Third World Approaches to International Law and the International Criminal Court: A Perspective from the Global South

Abstract

This essay engages in a critical examination of the theoretical framework of contemporary international criminal-law (ICL) scholarship vis-a-vis Third World Approach to the International Law (TWAIL). It attempts to explore the genesis, growth and fundamental formulations such as legislative, adjudicatory and implementation cycles of the International Criminal Court. It endeavors to understand the ongoing changes in the sovereign spaces of the Third World countries. It further attempts to demystify concepts like Individual Criminal Responsibility/sovereign immunity, Responsibility to Protect (R2P), complementarity and powers of the United Nations Security Council (UNSC) which predominantly appear as the matrix of contemporary International Law. It seeks to cover seismic tremors in international law due to which its constitutive elements such as treaty based crimes or more fundamentally consent based regimes are shifting towards binding universal norms. The current essay argues how rule making, enforcing and adjudication are becoming technical exercises clothed with bureaucratic procedures which in essence appropriates the democratic spaces of engagement. It strives to locate the center of power and seeks to unmask the minuscule minority which speaks the sponsored language of universality but serves their immediate interests. It further looks at how the current prosecutorial model serves the interest of its vested audiences and a satellite community of professionals. This essay maps out the importance of property relationship with the conceptualization of elements of crimes under the Rome Statute and how it further sets the discourse and lexicon of the International Criminal Law. Finally, the essay concentrates on the possibilities, particularly the power relationship of 'Third World' and its position to critique first world for dissent and have alternative views to sustain a culture of dissent and diversity at global level.

I. Introduction

'Knowledge is power' is a commonly used maxim. For the understanding of epistemology of any subject, it becomes fundamental to examine and understand the location of power. Power creates hierarchies, structures and prerequisite fulcrum for dominance in any society. Even in our everyday lives, ideas, rules and institutions are operationalised but this status quo may have its own background or sense of history. In other words, today's status quo is not a natural outcome but has evolved through a process of time. International law too is not a product of historical vacuum. For new generations of readers, it may appear that principles in international law are granted through the natural outcome of human conscience but it needs to be reiterated that constant and tireless efforts of first generation scholars of TWAIL-I[1] have created a space or grammar to articulate a language of international law for the colonized, oppressed and marginalised. It needs to be reiterated that power relationships significantly operate within the processes of knowledge production as well.

Oppressors have a tendency to monopolize and appropriate knowledge production at the root of slavery and deny any worth of the oppressed. In this context, Euro- centrism of international law was conceived in a background to exclude others and may be viewed as cultural appropriation. In other words, one can say that international law was used as a lubricant to expedite the process of colonial expansion and an apparatus and norms were designed which formed the body of knowledge in international law. It is equally important to understand who these 'others' are and this constitutes a significant part of the current essay.

During the saga of colonial intervention this otherness is significantly operationalised through Family of Nations.[2] Contrary to this, in the words of Chimni, this is not a bloody battle where we see our enemy face to face but indeed this is a movement and methodology to break

[1] First Generation of TWAIL Scholars is a group of scholars who articulated their voice mainly to establish a space for the protection of sovereignty of newly emerged colonized states. Their work primarily focused on sovereignty and representation of these nations in International Organisations, which in essence believed in the democratization of international law through their numerical strength.

[2] In 1814 through Treaty of Vienna, a group of nations called as Family of Nations created as the space of Sovereign Countries. It was primarily European nations only in early 19th century Japan was the first Asian country to be given membership of this group.

the structural dominance, game of hegemony, and foreplay of assertion. This process needs to be understood gradually and a political unity is required for this to be achieved. In this regard, TWAIL-II scholarship on the one hand creates a legal space for strong a political bond for a just world order and on the other hand critiques the existing structure of international law to change itself.[3]

In many ways, loss of sovereignty and subjugation in past constitute as material facts in the national memory of the third world countries. Naturally it can be presumed that the Third World seeks to protect its sovereign space in best possible manner and advocates laws for the same. However, this prerequisite for any democratic rule making may seem to be of secondary consideration when it comes to the current international law, particularly international criminal law. Contemporary regimes of international law with its fragmented characteristics such as human rights, humanitarian laws, international criminal laws, economic, trade and investment laws create such situations wherein sovereign discretion of third world are conditions to be viewed as obstacles for the rule of law. This antagonism creates a situation where third world countries' positions on the current order appear as contrary to the law or those who speak for it are labeled as nihilist.

It becomes significant to register in cognitive faculty that language of universalism, extra territorial jurisdiction, individual criminal responsibility, R2P, absence of consent, rule of law, international community, democracy, human rights and so on appear on the side of those who support prosecutorial model for the dispensation of justice. Whereas on the other hand the Third World's image is created by showcasing a picture of maladministration, human rights abuses, nepotism, dictatorship, corruption et al which provide legitimacy to ideas about their inability to rule through self by the Third World Countries. In effect international tribunals and courts appear high on a civilizing mission to correct and punish dictators of the oriental world.

