INTERNATIONAL CRIMINAL COURT: LIMITATIONS ON SUBJECT–MATTER JURISDICTION

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I. INTRODUCTION

The International Criminal Court (hereinafter referred to as "ICC") is a seat of justice, which adjudicates according to international criminal law. International criminal law is in essence, a mechanism to gain consistency and uniformity in holding offenders accountable for certain internationally recognized offences. The various trials conducted by the International Military Tribunal (IMT) at Nuremberg, International Military Tribunal for the Far East (IMTFE) at Tokyo, Yugoslavia Tribunal (ICTY) at The Hague and Rwanda Tribunal (ICTR) at Arusha have added substantially to the jurisprudence of international criminal law. By the creation of permanent criminal court at international level, the ad-hoc nature of tribunal creation and the consequent ad-hocism in dealing with subjects falling under international criminal law have been done away with.

The ICC is functioning since July 2002. It has 18 judges, including President, First Vice-President and Second Vice-President. The judges have been duly elected in June 2003. After the appointment of judges, the moot question before them is to examine whether an alleged international crime falls under the jurisdiction of ICC or not. The subject matter jurisdiction therefore, becomes important.

According to Article 5 of the Rome Statute, the ICC enjoys subject–matter jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[1] A brief discussion on each and every subject matter jurisdiction is proposed in this article. The content of subject matters in Statute of the Iraqi Special Tribunal also closely resembles the content of the Rome Statute. The Statute of the Iraqi Special Tribunal, which was adopted on 10th December 2003, confers jurisdiction on the Tribunal in the subject matters of genocide, crime against humanity and war crimes. This article attempts to discuss the subject matter jurisdiction of ICC with this aim.

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[1] Art. 5, Statute of ICC.

II. GENOCIDE

'Genocide' is an innovative terminology that blends science and law. The term 'genocide' was coined in 1944 by Raphael Lemkin in his book on Nazi crimes in occupied Europe.[2] Lemkin felt that the treaty regime on protection of national minorities was unsatisfactory. The prosecutors at Nuremberg Trial adopted the term genocide in the following year. The UN General Assembly declared genocide an international crime in 1946 and subsequently adopted a Convention on the Prevention and Punishment of the Crime of Genocide[3] in 1948.

The International Court of Justice confirmed the prohibition of genocide as a 'jus-cogens' norm[4] that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ordinary customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force.

The definition of genocide in Article 6 of the Statute of ICC constitutes a *verbatim* reproduction of Art. II of the Genocide Convention. Such decision at the Rome Conference to maintain a fifty-year-old text is convincing evidence that Article 6 of the Statute constitutes a codification of a customary international norm.[5]

According to Article 6 of the Rome Statute, genocide consists of five specific acts committed with intent to destroy, in whole or in part, four kinds of groups, namely national, ethnical, racial and religious group as such. Those five acts are:

a) killing members of the group;

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2 Raphael Lemkin, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS (Washington, 1944).

3 78 UNTS 277.

4 Advisory Opinion concerning *Reservation to the Genocide Convention* (1951) ICJ Rep. 15 at 23; *Belgium* v. *Spain, Barcelona Traction, Light and Power House Co. Ltd.* (*Barcelona Traction* case) [1970] 1 CJ Rep 3.

5 Schabas, William A., AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (Cambridge, 2001).

b) causing serious bodily harm or mental harm to members of the group;
c) imposing measures intended to prevent births within the group;
d) imposing conditions on the group calculated to destroy it; and
e) forcibly transferring children from one group to another group.

