Law Commission of the United Nations held its Forty-Seventh Session from May 2 to July 20, 1995, under the chairmanship of Pemmaraju S. Rao of India. The Commission continued its work on existing topics and considered aspects of the Draft Code of Crimes against the Peace and Security of Mankind, state responsibility, and liability for injurious consequences arising out of acts not prohibited by international law. The Commission began work on the two new topics of "state succession and its impact on the nationality of natural and legal persons" "nationality" and "the law and practice relating to reservations to treaties" and made a recommendation as to two additional topics for its future agenda.[90]

Although the hallmark of the 1994 session was the Commission's conclusion of its work on a statute for an international criminal court and a draft treaty on non-navigational uses of international watercourses, yet the 1995 session was noteworthy for the solid beginnings made on the new topics, and the progress made on existing topics. The Commission continued to use various working methods to further its work: plenary debates, the mandating of broad negotiating authority to the Drafting Committee and the establishment of ad hoc working groups to consider new topics and discrete problems that arose in the context of current topics like State Responsibility, Drafting Code of Crimes, Liability for Injurious Consequences, Reservations, Nationality etc.[91]

Similarly, the Permanent International Committee for the Study of the Punishment of Crimes Against the Law of Nations,[92] was held and it met at Luxembourg on 14 -16 May 1947.[93] The General Assembly, in turn, established a Preparatory Committee to take steps, through a series of meetings, to prepare for the Rome Conference in 1998.

[89]For opposite view further see: M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court", *Harvard Human Rights Journal*, Vol. 10, Spring 1997, pp. 11-58, at p. 12.

[90]Robert Rosenstock, "Forty-Seventh Session of the International Law Commission," *American Journal of International Law*, Vol. 90, January 1996, pp. 106-116, at p. 106.

[91] *ibid*., p. 115.

[92]It also recognised that "the diversity of the methods of repression in various countries responsible for the prosecution of war crimes under domestic law makes it clear that it would be desirable to now assign the trial of war criminals to a permanent international criminal jurisdiction, where not only judges from the countries who were victims of the aggression would sit, but also judges from neutral countries and even perhaps from the countries of which the accused are nationals.

[93]For further see: *Revue De Droit Penal Et De Criminologie*, 1948, No. 9, p. 826.

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The Preparatory Committee

The Preparatory Committee on the Establishment of an International Criminal Court (Preparatory Committee) held its first two sessions from March 25 to April 12, and August 12 to 30, 1996. The United Nations General Assembly decided to establish the Preparatory Committee on December 11, 1995 to build upon the work of the *Ad Hoc* Committee on the Establishment of an International Criminal Court (*Ad Hoc* Committee), which met twice in 1995 to consider issues related to the 1994 draft statute for an international criminal court prepared by the International Law Commission.[94]

The Preparatory Committee, chaired by Adriaan Bos (Netherlands), decided to address different topics in each session. In the first session, it considered in open plenary session (1) the scope of jurisdiction and the definition of crimes, (2) general principles of criminal law, (3) complementarity (when the ICC rather than national courts would act), (4) how cases would come before the court (trigger mechanisms), and (5) state cooperation with the ICC.[95]

At the second session, the committee considered in open plenary session (1) procedural questions, fair trial and the rights of suspects and accused; (2) penalties; (3) organizational questions concerning the composition and administration of the ICC; (4) the method of establishing the ICC; and (5) the relationship between the ICC and the United Nations. Separate informal working groups met to discuss the first three of these topics and two others discussed general principles of criminal law and state cooperation with the ICC. The committee met in closed plenary session to hear staff members of the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (Yugoslavia Tribunal) and to discuss recommendations to the Sixth Committee for further work.[96]

Significant progress was made by the Preparatory Committee in exploring the issues related to the establishment of the ICC and in usefully compiling and organizing comprehensive sets of government proposals for amending or supplementing every provision of the ILC draft statute.[97] It is evident to mention that the International Law Commission had done an appreciable work in all the three phases mentioned above.

[94]Christopher Keith Hall, "The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court," *American Journal of International Law*, Vol. 91, January 1997, pp. 177-187, at p. 177.
[95]*ibid*., p. 178.
[96]*ibid*., p. 179.
[97]*id.*

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Ratification of the Rome Statute

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) took place in Rome at the headquarters of the Food and Agriculture Organization from June 15 to July 17, 1998. The participants numbered 160 states, thirty-three intergovernmental organizations and a coalition of 236 nongovernmental organizations. The conference concluded by adopting the Rome Statute of the International Criminal Court.[98] There was an overwhelmingly favourable vote, with 120 countries voting in favour, 21 abstentions, and 7 countries, including the United States, against. The United States elected to indicate publicly that it had voted against the statute.[99] France, the United Kingdom and the Russian Federation supported the statute. The idea of an international criminal court appeared to be in the making.