[3] See, for example, B. S. Chimni , A Just World under Law: A View from the South, American University International Law Review 22 (2006-2007), p. 199; B. S. Chimni , The Past, Present and Future of International Law: A Critical Third World Approach, Melbourne Journal of International Law 8 (2) (2007), p. 499; Karin Mickelson , Rhetoric and Rage: Third World Voices in Interna- tional Legal Discourse, Wisconsin International Law Journal 16 (2) (1998), p. 353; Karin Mickelson , Taking Stock of TWAIL Histories, International Community Law Review 10 (2008), p. 355; Makau Muhua , What Is TWAIL?, ASIL Proceedings of the 94th Annual Meeting, Wash- ington D.C., April 5-8, 2000

In this approach, current international criminal law appears as punitive rather than preventive or remedial in nature. It fails to see beyond the formalistic approach of the occurrence of international crimes such as ethnic conflict in Rwanda and Water Crisis in Sudan due to which situations of crimes and conflicts may have occurred. It is important to understand this escape is not incidental but deliberate which is rooted in the mainstream. It bends heavily on the civil and political rights as legitimate agendas and any things other is termed as ideological questions.

II. Historical Roadmap of the Development of the International Criminal Court

Trials seem to be political instruments and this is perhaps equally true for international trials as well. International trials have not been generated in ideologically neutral background. It is not that the colonial brutalities where races were almost wiped out were questioned through trial. Indeed political economy of war among colonial powers generated this debate. Thus to have or not to have trial was preceded by series of event in the diary of Westphalia model, family of nation to most importantly inner contradictions of colonialism rather than genuine call of human kind. Due to this, trial as a tool to serve the interest of humankind was left behind and became a tool to be politically correct. In this regard, it is important to note that the first decisive and benchmark effort to curb international crimes through an international penal process arose after World War I (Third World needs to contest the phraseology of World War; it was not the global war and there was no global consensus for this. In fact it was battles among European powers and their subjects had to participate without any choice but coercion).

The question, why so, may invite few readymade answers based on one's ability to understand the situation in hand, perhaps due to advanced scientific and technological developments such as use of poisonous gases, the horrific effects on causalities of war had increased tremendously. Therefore, it was felt necessary to regulate sovereign excesses under the jurisdiction of international law through an international penal process and the promotion of

international justice.[4] However advancement of weapon technology was achieved way before the World Wars but despite several avenues of diplomacy and engagements among European powers no substantial progress was made during the peace time to control/use/prohibition on its further development. It is significant to note during the same space and time colonial powers suppressed even peaceful national liberation movements by severe colonial repression.

However, selective effort was made to compensate for the loss of near and dear one's in the European conflict among European powers. The Paris Peace Conference laid down the fundamental reference point to establish a system in place in the form of Allied Commission on the Responsibility of the War and the Enforcement of Penalties (Allied Commission). In addition to this, after much deliberation and a series of negotiations to ascertain the culpability of atrocities, Article 227 of the Versailles treaty provided for the creation of an ad-hoc international criminal tribunal to prosecute Kaiser Wilhelm II for initiating the war. It further provided in Articles 228 and 229 for the prosecution of German military personnel accused of violating the laws and customs of war before Allied Military Tribunals or before the Military Courts of any of the Allies. However, due to political situation, particularly Holland's refusal to surrender William Keiser and dominant powers to adamantly firm with the principle of state immunity whereby head of the state cannot be punished.

The same episode was repeated after the end of World War II, where the victorious parties selectively proposed to conduct a trial for punishing the defeated for their engagement in the elements of crimes but same act was too committed by the victorious soldiers at the mass scale but they were granted impunity. The idea of punishing through trials was an American proposal.[5] In fact, Churchill had an altogether different plan for the Nazis and wanted Nazi

[4] The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, usually called the Geneva Protocol, is a treaty prohibiting the use of chemical and biological weapons in international armed conflicts. It was signed at Geneva on 17 June 1925 and entered into force on 8 February 1928. It was registered in League of Nations Treaty Series on 7 September 1929.

[5] Sylvia Bertodano (2002), "Judicial Independence in the International Criminal Court", Leiden Journal International Law, vol. 15(2), p.n. 411

leaders to be executed as soon as they were captured and identified.[6] However, he later changed his mind and agreed to what became the Roosevelt-Churchill agreement in Quebec. Jackson, one of the legal luminaries of the time convinced Truman about the long term benefits of the trial. He understood the importance of trials as an act of vengeance against the defeated. He advanced the proposition that "aggressive wars are civil wars against the international community".[7] For this the Allied powers had to prove that the law created by the London Agreement and the Charter of the International Military Tribunal attached to this Agreement was but declaratory of already existing rules of general international law. This needs to be noted that judgment has legal value but it can be critiqued from technical and substantial political arguments.

