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**INTERNATIONAL LAW AND THE EFFECTIVENESS OF THE  
CURRENT LEGAL REGIME IN DEALING WITH WAR CRIMES**

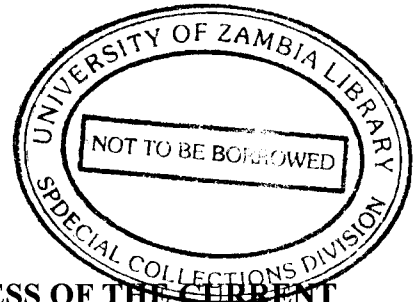
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**INTERNATIONAL LAW AND THE EFFECTIVENESS OF THE CURRENT  
LEGAL REGIME IN DEALING WITH WAR CRIMES**

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**A DIRECTED RESEARCH PAPER SUBMITTED TO THE UNIVERSITY OF  
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**DECLARATION**

**I, MULENGA CHITEBA, Computer Number 21030189 DO HEREBY DECLARE**

That I am the author of the Directed Research paper entitled **“INTERNATIONAL LAW AND THE EFFECTIVENESS OF THE CURRENT LEGAL REGIME IN DEALING WITH WAR CRIMES”** and that it is a creation of my own ingenuity with due acknowledgement having been given where the work of other scholars has been used or cited. I verily believe that this research has not previously been submitted to the faculty of law for examination.

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**TO**

**MUM AND DAD**

## ACKNOWLEDGEMENTS

First and foremost I would like to thank the almighty God for giving me good health and continuing to shower abundant blessings on me part of which have culminated in my completion of this work.

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Given that the completion of this paper in part signifies the end of my undergraduate education I must here also pay tribute to those that have been instrumental in this regard. Firstly I would like to thank my family, in particular my parents and my brothers, for their unwavering support and encouragement throughout my university education and my life in general.

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*Mulenga Chiteba*

## ABSTRACT

The world today stands at a very dangerous time in the history of mankind given the threat of war. Events such as the armed conflicts in the Former Yugoslavia, Afghanistan and currently in Iraq have confronted us with the cruelty and savagery of war coupled with the suffering, death and destruction that results. It is therefore imperative that international law is applied effectively and equally so as to forestall any threat to peace and stability as well as to ensure the maintenance of international law and order which is essential for international progress and human advancement.

Admittedly human societies have since time immemorial engaged in conflicts for some end or the other during different periods of recorded history. However the threat is even greater now in the 21<sup>st</sup> century with the advance in military technology and the shift from conventional warfare to a marked increase in the acquisition of nuclear weapons by states, as well as the now increasing use of chemical and biological warfare. This shift in approach by states could have ghastly consequences on the very existence of mankind as nuclear and biological weapons threaten to obliterate the Earth.

The effective enforcement of international law in maintaining world law and order has over the years been hampered by the fact that it has been applied unequally. Double standards have been applied in the enforcement of international humanitarian law as powerful nations in the past blatantly violated laid down international law standards. The effect of the arbitrary acts by powerful nations is that they weaken the charter system, in the process dismantling the entire structure of law based on international security that the United Nations was established to provide following the Second World War.

The aim of this essay is therefore to review how the international legal system has in the past dealt with the problem of war crimes at different stages of recorded history up to the present and make a critical analysis so as to make recommendations for the future uniform application of the law on war crimes.

## **ABBREVIATIONS**

<b>AJIL</b>	<b>American Journal of International Law</b>
<b>ASP</b>	<b>Assembly of State Parties</b>
<b>ICC</b>	<b>International Criminal Court</b>
<b>ICJ</b>	<b>International Court of Justice</b>
<b>ICRC</b>	<b>International Committee of the Red Cross</b>
<b>ICTR</b>	<b>International Criminal Tribunal for Rwanda</b>
<b>ICTY</b>	<b>International Criminal Tribunal for the Former Yugoslavia</b>
<b>ILC</b>	<b>International Law Commission</b>
<b>U.N</b>	<b>United Nations</b>
<b>U.S</b>	<b>United States of America</b>