The case law on genocide has evolved from Eichmann's trial (1962), Nikolic (1995), Karadzic (1996), Akayesu (1998), Jelisic (1999), Kayishema (1999), Krstic (2001) decisions of various courts and tribunals. A survey of those cases helps me in discussing various issues related to the crime of genocide. The primary issue before the tribunals was to gather *dolus specialis* (special intent) of the accused. Intention to destroy a group is the essence of the crime of genocide. The judicial assessment of such intention begins by first examining the existence of a genocidal plan and the commission of genocide, and then inquiring into the genocidal intent of the accused.[6] The forms of destruction of a group may be physical, biological and cultural. Rephael Lemkin's notion of genocide covered all forms of destruction of a group as a distinct social entity.[7] But cultural destruction could not find a place even in the Rome Statute. Still, that possibility lies.

The next issue to be determined by the court is to look into the quantitative dimension of the destruction of a group. The phrase used in Article 6 of the Rome Statute is 'in whole or in part'. This phrase indicates that where only a part of group is destroyed, it must be a substantial part.[8] Importance may be given not to the actual number of victims, but to the intention of the perpetrator to destroy a large number of members of the group. Where the number of victims becomes genuinely significant, it is the proof of such a genocidal intention.

The enumeration of four groups (national, ethnical, religious and racial) in Article 6 of the Rome Statute is exhaustive in nature. Therefore, the victim must be a member of one of the aforestated groups. However, the problem arose in *'Akayesu'* case when the above group membership was found to be limited in scope. In this case, Hutu tribe committed genocide

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6 Verdirame, G. *The Genocide Definition in the Jurisprudence of the Ad hoc Tribunals*, 49 ICLQ (2000) at 578.

7 *Supra* note 1 at 87-89.

8 *Prosecutor* v. *Jelisis* (Case No. IT-95-10-T) Judgement, 14 Dec. 1999, para 82.

against Tutsi tribe in Rwanda in 1994. The Tutsis and the Hutus share same nationality, language, culture and race. So, The Trial Chamber could not adopt a rigid approach regarding membership of the aforementioned four groups. Such an approach was a welcome step towards the protection of political and other socially vulnerable groups. A sort of legal vacuum is created when there is an attempt to subject a group to "sustained economic or social boycott". This kind of vacuum may be filled up by adopting the approach of the Trial Chamber of ICTR.

Another issue to be determined by the court in the crime of genocide is whether the alleged act falls under five punishable acts under Article 6 or not. The first act according to Article 6 of the Rome Statute is killing members of a group. Killing is at the core of the definition. The Elements of crimes, which assist the ICC in the interpretation and application of Articles 6,7,8 of the Rome Statute, lays down that the term 'killing' is interchangeable with the term 'causing death'. The second act of genocide, causing serious bodily or mental harm, refers to acts of major violence falling short of homicide. The Preparatory Commission for the International Criminal Court indicated that serious bodily and mental harm "may include but is not necessarily restricted to, act of torture, rape, sexual violence or inhuman or degrading treatment".[9] In the *Akayesu* decision, the Rwanda Tribunal gave rape as an example of such acts. The Elements are even more detailed, stating that such conduct may include acts of torture, rape, sexual violence or inhuman or degrading treatment. The ICTY Trial Chamber in the case of KRSTIC[10] found that serious bodily or mental harm for purposes of genocide is an intentional act or omission causing serious bodily or mental suffering. The gravity of the suffering must be assessed on a case by case basis and with due regard for the particular circumstances. The serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life. Inhumane treatment, torture, rape, sexual abuse and

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[9] Report of the preparatory commission for the International Criminal Court, finalized draft text of the ELEMENTS OF CRIMES, UN Doc. PCNICC/2000/INF/3 Add. 26th July 2000 at 6.

[10] *Prosecutor* v. *Krstic*, 40 ILM 2001 at 1346.

deportation are among the acts, which may cause serious bodily or mental injury. The third act of genocide imposing conditions of life calculated to destroy the group applies to cases like the forced marches of the Armenian minority in Turkey in 1915. The fourth act that imposes measures intended to prevent births within a group can be sexual sterilization, forced birth control, separation of sexes, or prohibition of marriages. 'Forcibly transferring children of the group to another group' is the fifth punishable act. It can be caused by forceful physical transfer and also by causing serious trauma to the parents or guardians that would necessarily lead to such transfer. But none of the acts defined in Article 6 consists of genocide if they are not accompanied by the specific genocidal intent. In cases where the intent falls short of the definition, prosecution may still lie for crimes against humanity or war crimes.