Needless to say that on one hand, crimes in the Nuremberg Charter, namely waging aggressive war, war crimes and associated crimes against humanity, was applicable only to selected defeated belligerents of the war. Whereas on the other hand, American decision to use nuclear weapon against the Japanese population was nowhere examined. This act was indiscriminate act of weapon exercise whereby one cannot make distinction among legitimate targets and prohibited one. In fact victorious used trial as a means and strategy to establish the foundational stone of post World War II system in their favour. Here Judge Radha Binod Pal's remarks highlights the Japanese prosecutions as little more than cynical neo-colonialism which further reflected his profound anti-colonialist sentiments.[8]

However, the Nuremberg trial being the bolierplate created the legal infrastructure for the further growth of international law in general and international criminal law in particular. In terms of an idea, it tested the prosecutrial model of punishment for international crimes. Since then it has been preached and propagated and is now emerging as the sole practice to dispense criminal justice.

As a matter of fact, afterwards United Nations General Assembly's resolution on 11 December 1946 proved to be another milestone which incorporated Nuremberg Principles as

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[6] https://www.theguardian.com/world/2012/oct/26/britain-execution-nuremberg-nazi-leaders accessed on 15th June 2016.
[7] Jackson's speech was read by Ambassador George L. Messersmith on March 27, 1941, as bad weather had prevented Jackson's flight to Havana. This address is printed in 35 Am. J. Intl L. 353 (1941).
[8] Schabas A. William (2013), "The Banality of International Justice", JICJ, vol. 11(3):547

'principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal.'[9] Subsequently, a Special Rapporteur relating to the establishment of the court submitted its first report to the International Law Commission (ILC) in March 1950.[10] In fact, preparing the momentum for the International Criminal Court (ICC) was one of the earliest agendas and mandates of the ILC. The ILC ultimately advocated the creation of an ICC and prepared a draft statute in 1951.[11]

In its initial years, the United Nations sought to institutionalize these developments with the creation of a permanent ICC.[12] However due to inherent contradictions between the allied powers especially between Soviet and USA and their contradictory views about substantive aspects of international criminal law, particularly on Genocide Convention and other human rights, it failed to develop any consensus for the establishment of a permanent ICC. Thus trial as a method itself creates political relationship with power.[13]

III. Advancement of International Criminal Law by the International Criminal Court

The Rome Statue has put in place the framework and modus operandi for the establishment of the ICC.[14] Since its inception in the year 2002,[15] the ICC has received an overwhelming response from its member states but opposing voices from different quarters of the globe. The Rome Statue was ratified by 124 member states and the ICC currently has 139 signatories. Following cases have been tried by the Court till date:

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[9] GA Res 95, UN GAOR, [188], UN Doc A/64/Add 1 (1946).

[10] Report of the International Law Commission on the question of International Criminal Jurisdiction, UNGAOR, 5th Sess., UN Doc. A/CN.4/15(1950).

[11] International Law Commission, Question of International Criminal Jurisdiction, http://untreaty.un.org/ilc/summaries (last visited May. 16, 2016).

[12] General Assembly Resolution, 95(1), 1946, 177(II),1947, General Assembly resolution 488 (V) of 12 December 1950) for further details. Visit. http://legal.un.org/avl/ha/ga_95-I/ga_95-I.html.

[13] D.Polon, 'Toward a Theory of Law and Patriarchy', in D.Kairys (ed.), The Politics of Law: A Progressive Critique (1982), 294. See also T.Krever, 'Calling Power to Reason?', 2010) 65 New Left Rev 141.

[14] (Rome Statute is the treaty document for the International Criminal Court. The Statute was adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. In accordance with its article 125, the Statute was opened for signature by all States in Rome at the Headquarters of the Food and Agriculture Organization of the United Nations on 17 July 1998.)