## TABLE OF CONTENTS

	<b>PAGE</b>
Certificate.....	.i
Title.....	.ii
Declaration.....	.iii
Dedication.....	.iv
Acknowledgements .....	v
Abstract.....	.vi
List of Abbreviations.....	.viii
 <b>CHAPTER ONE: GENERAL INTRODUCTION</b>	
Introduction.....	1
War Crimes: The evolution of a legal sphere.....	.2
Grave breaches under International Humanitarian Law.....	4
State and Individual Criminal Responsibility Distinguished.....	7
The Earliest war Crimes trials.....	10
Conclusion.....	12
 <b>CHAPTER TWO: POST WORLD WAR TWO WAR CRIMES TRIBUNALS</b>	
Introduction.....	13
Nuremburg and Tokyo War Crimes Tribunals.....	13
Jurisprudence laid down by the Tribunals.....	17
Resulting International legal heritage on war crimes.....	19

Conclusion.....	21
<b>CHAPTER THREE: AD – HOC INTERNATIONAL CRIMINAL TRIBUNALS OF THE 1990s</b>	
Introduction.....	22
Recent War Crimes Tribunals.....	22
<b>KEY CONTRIBUTIONS MADE TO THE GENERAL BODY OF INTERNATIONAL PENAL LAW</b>	
ICTY.....	24
ICTR.....	28
Sierra Leone Special Court.....	30
Analysis of the role and performance of International Tribunals in repressing War Crimes World Wide.....	33
Conclusion.....	36
<b>CHAPTER FOUR: THE INTERNATIONAL CRIMINAL COURT</b>	
Background.....	37
Creation of the Court and its Structure.....	38
Jurisdiction.....	40
Individual Criminal Responsibility and Command Responsibility.....	41
Investigations and Prosecution.....	42
Work and Performance of the Court Thus far.....	43
Conclusion.....	45

**CHAPTER FIVE: GENERAL CONCLUSIONS AND RECOMMENDATIONS**

Summary.....	46
Recommendations and Conclusion.....	48
BIBLIOGRAPHY.....	50

## **CHAPTER ONE**

### **INTRODUCTION**

In evaluating the effectiveness of the current legal regime on war crimes, it is imperative that we trace its genesis and evolution to the point where it is at present. This is important because it enables a clearer and broader understanding of the current issues so as to form a firm foundation on which to make meaningful recommendations for the future uniform application of the law.

It is also to be stated from the outset that the major focus of this dissertation is on the effectiveness of the enforcement measures in place to ensure the prosecution and punishment of perpetrators of war crimes and the fairness of the legal regime in dealing with all players, so as to ensure and sustain global peace. Nonetheless in laying a background for the ensuing discussion, one will inevitably have to discuss the legal provisions in the form of treaties and customary international law under which war crimes fall.

This chapter will be a general introduction of the essay, which will trace the evolution of a legal sphere dealing with war crimes and crimes against humanity. This will include a look at the earliest war crimes trials leading to the period just before the Second World War and the establishment of the United Nations Organization.

## **WAR CRIMES: THE EVOLUTION OF A LEGAL SPHERE**

The international legal provisions on war crimes and crimes against humanity have been developed within the framework of international humanitarian law, a special branch of international law. International humanitarian law is that part of public international law comprising customary and treaty law of war, applicable in times of armed conflict, whether of an international or non – international character<sup>1</sup>. It encompasses the principles and rules regulating the means and methods of warfare as well as the humanitarian protection of the civilian population, of sick and wounded combatants and of prisoners of war<sup>2</sup>.

The aims of international humanitarian law, as the name would suggest, are to protect persons who are not or no longer taking part in the armed hostilities; and to restrict the means and methods of warfare employed by the belligerents. It further seeks to subject war to legal regulation and to limit as far as possible the death and destruction that results from war.

International humanitarian law may be expressed through the provision of bilateral agreements which can be concluded before hostilities begin (cartels), during hostilities (truces and instruments of surrender), or at the end of a conflict (ceasefires and peace treaties), setting out the treatment to be given to civilians, prisoners, the sick and wounded, and neutral intermediaries. Or it may be formed through multilateral agreements, frequently concluded in reaction to a bloody conflict<sup>3</sup>.

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<sup>1</sup> Anyangwe, C, 2004, Introduction to Human Rights and International Humanitarian Law, UNZA Press

<sup>2</sup> Ibid.