The crime of genocide as described in the Statute concludes with the words 'as such'. These words were added in 1948 by states, which felt that genocide required not only an intentional element but also a motive. The two concepts are not equivalent. Individuals may commit crimes intentionally, but for a variety of motives like greed, jealousy, hatred and so on. Proof of motive becomes an added obstacle to effective prosecution. Till date, this question has been simply avoided by the courts / tribunals.

III. Crimes against Humanity

The concept of crimes against humanity in its modern form may be traced back to the Hague Convention of 1907. The Preamble to the 1907 Hague Convention No. IV contains *Martens Clause*, which makes that treaty of utmost importance. The *Martens Clause*, so called after the Russian representative, stipulates that in cases not covered by the rules of law, "the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result form the usages established by civilized peoples, from the laws of humanity and the dictates of public conscience". The *Martens Clause* aimed at extending additional protection to both combatants and civilian populations where the law was silent or in development, until such time as more comprehensive rules were adopted.

However, the above term was used in its contemporary context in 1915. The then Ottoman Empire ordered the massacre of Armenian population. At least 1.5 lakh Armenian civilian were massacred. Following it the Governments of Great Britain, France and Russia issued a declaration denouncing the

atrocities, as crimes against humanity and civilization. The 1920 Peace Treaty of Sevres which made provisions for the trial of those Turkish officials responsible for violating the laws and customs of war and of engaging in the Armenian massacres during the war, but excluding reference to the law of humanity,[11] was superseded by the 1923 Treaty of Lausanne which contained a Declaration of amnesty for all offences committed between 1914-22.[12] However, as Bassiouni points out, the political motivations behind this compromise, could not guise the fact that amnesties are only granted for crimes, which even if not prosecuted does not negate their legal existence.[13]

Immediately upon conclusion of the First World War, the Allied and Associated Powers established in 1919 a Commission on the Responsibility of the Authors of the War and Enforcement of Penalties.[14] The majority of the Commission supported the establishment of a tribunal with criminal jurisdiction over all persons belonging to enemy countries that were found to have violated the laws of war or the laws of humanity. The USA's dissent over the scope of the term laws of humanity prevailed against endorsing the Commission's position and so the 1919 Treaty of Versailles excluded reference to crimes against humanity.

In 1945, the Nuremberg Tribunal got the mandate to exercise jurisdiction over crimes against humanity also. However, it was considered legally unsound to hold the Nazis responsible for crimes committed against Germans within the borders of Germany. After considerable pressure from the Jewish non-governmental organizations, it was agreed to extend the criminal responsibility of the Nazis to internal atrocities under the rubric 'crimes against humanity'. But even the allies were uncomfortable with its ramifications with respect to treatment of minorities within their own countries, not to mention their colonies. For this reason they insisted that crimes against humanity could only be

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[11] Clark, R, *Crimes against Humanity at Nuremberg*, in Ginsburg, G. and Kudriavtsev, V.N. (eds.), THE NUREMBERG TRIAL IN INTERNATIONAL LAW (Dordecht, 1990).

[12] Articles 226, 230, Treaty of Peace between the Allied Powers and Turkey (Treaty of Sevres).

[13] Bassiouni, C.M., CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW, (Dordrecht Boston, 1992).

[14] Commission on the Responsibility of the Authors the War and on Enforcement of Penalties, 14 AJIL 1920 at 95.

committed if they were associated with one of the other crimes within the Nuremberg Tribunal's jurisdiction, i.e. war crimes and crimes against peace.[15] In effect, they imposed a nexus between crimes against the humanity and international armed conflict. This requirement of nexus proved to be unsatisfactory as peacetime atrocities took place more often.