[15] Came in to force on 01 july 2002. For Further information: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&lang=en

Table 1: Cases tried by the International Criminal Court

Year	Country	Mechanism	Accused	Membership Status
2004	Uganda	Self Referral[16]	Lord's Resistance Army	Yes
2004	Democratic Republic of Congo	Self Referral	Thomas Lubanga Dyilo	Yes
2005	Sudan	Security Council Resolution[17]	Omar Al Bashir	No
2004	Central African Republic	Self Referral	Jean-Pierre Bemba Gombo	Yes
2010	Kenya	Prosecutor opens proprio motu investigation	William Samoei Ruto	Yes
2011	Libya	Security Council Resolution[18]	Saif Al-Islam Gaddafi	No
2011	Cote d'Ivoire	ICC Prosecutor opens proprio motu investigations[19]	violence erupted after Presidential election results	No

[16] See Article 13 of the Rome Statute
[17] UNSC resolution S/RES/1593 (2005)

[18] UNSC Resolution S/RES/1970(2011).
[19] This was the first investigation opened while a country had accepted the Court's jurisdiction (under article 12(3) of the Rome Statute) but was not yet a State Party.

			between opponents Mr Laurent Gbagbo and Mr Alassane Ouattara were disputed.	
2012	Mali	Self Referral	Different Armed Groups	Yes
2014	Central African Republic	Self Referral	Jean-Pierre Bemba Gombo	Yes
2016	Georgia	ICC Prosecutor opens proprio motu investigation	Alleged acts of war crimes and crimes against humanity, violation in international Armed conflict Situation in South Ossetia	Yes

(Source: https://www.icc-cpi.int)

After going through these cases one proposition seems safe to accept that prosecutions create a world of division. It is solely African nations which serve the registry of the ICC and First world decides whom to prosecute. In this case, TWAIL can be used as a tool to express the discontent of third world against the international criminal justice system. It is pertinent to note that these cases have at a fundamental level triggered and shaped the modus operandi of the ICC. Nevertheless several tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Tribunal For Rwanda (ICTR), East Timor and Sierra Leone were already in place before the establishment of the ICC, but it is difficult to assess the

deterrence and preventive effects of the these tribunals and trials on other cases or potential cases.

As a matter of fact, unlike its predecessors, the ICC is a permanent and independent body[20] thus its scope, area, significance and operational jurisdiction is vast which on the one hand creates a group as member states to support where as other group sees this as potential instrument to intervene in their domestic system. Particularly third world contest on several grounds such as against the inclusion of UNSC and role of independent prosecutor in the referral of the cases in the ICC[21]. Due to which state consent system which was sine qua non for the treaty system is no more a sagacious norm.[22] There was no consensus on the elements of the crimes as well. It is true that third world by and large failed to appreciate the idea behind International Criminal Court. Countries like India, Pakistan or others wanted prior consent of the state for any trial to commence. These countries even protest for the inclusion of non international armed conflict under the ambit of court.

It needs to be noted that the Rome Statute defines and criminalizes four crimes namely genocide, crimes against humanity, war crimes and aggression.[23] However third world countries were of the view to include use of nuclear weapon as crime and further include terrorism, drug trafficking, money laundering etc as elements of crime. However dominant idea prevailed that the element of crimes is basically a category whereby it seeks to ascertain individual criminal responsibility of those are involved in the act of brutalities. In order to commit such acts agency such as state is required. Whereas crimes such as drug trafficking are committed by individual members or group of individual members they can be tackled by the effective efforts of the state or group of states. Therefore, international crimes act as check and balance mechanism.

It seems that third world delegates failed to appreciate the ideas behind conceptualization of element of crimes. There was no consensus among third world countries. Empirically based on their positions during the travaux preparatoires of the Rome Statute, it appears that there was significant and wider division in these countries and some opposed the idea of ICC, but many fail to see the world beyond Westphalia system and spoke in a language which appear as

[20] See Article 4 of the Rome Statute.
[21] See Article 13 of the Rome Statute.
[22] See Article 27 of the VCLT,1968.
[23] See Article 6 to 8 of the Rome Statute.

outdated. It is true that there is responsibility on each state to prevent international crimes to happen. In this process state's sovereignty should be protected, but merely state is sovereign and could go up to any extent is no more a legal doctrine. However in past we can see how abuse of intervention used as political tool to target unfriendly foreign regimes whereas same sorts of acts was prevailing in the friendly regime. These sorts of activities create severe challenge for the ICC that it should remain objective and change its modicum to give space to dissent.

The Rome Statute has enormous power and gives voluminous room for discretion which may be transformed in arbitrariness and in effect harm the sovereign space of the third world countries. It ascertains liability based on individual criminal responsibility and advocates to punish individuals irrespective of sovereign immunity granted to them by their domestic laws.[24] Further Complementarity[25] constitutes founding pillar of the relationship between domestic system and court. It enunciates the principle that ICC shall work as Court of last resort The Rome Statute also entitles the ICC to have a final say over the efficacy of the domestic legal systems[26]of states and to transfer relevant cases to Hague. It further seeks to homogenizes domestic and international criminal law and envisages an agenda to legislate in the domestic jurisdiction on the line of Rome Statute so that Penal Code should be update and must necessarily criminalizes international crimes in the domestic jurisdiction.