<sup>3</sup> Michael Veuthy 'International Humanitarian Law and the Maintenance and Restoration of Peace'  
Published in *The African security Review*, Vol. 7 no. 5, 1998

There appears to have been from time immemorial some sort of limits placed on the conduct of warfare so as to ensure minimal loss of lives and respect for at least some basic human rights.

In the Ordinance for the Government of the Army, published in 1386 by King Richard II of England, limits were established to the conduct of hostilities and — on pain of death — acts of violence against women and unarmed priests, the burning of houses and the desecration of churches were prohibited<sup>4</sup>. Provisions of the same nature were included in the codes issued by Ferdinand of Hungary in 1526, by Emperor Maximilian II in 1570<sup>5</sup> and by King Gustavus II Adolphus of Sweden in 1621<sup>6</sup>. Article 100 of the *Articles of War* decreed by Gustavus II Adolphus established that no man should “tyrannise over any Churchman, or aged people, Men or Women, Maydes or Children”.

Each of the stages of humanitarian law codified in Geneva from 1864 to 1977 appears to have resulted from a war that created a shock wave in public opinion: the battle of Solferino of 1859 between Austrian and French armies was the impetus for the First Convention, in 1864; the naval battle of Tsushima in 1905 between Japanese and Russian fleets prompted adjustment of the Convention on War at Sea in 1907; World War I brought about the two 1929 Conventions, including a much broader protection for prisoners of war; World War II led to the four 1949 Geneva Conventions and an extensive regulation of the treatment of civilians in occupied territories and internment; and decolonization and the Vietnam War preceded the two 1977 Additional Protocols to

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<sup>4</sup> G. Shwarzenberger, 1968, International Law as Applied by International Courts and Tribunals, vol. II: The Law of Armed Conflict, Stevens, London

<sup>5</sup> International humanitarian law rules are found in articles 8 and 9

<sup>6</sup> Supra note 4, at pg. 15

the four Geneva Conventions, which introduced written rules for the protection of civilian persons and objects against hostilities.

It is under the umbrella of international humanitarian law that war crimes have been defined as those violations of the laws of war or international humanitarian law that incur individual criminal responsibility<sup>7</sup>.

The 1945 Charter of the International Military Tribunal at Nuremberg under Article 6 defined war crimes as "violations of the laws or customs of war," including murder, ill-treatment, or deportation of civilians in occupied territory; murder or ill-treatment of prisoners of war; killing of hostages; plunder of public or private property; wanton destruction of municipalities; and devastation not militarily necessary<sup>8</sup>.

## **GRAVE BREACHES UNDER INTERNATIONAL HUMANITARIAN LAW**

The 1949 Geneva Conventions, which codified International Humanitarian law after World War II, appear to have marked the first inclusion in a humanitarian law treaty of a set of war crimes known as the grave breaches of the conventions<sup>9</sup>. Each of the four Geneva Conventions, on wounded and sick on land, wounded and sick at sea, prisoners of war, and civilians, contains its own list of grave breaches<sup>10</sup>. The list is long and detailed, among the breaches contained are: wilful killing; torture or inhuman treatment, including medical experiments; wilfully causing great suffering or serious injury to body

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<sup>7</sup> 'Categories of War Crimes' by Steven R. Ratner, Published in Crimes of War, The Book

<sup>8</sup> The Charter of the International Military tribunal was annexed to the 'London Agreement' of 1945

<sup>9</sup> Supra note 7

<sup>10</sup> Ibid

or health. It will be alluded to later on in this essay that each of the conflicts that have occurred has led to an expansion of this list as will be seen in the Rome Statute of the International Criminal Court.

Additional Protocol I of 1977 expanded the grave breaches provisions of the Geneva Conventions for international conflicts to include among others: certain medical experimentation; making civilians and non-defended localities the object or inevitable victims of attack. Under the Geneva Conventions and Additional Protocol I, States must prosecute persons accused of grave breaches or hand them over to a State willing to do so.

The grave breaches provisions only apply in international armed conflicts; and they only apply to acts against so-called protected persons or during battlefield activities<sup>11</sup>. Protected persons are, in general, wounded and sick combatants on land and sea, Prisoners of War, and civilians who find themselves in the hands of a state of which they are not nationals<sup>12</sup>.