Over the years since 1945, there were several variants on the definition of crimes against humanity, some of them eliminating the nexus with armed conflict.[16] The clarification about eliminating the nexus between crimes against humanity and armed conflict came from Security Council when it established the International Criminal Tribunal for Rwanda,[17] and further recognized by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in its celebrated '*Tadic*' jurisdictional decision.[18]

Article 7 of the Rome Statute modifies and enlarges the ambit of the concept of crimes against humanity. Although a significant number of delegations argued vigorously that crimes against humanity could only be committed during an armed conflict, Rome Statute finally did away with this requirement. In Article 7, Para 1 sets out 11 acts which may constitute crimes against humanity if committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Thus, there is an important threshold that elevates the acts to the level of crimes against humanity.

The first threshold is the requirement that these acts be a part of a widespread or systematic attack. At Rome Conference, some proposals required that the attack be widespread and systematic both. In paragraph 2 of Article 7 of the Rome Statute, the meaning of attack is given. Attack involves multiple commission of acts referred to in paragraph 1 of Article 7 against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack. By this analysis, it seems that the term 'attack' has both widespread and systematic aspects. Apart from widespread and systematic, the attack must be directed against a civilian

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[15] Report of Robert H. Jackson, US Representative to the International Conference on Military Trials, Washington, US.

[16] International Military Tribunal for the Far East, Control Council Law No. 10.

[17] Article 3, Statute of ICTR.

[18] *Prosecutor* v. *Tadic* (Case No. IT-94-1-AR 72).

population, distinguishing it from many war crimes, which may be targeted at combatants or at civilians. The attack must also be carried out pursuant to or in furtherance of the state or organizational policy to commit such attack. This phrase indicates that non-state actors may, in some circumstances, commit crimes against humanity. Finally the perpetrator must have knowledge of the attack. Hence specific form of mental element is required though less than what is required in genocide. According to the Elements of Crimes, it is not necessary that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the state or organization.[19]

The element of motive also remained controversial until the Appeals Chamber of the ICTY in *Tadic* case[20] declared that there was no particular motive requirement for crimes against humanity in general (the act of persecution has a motive requirement built into its definition).[21] This doesn't mean that motive is not relevant. It matters at the time of sentencing. It may be a compelling indicator of guilt.

The list of 11 acts in Article 7 paragraph 1 is larger than that of Nuremberg Charter. Some terms have been developed and expanded since then. For example, 'deportation' is followed by the words 'forcible transfer of population' in Article 7(1)(d) of Rome Statute, recognizing the concept of ethnic cleansing particularly when this takes place within a country's own borders. Enforced migrations of a group from one state territory to another within a country's own borders might also be a crime within the meaning of Article 7(1)(d). The offence of 'terrorism' could also not be included in the crimes against humanity although scope of its inclusion was felt considerably.

Feminism got a convincing success at the Rome Conference when 'gender-crimes' were recognized. The Nuremberg Charter did not even recognize rape as a form of crime against humanity. The Rome Statute refers to rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.[22] To

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[19] Article 7, Para 2, Rome Statute.

[20] *Prosecutor* v. *Tadic* (Case No. IT – 94-1-A), Judgement, 15 July 1999.

[21] Rules of Procedure and Evidence, UN Doc. PCNIC 2000/INF/3/Add. 1 Rule 145(2)(v).

[22] Barbara C. Bedont, *Gender-Specific Provisions in the Statute of the ICC* in Lattanz and Schabas (eds.), ESSAYS ON THE ROME STATUTE at 183-210.

allay the fears of many states which were having anti-abortion laws, the term 'forced pregnancy' was defined as unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out grave violations of international law.