In this context, it is important to revisit one of the golden rules of international law where only customary laws are applicable despite states' non-consent to such laws. The development of the ICC has thus unpacked many problems of international law which were traditionally considered to be states' privilege.[27]

IV. International Criminal Order: A binary of North and South

The world and international community are not monolithic units. They represent plurality and diversity at interwoven and complex manner. Global North and Global South as category signify more than identity. Perhaps due to historical reasons, particularly colonialism and imperialism by

[24] See Article 25 of the Rome Statute
[25] See Article 17 of the Rome Statute
[26] See article 17 of the Rome Statute.
[27] Dapo Akande, International Law Immunities and the International Criminal Court , The American Journal of International Law, Vol. 98, No. 3 (Jul., 2004), pp. 407

western powers, many unwarranted identities have taken birth, out of which Global North and Global South divide, binary and antagonism seem to most definitely have colonial roots. One extreme of this binary represents a powerful class while the other reflects aspirations of the weakest and most marginalized. In this context, TWAIL as method to understand international law is equally useful to further demystify these categories and can provide a tool to theorize or express the complex juridical phenomenon in lucid ways.

Why do we need to understand ideology or any perspective such as TWAIL for the study of International Criminal law? International tribunals and courts, mechanisms of trials, processes of investigations, development of a body of jurisprudence, systems of punishment/penology, addressing the grievances of victims, arrangement of finances and execution are a complex process. It operates in its own eco system. In this context, it seems pertinent to mention that The Global North advocates that criminal justice needs a rule bound sovereign and what the rule is and to what extent this rule will cost the sovereigns is a question of great deliberation. It is seen as a sibling of realpolitik, thwarting international criminal justice at every turn. States view ICC with paranoia or as an assault on their exclusive domain of criminal justice.

This transformation from state bound criminal justice system to international community based justice system is fundamentally defined and demarcates the sovereign's limitations and obligations. Unless we see trials or punishment from critical eyes, we will fail to appreciate the justice or miscarriage of justice. International Criminal Court is not neutral to the power structures of the existing world 'order'. Taking such position with regard to the court, does not suggest negating the importance of International Criminal Court but merely an attempt to make it egalitarian, participatory, communicative, affordable, approachable and democratic in deed and practice.

Expansion of ideas or institution is inherent character of any global scheme. In today's time, membership of multiple nations in any organisations gives legitimacy to it, and provides stability and acceptability. In this context, International Criminal Court's 124 memberships is a success story in itself. Court is inviting new members, but now the African continent, which once saw the Court as panacea to ongoing conflict in the region, subsequently due to working culture of the court it appears that the same region now is critical about its role in Africa and accuses

Court for its selectivity and showing wide protests. Thus, it is difficult to deny that court being so called democratic institution suffers from democratic deficiency syndrome, which proves to be substantial impediment in delivering justice with fairness and objectivity.

International law after the cold war is becoming more clothed with the idea of integration and reflects the intent and extent of the unipolar world order. In the aftermath of the disintegration of USSR, international law appears as mirror image of liberal state. In essence, liberal model of laws, whereby civil and political aspects such as parliamentary or western pattern of electoral democracy, human rights, free trade, seems essential paraphernalia of the international law. In the same thread, incarnation of the ICC gives birth defects in the conceiving of material factors behind the crimes. Thus, it is safe to say that it has incapacitated to examine any conflict situation beyond the drive of prevention and punishment.

The Post-World War notion of universal human rights, coupled with a thickening network of international rules directly affecting citizens has given birth to the utopia of a global rule-bound society. Hence, the idea of a global civil society is historically connected with the ideas behind humanitarian and human rights law. The substance of human rights laws and the idea of an international fraternity is based on the right to property. Under the pretext of human rights, the global society does not lawfully allow movement of people and in fact adopts serious measures to control movement of people by it multiple regimes. However, at the same time digital capitalism has multiplied the movement of goods and capital and made it as barrier free as possible. In this light, Chimni further argues that international human rights law unites global peoples in a language that is coming to be universally shared and frequently deployed in the struggle to secure a global law of welfare from the international institutions that constitute the emerging global state. Here it is important to reiterate that this unity of people and civilization under the banner of human rights seem more a rhetoric than a legal aspiration. However in this process the way democracy has been shaped and defined, human rights regime has emerged and trade laws appeared. It constituted challenges for the third world as cultural conflict, unable to suit their economic interests. So it appears that inner content of international law is subsumed by the dominant discourse of power.