Wartime atrocities not prohibited under the Geneva Conventions or Additional Protocol I may still be considered as war crimes under the customary law bracket of "violations of the laws and customs of war" For interstate conflicts, states agree that such war crimes include certain violations of the 1907 Hague Convention and Regulations, such as use of poisonous weapons, wanton destruction of cities not justified by military necessity, attacks on undefended localities, attacks on religious and cultural institutions, and plunder of public and private property. The Statute of the International Criminal Court

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<sup>11</sup> Ibid

<sup>12</sup> Ibid

(ICC), also known as *The Rome Statute* lists as war crimes for international conflicts not only the grave breaches of the Geneva Conventions, but some twenty-six serious violations of the laws and customs of war, most of which have been considered by States as crimes since at least World War II.

It should be noted that the laws of war or more aptly international humanitarian law only cover atrocities during armed conflict<sup>13</sup>. Given this state of affairs many of the worst abuses of the 20<sup>th</sup> century, such as the atrocities and large scale murders committed in Cambodia under Pol Pot have escaped the attention of the law and subsequent sanction.

In addition, the creation of a normative legal framework criminalizing certain violations of the laws of war does not in itself ensure the actual prosecution of war criminals<sup>14</sup>. This remains a matter for States and, increasingly, the United Nations and other international organizations<sup>15</sup>. Thus for example the International criminal court exercises complimentary jurisdiction to national courts and may only prosecute once national courts are unwilling or for some reason unable to prosecute. The Geneva Conventions require all parties to search for and either extradite or try all persons suspected of having committed grave breaches. And international law gives all States the legal right to prosecute war criminals under the theory of universal jurisdiction<sup>16</sup>. While States have at times prosecuted war criminals for example, the U.S. trial of the My Lai offenders, the more persistent pattern, despite the obligations of the Geneva Conventions, has been

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<sup>13</sup> Supra note 4

<sup>14</sup> Ibid

<sup>15</sup> Ibid

<sup>16</sup> Supra note 1

either mere administrative punishment or impunity<sup>17</sup>. The ad hoc tribunals for Yugoslavia and Rwanda have jurisdiction over both grave breaches of the Geneva Conventions and other crimes committed in these particular conflicts, and the International Criminal Court has jurisdiction over most war crimes<sup>18</sup>.

## **CRIMINAL RESPONSIBILITY FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW: STATE AND INDIVIDUAL CRIMINAL RESPONSIBILITY DISTINGUISHED**

Traditionally states are the primary subjects of international law<sup>19</sup>. As such the principle of *locus standi* in public international law is limited to states and certain international institutions<sup>20</sup>. However states like corporations are abstract entities and merely fictions of the law, as such it may be argued that states actually function as a bracket, to borrow from jurisprudence for the activities of their human representatives. The question of who should ultimately suffer criminal responsibility for violations of the laws of armed conflict or international humanitarian law has long exercised the minds of international jurists. The central issue being to determine who should shoulder criminal responsibility, the individual who carries out the wrongful act or the state in whose name the act is carried out.

The proponents of the theory of criminal responsibility of the state have envisaged criminal responsibility of states alone or cumulative

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<sup>17</sup> Ibid.

<sup>18</sup> Ibid

<sup>19</sup> McCoubrey and White, 1992, International Law and Armed Conflict, Dartmouth

<sup>20</sup> Ibid.

responsibility of states and individuals.<sup>21</sup> They regard the state as a unit susceptible to certain penalties in the form of indemnities and various measures of security such as military occupation, demilitarization and destruction of existing war potential and international control of government activity.<sup>22</sup> Some developments in international law since the First World War could be used to support the idea of state criminality. It can be argued that instruments like the Geneva Protocol and the Kellogg – Briand Pact that declared aggressive war to be an “international crime”, referred and could at the time only refer to state responsibility.<sup>23</sup> However the sources of international law now indicate that the state is only liable for delicts, i.e. to give compensation; the individual directly responsible for a crime against peace is liable to trial and punishment. The Charter of the Nuremburg Tribunal, the Draft code of offences of the International law commission, the Nuremburg principles, recent peace treaties and state practice ignore the concept of state criminality.<sup>24</sup>

The principle of individual responsibility for crimes under international law was clearly established at Nuremburg. Article 6 of the Nuremburg Charter annexed to the London Agreement of 8<sup>th</sup> August 1945 provided for individual criminal responsibility for war crimes proper and for what is described as crimes against humanity, as well as for crimes against peace, that is the crime of aggressive war.