The crime of persecution requires discriminatory intent. Article 6(c) of the London Agreement envisaged two categories of crimes. One of them was that of murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population. Hence this was the category for which no discriminatory intent is required, while the other category ("persecutions on political, racial or religious grounds") is patently based on a discriminatory intent. An identical provision can be found in the Statute of the Tokyo International Tribunal (Article 5(C)). Similar language can also be found in Control Council Law No. 10 (Article II (1)(C)). The words added to the last part of the crime of persecution 'in connection with any act' referred to in this paragraph or 'any crime within the jurisdiction of the court' narrows its scope considerably. These words were neither found in the ICTY or ICTR or customary law. The Statute of ICC includes political, racial, national, ethnic, cultural, religious and gender in its list of discriminatory grounds as well as other grounds that are universally recognized as impermissible under international law. The latter is an open-ended provision.

The clause (k) of paragraph 1 of Article 7, which includes 'other inhumane acts of a similar character intentionally causing great suffering', leaves the door open for evolution. In the *Akayesu* decision, the Rwanda Tribunal interpreted 'other inhumane acts' to encompass such behavior as forced nakedness of the Tutsi women.[23] But, under the Rome Statute, the concept of 'other inhumane acts' is actually narrowed by adding the words 'of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health'.

IV. War Crimes

The Rome Statute containing the provisions related to war crimes in Article 8 is the lengthiest one. War crimes are the oldest of the four offences within the jurisdiction of ICC. The Hague Convention No. IV, 1907, for the first time, recognized war crimes as an offence under international law. However, it did not conceive war crimes as a source of

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[23] *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgement, 2 Sept. 1998.

individual criminal responsibility. The Commission on Responsibility, 1919, also defined war crimes on the basis of the aforementioned Convention. War crimes were subsequently codified in the Nuremberg Charter. Four years later, in the 'grave breaches' provisions of the four Geneva Conventions of 1949[24], a second codification was put forth.

The Nuremberg Charter and the Geneva Conventions do not cover the entire range of serious violations of the laws of war. Only most severe atrocities are covered. When the 1949 Geneva Conventions were updated with two Additional Protocols in 1977, the drafters excluded grave breach provisions during a non-international armed conflict. But, Article 8 of the Rome Statute expressly covers non-international armed conflicts also.

Some of the war crimes mentioned in Article 8 are defined in detail. Article 8 consists of four categories of war crimes, two of them addressing international armed conflict and two non-international armed conflicts. Within the subset of non-international conflicts there are two distinct categories. Hence the task of distinction between the international and non-international armed conflict becomes more difficult for the court.

In customary law, war crimes and the two other offences – crimes against humanity and genocide are different. Crimes against humanity must be widespread or systematic and genocide requires a *dolus specialis*. War crimes can cover even isolated acts committed by individual soldiers acting within direction or guidance from superiors. Article 8 paragraph 1 begins with a language which brings war crimes closer to crimes against humanity when it provides that the court has jurisdiction over war crimes when committed as part of a plan or policy or as part of a large scale commission of crimes. However, the words 'in particular' is a compromise between those favoring a rigid threshold and those opposed to any such limitation.[25]

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[24] Convention on the Amelioration of the Condition of the Wounded and Sick in Armed forces in the Field, (1949) 75 UNTS 31, Convention for the Amelioration of the Condition of Wounded, Sick and Ship-wrecked Members of Armed forces at Sea, (1950) 75 UNTS 85, Convention Relative to Treatment of Prisoners of war, (1950) 75 UNTS 135; Convention Relative to the Protection of Civilian Persons of War, (1950) 75 UNTS 287.

[25] Von Hebel and Robinson, CRIMES WITHIN THE JURISDICTION at 124.

The primary issue in charges under Article 8 is the existence of an armed conflict, be it international or non international. The International Criminal Tribunal for the former Yugoslavia has held that an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.[26] The narrow interpretation of 'armed conflict' given by Rwanda Tribunal in the *Akayesu*' case (1998) is under appeal.