The essential question that arises is that looking at the core of violence at the global level and the current codified regime of the international criminal law, can we afford to neglect answering the question around defining this nexus, thereby being a significant question such as the role of property in the escalation of conflict and creating situations of systemic and widespread violence. Right to Property is the sine qua non of the Grotian model of international law and international criminal law is too not exception to this. The UN Special Court for Sierra Leone has identified the unlawful international trade in diamonds as central to the funding and motivation for conflict.[28] It is important to recognize that core crimes are committed within an organizational structure which themselves represent an inherent class character. It needs to be understood that army, bureaucracy, arms, police and other state apparatus consume a vast supply of resources and one who controls the supply of money is the one who dominates the economy. Here, Semeulers writes that to identify collective motive, the masses aim to get rid of the alleged privileged classes or minorities whom they blame for their misfortune.[29] Therefore, violence is never neutral to class, neither at the level of the perpetrators, nor that of the victims. However, the Rome Statute seems neutral to these material realities that define violence.

The Statute is neutral towards class conflicts and deprivation of economic, social and cultural rights as prime factors leading to the committing of prohibited acts. Chimni's work is truly enlightening as he elucidates how 'international law is class law'.[30] Thus, this neutrality itself legitimizes the class oppression through the creation of powerful classes.[31] It has been rightly pointed by Bass that international criminal trials bring 'a sense of order to a violent world'. In this respect Schabus says that crimes against humanity might usefully be viewed as an implementation of human rights norms within international criminal law.[32] In essence, it seems that the criminal trials present a conspicuous application of legal rules in a neutral, even-handed

[28] UN Security Council Resolution,1306/2000.
[29] Wilt, Vervliet,Sluiter and Cate(2012), The Genocide Convention: The Legacy of 60 years, Leiden: Martinus Nijhoff,p.n 257
[30] Chimni B.S (1993), International Law and World Order: A Critique of Contemporary Approaches. New Delhi: Sage,p.n100-101
[31] Notes from Akeel Bilgrami's lecture.guest speaker in Krishna Bharadwaj Annual lecture held on 20th Oct 2015.
[32] Schabas William (2010), "The International Criminal Court: A Commentary on the Rome Statute", London: Oxford

anner, punishing criminals and affirming social order, but without ever touching on the social relations in which crime is rooted.[33]

It is important to highlights Chimni's argument that international law during last two decades has been the principal instrument through which the rule of private property is being extended in the world economy. Second, it is the means through which the rights of transnational capital are being safeguarded. [34]

International criminal justice system compared to domestic justice systems seems to be in a nascent phase. It is evolving its own mechanisms. This evolution of international criminal justice system has its own flaws. International criminal justice offers legal solutions like punishment, trial and arrest etc. but it does propose non-legal solutions as acts which could be restorative and victim oriented mechanisms. Further it is interesting to note that the finality of debate about the justice versus peace is framed in a manner, whereby the ICC has final say over justice and trials being the solo performance to get justice.

In reality it creates a rent seeking economy of professionals and a structure for their mutual interests. It has created a situation where a vast market involving global NGOs and lawyers from the Global North has emerged with specialization in dealing with cases of international criminal law. It in turn provides them the opportunities to earn a good living out of the system and thus it has created a vested interest of these people to speak for the Court and justify trials and further institutionalization of the adjudication process. Needless to say that it has marginalised poor nations on multiple terms and it appears that the access to the justice system is completely dependent on the purchasing power of individuals.

It is pertinent to note that the Global North and South are not merely manifestations of society's unequal power; indeed it is a voice, language, movement of mutuality and commonality to have a dialogue to create a just world order. How far this theme is reflective in the terminologies like First and Third Worlds, rich and poor countries, colonial and colonized is a question of further research.

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[33] Gabel, P. and Harris, P. (1982) 'Building Power and Breaking Images: Critical Theory and the Practice of Law', Review of Law and Social Change, vol. II, pp. 369

[34] B.S. Chimni, 1999 A Manifesto, Marxism and International Law: A Contemporary Analysis Author(s): B. S. Chimni Reviewed work(s): Source: Economic and Political Weekly, Vol. 34, No. 6 (Feb. 6-12, 1999), pn.339

V. New waves of Sovereignty and the International Criminal Law

In recent times, the emergence of an independent and permanent ICC has reopened the old or classical debate about the boundaries of sovereignty. In fact, sovereignty and international criminal law stand so close to each other that they are looked at as each others' shadows. The ICC is seeking a space which has traditionally been a domain of the sovereign and this remains an area of confrontation wherein nations feel uncomfortable in losing their grip over their sovereignty. International criminal law's scholars, particularly from the Global North, see sovereignty as part of the problem. This is best expressed in the words of Antonio Cassese, as one either supports the rule of law, or state sovereignty.[35] In many ways these two seem to be contradictory to each other. However, close cooperation between states is required for the success of the international justice system. Otherwise, states being a cellular unit in the body of international legal order may undermine the legitimacy of the ICC or the ICC may breach the sovereign rights of weaker states.