It has a jurisdiction over some of the most serious International crimes. Its value is not only in prosecuting and punishing the alleged perpetrators of the listed crimes, genocide, war crimes, crimes against humanity and potentially aggression, but also in its capacity for deterrence. An impartial International Criminal Court with an independent prosecutor's office must discourage those who seek to instigate and perpetrate barbarous atrocities in violation of customary international and treaty law. The major challenge for the international community is to make it truly effective and not merely symbolic. [100]

There is only one means of ensuring that genocides and crimes against humanity will cease and that is by having an effective and efficient deterrent, the punishment of those who abuse power, especially state power, against innocent men, women, and children. In short, international humanitarian law must not remain purely an aspiration and must become an enforceable law in reality.[101] It is impossible to turn back the clock and know what would have happened had an international criminal court existed a century ago. Would a real threat of prosecution together with enforcement capability have made a difference to the course of history?[102]

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[98] Mahnoush H. Arsanjani, "The Rome Statute of the International Criminal Court," *American Journal of the International Law*, Vol. 93, January 1999, pp. 22-42, at p. 22.
[99]Mahnoush H. Arsanjani, 1999, at p. 25.
[100]Sharon A. Williams, "The Rome Statute on the International Criminal Court: From 1947-2000 and Beyond", *Osgoode Hall Law Journal*, Vol. 38, 2000, pp. 297-324, at p. 298.
[101]Richard Goldstone, "Exposing Human Rights Abuses - A Help or Hindrance to Reconciliation?", *Hasting Constitutional Law Quarterly*, Vol. 22, Spring 1995, pp. 607-619, at p. 619.
[102]Sharon A. Williams, 2000, pp. 297-324, at p. 302.

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It may be appropriate to mention here that the broad support of the Rome Statute truly represented the worldwide consensus on the desire for a permanent International Criminal Court. Although 60 countries were required to ratify the Rome Statute for it to become effective, 139 countries had signed it and 48 countries had actually ratified it at the earliest stage. On the basis of the degree of support the experts had anticipated that obtaining actual ratification from the requisite 60 countries was not expected to "pose much of a challenge." The experts had rightly observed that given the large majority by which the Rome Statute was approved, the 60-country-threshold was likely to be easily achieved, although the time frame within which such ratification were to take place was unclear. At Present, 120 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them 33 are African States, 18 are Asia- Pacific States, 18 are from Eastern Europe, 26 are from Latin American and Caribbean States, and 25 are from Western European and other States.[103]

The Present Scenario

Ultimately on 1 July, the Rome Statute came into force after receiving 60 ratifications. By 1 July 2002, there were 84 ratifications. The Court has now finally been established at The Hague in the Netherlands. Now 120 countries have ratified the Rome Statute till May 2013. It will surely count as one of the more important new international legal institutions in the dawn of the new millennium. However, we are yet to come across the actual decision-making by it whereby its performance appraisal could be made.[104]

IV. CONCLUSION

When the International Criminal Court (ICC) came into being in July 2002 at the Hague, it was greeted by most fair-minded people as the guardian for the world's conscience. Now the oppressed and the victimized have a voice and everyone on the planet, no matter how powerful, would be held to account for crimes against humanity, war crimes and genocide. ICC has been established with this idea. The reality has, however, turned out to be very different. Firstly, three of the planet's most influential nations, the United States, India and China refused the court's jurisdiction citing potential infringement of the sovereignty issues or fears that states would manipulate the court according to their own geo -political agenda. Nevertheless, with 120 strong

[103] *http:// www. icc-cpi. Int / Menus/ ASP / states + parties /,* visited on 26.1.2021
[104] Gurjeet Singh**,** 2003, at p. 14.

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nation membership, it was hoped that the ICC would be credible and impartial. As a matter of fact, since its inception, the ICC has only investigated crimes in the Northern Uganda, the Central African Republic, the Democratic Republic of Congo and Sudan's Darfur region, Kenya, Libya, Cote d' Ivore, etc. The Office of the Prosecutor received 1,732 complaints from individuals or groups from at least 103 different countries. Only 12 arrest warrants have been issued mysteriously pertaining only to the African nationals. Just four of those accused are currently being detained by the ICC, which does not have its own police force and is, therefore, reliant on the member states' hunting down and handing over the alleged perpetrators for trial by the ICC. Despite all this criticism that the ICC it is a check upon those who think that the y are immune from the punishment. However, International Criminal Court is step towards the peace. Notwithstanding the views expressed for and against, it is yet too early to comment fully on the functioning of the court.

In this chapter I have endeavoured to highlight historical background of the Rome statute and emphasised upon the Nuremberg Trial, the Tokyo Trial, the ICTY and the ICTR. The trial courts' were established from time to time for dissemination of justice and to remove the concept of impunity. The history was divided into the three phases. I have also explained the working of various trials. In the next chapter I shall discuss composition and administration of the ICC.

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