'Grave breaches' of Geneva Conventions, 1949 form the first category of war crimes. Its scope is limited because it could only be committed in the course of international armed conflict. International armed conflict may also occur when a state exercises overall control over a rebel entity so as to justify attributing its actions to the controlling state. The test of 'effective control' as laid down in the *Nicaragua* case has now been overruled by the *Tadic* case. The Appeals Chamber in the *Tadic* case laid down a new test of 'overall control'. It held the Bosnian Serb Army (VRS) to constitute a military organization under the overall control of the Federal Republic of Yugoslavia, finding the latter not only to have equipped and financed the VRS, but to have also participated in the planning and supervision of its military operations.[27]

Victims of grave breaches must be protected persons. In the case of first three Geneva Conventions, this means members of the armed forces of party to the international armed conflict. Regarding fourth Convention, protected persons must be in the hands of a party to the conflict or occupying power of which they are not nationals. In the *Tadic* case, the Tribunal held that even nationals are protected if they cannot rely upon the protection of the state of which they are citizens.[28] Sometimes, ethnicity becomes more important than nationality in determining loyalties.

The next category of war crimes is 'other serious violations of the laws and customs applicable in international armed conflict'. The wording makes it clear that this category is confined to international armed conflict. There is no requirement that the victims be protected persons as in grave

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[26] *Prosecutor* v. *Tadic* (Case No. IT-94-1-T), 36 ILM 1997 at 908.

[27] *Tadic* Appeals Judgment (1999), para 13.1.

[28] *Prosecutor* v. *Tadic*, paras 164-6.

breaches. The list of violations is primarily drawn from the regulations annexed to the 1907 Hague Convention No. IV.[29] The overall focus of Hague law is on combatants themselves as victims, not the innocent victims. Some new provisions of Article 8(2) (b) which are not found in the 1907 instrument are those concerning the protection of the humanitarian or peace keeping mission[30] and prohibiting environmental damage.[31] The sub provision, which was most controversial at Rome conference, was sub paragraph (viii). This provision governs not only population transfer within the occupied territory, but also the transfer by an occupying power of parts of its own civilian population into the occupied territory.[32] Israel opposed this provision particularly. The provision, which makes it a crime to enlist or conscript children under the age of fifteen into the national armed forces or to use them to participate actively in hostilities, is new one. This provision has been taken from the Convention on the Rights of the Child,[33] as well as Additional Protocol I to the Geneva Conventions. The sexual offence text in the violation of laws and customs of war is essentially new. In *Prosecutor v Furundzija*,[34] the Trial Chamber found the following elements as objective for the offence of rape:

(i) The sexual penetration, however slight
   a. of the vagina or anus of the victim by the penis or any other object; or
   b. of the mouth of the victim by the penis
(ii) By coercion or force or threat of force against the victim or a third person.

The prohibited weapons listed in Article 8(2)(b) sub paragraphs (xvii) to (xx) are not suitable for the 21st century military technology. Simple weapons are prohibited but nuclear, biological, chemical weapons and anti-personnel land mines are not prohibited.

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29 Convention Concerning the Laws and Customs of War on Land (Hague Convention IV)

30 Article 8 (2)(b)(iii), Rome Statute.

31 Article 8(2)(b)(v), *id.*

32 *Supra* note 25 at 112.

33 Article 38, Convention on the Rights of the Child, GA Res. 44/25, Annex.

34 38 ILM (1999) at 355.

The next two categories of war crimes apply to 'non-international armed conflict'. The 1949 Geneva Conventions refer to non-international armed conflict in only one provision, known as 'common Article 3'; Article 3 is 'common' because it is identical in all four Conventions. Additional Protocol II to the 1949 Geneva Conventions, 1977 tried to expand the scope of Article 3. Paragraphs (c) and (d) of Article 8 apply to non-international armed conflicts contemplated by common Article 3 of the four Geneva Conventions, while paragraphs (e) and (f) apply to non-international armed conflicts within the scope of Additional Protocol II. The scope of both provisions is limited as they apply to armed conflicts of non- international character, but not to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. The Additional Protocol II crimes listed in paragraph (e) apply to armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.[35] There is a further limitation on the common Article 3 crimes: 'Nothing in Paragraphs 2(c) and (d) shall affect the responsibility of a Government to maintain or re-establish law and order in the state or to defend the unity and territorial integrity of the state, by all legitimate means'. These thresholds have been a source of criticism for their narrow scope. In effect, in cases of internal disturbances and tensions, perpetrators may be punished for crimes against humanity but not for war crimes. However, the Statute of the Iraqi Special Tribunal (2003) does not recognize such thresholds.