Mainstream international law has never been politically neutral to the power structures in the world.[36] It is shaped by the dominant discourses of contemporary times but is sometimes restructured by alternative discourses as well. International law emanates from the free will of states and therefore restrictions on the independence of states cannot be presumed. [37] This was the reason that the Soviet Block viewed customary laws to be subject to the consent of the states. Even during the Nuremberg tribunal while the USSR did not object to the completion of trial but it was unable to fit this within its own stand on international law. With the establishment of the United Nations (UN), sovereign equality of nations and their free consent have been duly recognized as the foundational principles of international law.

Anghie writes that the international lawyers have to develop a sociological vision, an understanding of various attributes of societies and their customs and the way in which they

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[35] Robert Cryer International Criminal Law vs State Sovereignty: Another Round? Oxford Journals Law European Journal of International Law Volume 16, Issue 5Pp. 979-1000

[36] R.P Anad Anand, (2006), Changing Dimensions of International Law: An Asian Perspective, Martinus Nijhoff,p.n1

[37] Lotus Case, PCIJ,1927

function both independently and in relation to each other.[38] In this context, it seems pertinent to mention that mainstream scholars are seeking to subject sovereignty to democracy, human security, good governance, transparency and human rights. In effect, indirectly it portrays the liberal state as the ideal image of the sovereign where free market, periodic elections, free press and political rights go hand in hand. In this scenario, sovereignty is constructed as a mandate to do functional work like maintaining law and order in the society. This process is divisive in nature as it creates a divide between bad sovereign and good sovereign and such a state which does not hold the percepts of liberal states is in danger of being classified as an outlaw or pariah state.

It is interesting to note that how notion of sovereignty operates with limited yardsticks. Sovereignty can be analyzed in terms of appropriation and monopolization of power. The gap between a dictatorial and liberal state can also be defined through a close examination of sovereignty. Based on the narratives of liberal groups, a dictatorial method holds power and undermines all the institutions. In a democracy power must be shared and there should be checks so that counter balance can be maintained. However, in the neo liberal era, market has an equally forceful presence in everyday life. The availability of consumer goods is equally important and everyone needs to sustain their lives. It is equally true that corporate through their predatory practices create a monopoly and monopolization may affect a large population. In Africa, due to high costs of life-saving drugs, millions of people received death warrants from the current Intellectual Property Rights regime. However, it is unfortunate that even in such cases corporate monopoly is not questioned and is allowed to thrive in the name of individual rights. Thus, it appears that international law looks at violence from a fixed lens.

In this process, sovereign spaces and their apparatus have begun to be regulated by the paraphernalia of international criminal justice system. This tension had emerged during the ICTY and ICTR itself.[39] What could be the potential or possible relationship between the sovereignty and the ICC is a question which may have contradictory answers. Whether they are part of the same coin and mutually reinforcing each other or they are antagonistic to each other is

[38] Anghie, (1999) 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', Harv. Int'l.L.J. vol. 40(1) p.n 19

[39] Cassese Antonio (1998), "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law", European Journal of International law, Vol. 9, p .n.9

a question that needs to be pondered upon with utmost seriousness. As mentioned earlier, criminal law has largely been considered to be the sovereign's exclusive domain.

The Rome Statute mandates a criminal justice system which is based on 'individual criminal responsibility'.[40] It seeks to challenge the well established and well accepted boundaries of sovereign immunity which has its basement in the customary international law, viewing them as mechanisms which promote impunity. Prior to Nuremberg trial international responsibility was predominantly fixed on States not on individuals, since States are the first and main subject of international law. In this regard, it appears that the Nuremberg and Tokyo tribunals are the turning points for the ICR. It is important to note that the Rome Statute comes in direct conflict with the principle of free will at political and legal level because it can exercise international criminal jurisdiction directly over individuals living in any state and subject them to the authority and supervision of the ICC. This seems like a moralistic or self-proclaimed obligation on the ICC which reflects or communicates in the language of collectivity of 'international community' to protect, prohibit and punish core crimes. In this complex web of norm creation, the responsibility to protect (R2P) gets linked with the ICC because it is designed as subset of the Rome Statute with more or less the same fabric to act as a lubricant in the functioning of the Court.

The ICC and R2P work on the logic of division of labour. One seeks to prohibit while the other is designed to punish. Thus, effectively R2P is not a distant and separate doctrine; rather it operates in a much similar background as the ICC. The principle of complementarity further creates a nuance to analyse the changing contours of sovereignty in international law. It gives leeway to the ICC to have the final authority over the effective functioning of the trial system. Thus, it legalizes the Court's surveillance on the domestic legal system and gives primacy to the words of the ICC over domestic criminal justice system. There are riders which are too spacious to accommodate and interpret and finally it is the ICC which has the final say over these riders. It has been said that the trend towards 'criminalization of International law', through criminal prosecution and punishment of breaches of international humanitarian law by international criminal tribunals should not blind us to the basic dilemma facing international tribunals, that of

[40] See Article 25 of the Rome Statute, Article 5 and Article 6 of the Statutes of the ICTR and the ICTY

prosecution and punishment or continued respect for state sovereignty. It thus casts aside the 'shield' of state sovereignty.