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<sup>21</sup> Max Sorenson, 1968, Manual of Public International Law, MacMillan, London

<sup>22</sup> Ibid

<sup>23</sup> Ibid

<sup>24</sup> Ibid

In a landmark judgment the International Military Tribunal of Nuremberg confirmed the direct applicability of international criminal law with respect to the responsibility and punishment of individuals for violation of this law in the following terms:

“... Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced... the principle of international law, which under certain circumstances, protects representatives of a state, cannot be applied to acts which are condemned as criminal under international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings... He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state authorizing the action moves outside its competence in international law...”<sup>25</sup>

The above judicial statement of the International military tribunal is said to have effectively pierced the ‘corporate veil’ of the state<sup>26</sup>. This decision brought an end to the hitherto persistent pattern referred to above, of mere administrative punishment by the military establishment or impunity.

It is now settled therefore that a person found liable for having committed war crimes cannot hide behind the artificial veil of the state so as to escape criminal responsibility.

The cornerstone of international criminal law consists of the principles of individual responsibility and punishment for crimes under international law. In accordance with this principle states may exercise such jurisdiction individually, collectively or set up institutions for the prosecution of such crimes.

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<sup>25</sup> IMT, Judgment and Sentences, (1947)41 *AJIL*, 172; *Cmd. 6964, London, pp.41-42*

<sup>26</sup> McCoubrey and White, 1992, International Law and Armed Conflict ; Dartmouth

## THE EARLIEST WAR CRIMES TRIALS

The earliest trial for war crimes seems to have been that of Pierre d'Hagenbach (Peter von Hagenbach) in the year 1474. The Accused was charged inter alia with the violations of natural law, as well as the law of God and mankind, for having pillaged and massacred the inhabitants of Braschi, an Austrian city of which he was governor. He was tried before a tribunal of twenty-eight Swiss, Alsatian and German judges of the Holy Roman Empire. Of particular interest — as during and after the Nuremberg Trial — punishment of the accused hinged on the question of compliance with superior orders. The Accused claimed to be acting on behalf of Charles of Burgundy. The plea was rejected and the Accused was then executed.<sup>27</sup>

There were attempts to prosecute Napoleon Bonaparte in 1815. By the convention of 11<sup>th</sup> April 1814, entered into by Austria, Prussia, Russia, on the one hand and Napoleon, on the other, the latter had formally agreed to relocate to Elba. After he escaped and re-entered France with his army, the congress of Vienna issued a declaration on 13<sup>th</sup> March 1815, stating that by having violated the agreement, Napoleon had placed himself outside the civil and social relation. Had they followed the commendation of Field Marshall Bluecher Napoleon would have been shot on sight as an international outlaw. Instead following his surrender at Waterloo, he was handed over to the British and deported to St. Helena<sup>28</sup>

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<sup>27</sup> Green, L.C The Contemporary Law of Armed Conflict (Martinus Nijhoff, The Hague 1993)

<sup>28</sup> Ibid. Pg 4

Even though this decision appears to have been taken on political grounds; it can be regarded as a type of criminal sanction imposed for violation of an international legal obligation by an individual.

Closer to the present times, in the 20<sup>th</sup> century was the 1921 case of the '**Landoverly Castle**' in which officers of the U-boat were sentenced for actions contrary to international law, for firing upon and killing survivors of an unlawfully torpedoed hospital ship. The court found that the commander of the U-boat 86, Patzig, contrary to instructions of his superiors, ordered to be torpedoed, a British hospital ship, and subsequently gave the order of firing at the survivors of the sunken ship. The whereabouts of Patzig were unknown to the court. The case was chiefly concerned with the determination of the liability of two officers of the watch in relation to the firing incident.<sup>29</sup> The latter two received the heaviest sentences meted out by the Supreme Court of the Reich of Leipzig; each was sentenced to four years imprisonment.