Like the 'grave breaches' in paragraph (a), the common Article 3 crimes must be committed against protected persons. These persons are those who take no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *'hors de combat'* by sickness, wounds detention or any other cause.

The crimes listed in paragraph (e) are considerably drawn from Additional Protocol II. However all serious violations of Protocol II are not included in Article 8 of the Rome Statute. Attacks, which are intentionally directed against the civilian population, culturally significant buildings,

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[35] Actually, Article 8(2)(e) of the Rome Statute is slightly broader than Additional Protocol II, in requiring that the conflict be protracted whereas the Protocol requires rebels to control territory.

hospitals, Red Cross units and other humanitarian workers such as peacekeeping missions, are covered in paragraph (e). Gender–crimes are included in sub paragraph (vi) of paragraph (e). Child soldiers are also not to be recruited.

In the *Tadic* jurisdiction decision, the Appeals Chamber held that Article 3 in fact covers all violations of international humanitarian law other than grave breaches. This therefore includes besides the 1907 Hague Convention, provisions of the 1949 Geneva Conventions other than grave breaches provisions, violations of common Article 3 of the four Geneva Conventions, as well as other customary law applicable to internal conflicts. That construction of Article 3 recognized, for the first time, individual criminal responsibility for offences committed in the context of non- international armed conflicts.[36]

V. Conclusion

The subject matter jurisdiction of the ICC is fundamentally based on core values of humanity as a whole. Today the human civilization has become conflict prone. Relatively conflicts are now tending to be localized. Thus, non-international armed conflicts are found to be more in number than the international armed conflicts. The ICC might be better equipped with respect to jurisdiction in non-international armed conflict matters. Further, destruction of a socially and politically vulnerable group might also be punishable as genocide under Article 6 of the Rome Statute. An attempt to subject a group to sustained economic or social boycott should also be included within the ambit of Article 6.

The concerns of some states regarding the inclusion of terrorism and prohibition of the use of nuclear weapons are also not misplaced. At the time of Rome Conference, terrorism could not rally sufficient support from the delegates due to very poor appreciation of terrorism by the western countries. Now there is a paradigm change in the scenario. The most powerful countries in the world are experiencing horrendous acts of terrorism. The jurisdiction of ICC should therefore include terrorism, sooner the better. Further, 'forcible transfer of population' appearing in Article 7(1(d) should be interpreted in a way as to include enforced migration of a group from one state territory to another within a country's own borders.

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[36] *Tadic* Appeal Jurisdiction Decision (1995), paras 87, 89.

Last but not the least, the Court has no jurisdiction over most serious crimes, namely, use of N-weapons, drug trafficking, use of weapons of mass destruction like anti-personnel land mines, blinding lasers, etc.[37] The International Court of Justice came very close to ban the threat or use of N-weapons in 1996, but it missed the opportunity of doing so.[38] . Similarly, the use of chemical weapons, biological weapons, anti-personnel land mines should be treated as war crimes or crimes against humanity and be included in the subject matter jurisdiction of the ICC. There are provisions in Articles 121 and 123 of the Rome Statute of a future review of the list of crimes contained in Article 5.Therefore, the list of crimes should be enlarged and modified in a future review of the Statute.

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[37] Gurdip Singh, INTERNATIONAL LAW (2003) at 458.

[38] Advisory Opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, 35 ILM 1996 at 809.