In this process states are becoming more disciplined and power is being transferred to the hands of international community. It is a challenging task to determine what this ‘international community’ stands for. Some view it as an appropriation of power by the Global North. Here hard earned sovereignty is not only tamed but liberal states with free capital are creating the contours of sovereignty. Professor Luban has demonstrated that such an intervener’s conclusion, that a government’s behaviour is ‘uncivilized’ may merely reflect ‘a distinction based on social sentiment’ of the intervening state ‘rather than universal reason’. Thus, applying standards of ‘civilized’ behaviour to specific instances (even when such standards have been broadly defined in global conventions), to some degree is likely to reflect specific cultural values. Finally, there is a ubiquitous desire or absence of second thought about the end of culture of impunity. It is true that culture of impunity gets shelter in the backyard of sovereignty itself. However, it is equally true that intervention, punishing individuals and creating a homogenous space for trials will not yield any productive results instead it may make situation worst and abusive.

Therefore, it is essential to identify its possible ramifications on the sovereign space of third world countries. An analytical study into the present internal and external modicum of the ICC will help to unpack the possible apprehensions and reservations of the third world approach about the ICC.

VI. Conclusion

The condition of the International Criminal Justice system is like a boiling frog. This sentence from Raphael Lemkin’s unpublished autobiography captures the essence of criminal justice system of our era. It is a reference to an anecdote which basically describes the phenomenon of a frog being slowly boiled alive. Initially if a frog is placed in hot water, it has the opportunity to jump out, but if it is placed in cold water that is slowly heated, it will not perceive the danger but enjoys the slow heat and finally when it perceives the danger it is too late as it is cooked to death. The story is often used as a metaphor for the inability or unwillingness of people to react or be

aware of threats that occur gradually. This metaphor is equally suitable for conscience of the international community during or before the occurrence of core crimes.

'The purpose of a trial is to render justice, and nothing else', wrote Hannah Arendt in the epilogue to her famous account of the trial of Adolf Eichmann in Jerusalem. However, she was skeptical of the notion of using the trial as a means of creating a historical record. As Richard Goldstone has pointed out, prosecutorial mode is not the only form of justice, nor necessarily the most appropriate form in every case. Similarly, William Schabas too believed that 'post conflict justice requires a complex mix of therapies, rather than a unique choice of single approach from a menu of alternatives'. Glasius and Meijers too note that in a trial, the prosecutor and defense are constructing narratives about the political legitimacy of the court itself. But international criminal law has relied on trials as the sole trustworthy partner to render justice on its own terms.

In today's time the concept of human rights is a universal phenomenon. The relationship between the human rights and international law is one that reinforces each other. It is safe to assume that the ICC is another extension of human rights institutions. In this context, it becomes important to highlight that the 'element of crimes' under the Rome Statute covers the broad range of human rights issue under the purview of the ICC.

The litmus test for the ICC is to differentiate how it is not a mere extension of Nuremberg and Tokyo tribunal. It is only then the ICC will evolve to prove its credentials in Global South. In contemporary times, the supplementary apparatus of ICC like UNSC, ICR, Complementarity, R2P etc. are marking its presence in the domain of international law. At the same time, its role with respect to the ICC is becoming divisive. In this context, the growth of international law led by the question of sovereignty of nations, North- South relationship, the distribution and production of wealth, space for Transnational capitalist class/international community, and the question of democracy are relevant questions for the ICC.

However, if the justice is constitutive of the above mentioned actors, then such questions are hard to ignore. The ICC can no longer afford to be isolated. From human rights lens, which is often coerced upon from the Global North perspective, the third world has a poor track record. Particularly, wider narratives carry the impression that the cultural spaces of third world countries have contradictions with current human rights regime. On the other side, the Global

North appears to have sanitized its image. The Global North's definition of democracy manifests this sanitization in the form of their biased interpretation of rule of law, human rights, and the like. Such manifestation gets the imprint in the internal structure of ICC and other relevant international law.

Keeping these factual details in mind, one can reasonably forecast that international criminal justice system is heading towards centralization which is undermining plurality at the local level. It proposes similar solutions to all problems and creates a super structure of courts where local situation is visualized through law rather than by political and social tools. Needless to say the legal system is a plural domain; it is inundated with multiple schools, narrations, systems, case laws and divergent jurisprudence which caters to the needs of diverse people. Thus, homogenization of international criminal justice system will have to fight with its own diversity.