Other Leipzig cases which led to convictions are the Heymen, Mueller and Nenmann cases of 1921, in which the defendants were found guilty of ill-treating prisoners of war (P.O.Ws), contrary to the German Penal Code and the Military code.<sup>30</sup>

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<sup>29</sup> Agreement for the Prosecution and Punishment of the Major war criminals of the European Axis and Charter of the International Military Tribunal, London, 8<sup>th</sup> August 1945

<sup>30</sup> Atkins, R.D The Alleged Transnational Criminal: The Second Biennial International Criminal law Seminar ( Martinus Nijhoff, The Hague, 1995)

## **CONCLUSION**

Having laid a conceptual background for the treatment of war crimes under international law, the next chapter will critically discuss the legal framework for the establishment of the Nuremburg and Tokyo tribunals following World War II and in addition appraise their performance. This will include a discussion of some of the cases decided by the two tribunals and the jurisprudence that emerged from them.

## **CHAPTER TWO**

### **INTRODUCTION**

Having laid down a conceptual background for the treatment of war crimes in international law in the first chapter, this chapter will now delve into discussing the war crimes trials at Nuremburg and Tokyo that were held following the Second World War. This will encompass a critical analysis of the cases that were handled by the two tribunals and the jurisprudence that emerged from them with specific focus on how they helped shape the current legal regime dealing with war crimes. Emphasis will also be laid on how the principle of individual criminal responsibility was strengthened by the two tribunals and the legal heritage that emerged in response.

### **NUREMBURG AND TOKYO WAR CRIMES TRIBUNALS**

Prior to the setting up of the International military tribunals at Nuremburg and Tokyo, punishment for war crimes was left to the military. However it was realised that this method was not very effective because in most cases the military would not punish its own officers for anything other than violation of strict military discipline, such as insubordination. With respect to violations of war crimes, officers would plead that they were merely following superior orders. Therefore in such a situation it would be practically impossible for a military establishment to prosecute its own officers that had committed excesses, as long as they had acted in line with the general policy of their national leaders by taking a particular course of action. This is evident in the fact that all officers of the military up to the army commander would plead obedience to superior orders, with the buck stopping at the Head of state who would in his turn plead sovereign

immunity. This pattern of treatment led to impunity amongst soldiers and commanders because they knew they would not be answerable to anyone.

The international military tribunals therefore represented a shift from the traditional punishment for war crimes by the military tribunals or court martial to an international or more appropriately in this case, multinational judicial tribunal. As will be seen, despite the shortcomings and criticisms of the IMTs, they generated some very valuable jurisprudence in the area of international humanitarian law.

The circumstances in which the Nuremburg and Tokyo Military tribunals were created are unique and have never been replicated since. They were set up by a few principal allied powers following the end of hostilities in Europe, Asia and the Pacific, “for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organisations or groups or in both capacities”<sup>31</sup>. Their establishment was preceded by the complete surrender by the vanquished nations, Japan and Germany. In view of these peculiar conditions, a more apt description of the post second world war tribunals therefore is that they were multinational rather than international.<sup>32</sup>

The London Agreement provided for the establishment of the International Military Tribunal, composed of one judge and one alternate judge from each of the signatory nations, to try war criminals. Under the London Agreement, the crimes charged against defendants fell into three general categories:

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<sup>31</sup> Art. 1 of the London Agreement for the Prosecution and Punishment of Major Criminals of the European Axis of 8<sup>th</sup> August 1945 cited in D Shindler/ J. Toman, *The laws of Armed Conflicts: A Collection of Conventions, Resolutions and other Documents*, Martinus Nijhoff/ Henry Dunant Institute, Dordrecht/ Geneva, 3<sup>rd</sup> ed., 1988

<sup>32</sup> Atkins R.D. *The Alleged Transnational Criminal: The Second Biennial International Criminal law Seminar* (Martinus Nijhoff, The Hague, 1995)

- (1) Crimes against peace—that is, crimes involving the planning, initiating, and waging of aggressive war;
- (2) war crimes—that is, violations of the laws and customs of war as embodied in the conventions adopted at the Hague Conferences (international peace conferences of 1899 and 1904); and
- (3) Crimes against humanity, such as the extermination of racial, ethnic, and religious groups and other large-scale atrocities against civilians<sup>33</sup>.

The Charter of the International Military Tribunal for the Far East at Tokyo, by contrast did not come about as a result of a formal treaty. It was proclaimed by the Supreme Commander of the Allied forces, based on a series of international instruments and declarations pertaining to the end of the war in the East and the Surrender of Japan<sup>34</sup>.

On October 18, 1945, the chief prosecutors lodged an indictment with the tribunal charging 24 individuals with a variety of crimes and atrocities, including the deliberate instigation of aggressive wars, extermination of racial and religious groups, murder and mistreatment of prisoners of war, and the murder, mistreatment, and deportation to slave labour of hundreds of thousands of inhabitants of countries occupied by Germany during the war<sup>35</sup>. The accused were top Nationalist Socialist leaders, top military officials and other civilian officials<sup>36</sup>.

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<sup>33</sup> Shelton, D, *International Crimes, Peace and Human Rights: The Role of the International Criminal Court*, University of Notre Dame

<sup>34</sup> D Shindler/ J. Toman, *The laws of Armed Conflicts: A Collection of Conventions, Resolutions and other Documents*, Martinus Nijhoff/ Henry Dunant Institute, Dordrecht/ Geneva, 3<sup>rd</sup> ed., 1988

<sup>35</sup> Ibid

<sup>36</sup> Ibid

However it must be noted that only major war criminals previously identified by a committee of Chief prosecutors of the signatory powers, were brought before the two tribunals. There was an obvious division of labour between these tribunals established for the sole purpose of prosecuting major war criminals and other tribunals empowered to deal with the majority of other cases. These other tribunals came in a variety of forms. Whilst they all applied international law, they can't be considered as truly being international tribunals because they lacked a multinational structure. Some military tribunals were created by the occupying powers specifically for the purpose of prosecuting war criminals in their zone of occupation. For instance several prosecutions were conducted as a result of the Allied Control Council Law Number 18, which came into effect on 20<sup>th</sup> December 1945. Its purpose was to give effect *inter alia*, to the London Agreement of 1945 and the Nuremburg Charter and to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal.<sup>37</sup> In addition nothing prevented individual states from empowering their Municipal Courts to try perpetrators of war crimes apprehended in their respective territories.

Despite the otherwise commendable contribution of the decisions of the Tokyo and Nuremburg tribunals in strengthening international criminal law with respect to war crimes, the two tribunals have been criticised as merely constituting 'victor's justice'. This has been stated in light of the fact that the two tribunals were constituted by the victorious nations following World War II and they specifically targeted troops and leaders belonging to the vanquished nations. However, notwithstanding such criticism,

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<sup>37</sup> Law Reports of the Trial of War Criminals, Vol. XV, United Nations War Crimes Commission (1945) at Pg. 39

the tribunals acted as a catalyst for the development of international law on war crimes under such treaties as the four Geneva Conventions and the subsequent additional protocols of 1977 up to the point it stands at present with the Rome Statute of the International Criminal Court in place.

## **DECISIONS OF THE TRIBUNALS AND THE JURISPRUDENCE EMANATING FROM THEM**

The judgment of the International Military Tribunal was handed down on September 30-October 1, 1946<sup>38</sup>. Among notable features of the decision was the conclusion, in accordance with the London Agreement, that to plan or instigate an aggressive war is a crime under the principles of international law<sup>39</sup>. The tribunal rejected the contention of the defence that such acts had not previously been defined as crimes under international law and that therefore the condemnation of the defendants would violate the principle of justice prohibiting *ex post facto* punishments<sup>40</sup>. It also rejected the contention of a number of the defendants that they were not legally responsible for their acts because they performed the acts under the orders of superior authority<sup>41</sup>. According to the tribunal, “the true test ... is not the existence of the order but whether moral choice (in executing it) was in fact possible<sup>42</sup>.”

With respect to war crimes and crimes against humanity, the tribunal found overwhelming evidence of a systematic rule of violence, brutality, and terrorism by the

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<sup>38</sup> Shelton D, *War Crimes Trials*, article in Encarta Standard Encyclopaedia 2005

<sup>39</sup> Ibid

<sup>40</sup> Anyangwe, C, 2004, Introduction to Human Rights and International Humanitarian Law UNZA Press, at Pg. 88

<sup>41</sup> Ibid

<sup>42</sup> Ibid

German government in the territories occupied by its forces<sup>43</sup>. Millions of persons were destroyed in concentration camps, many of which were equipped with gas chambers for the extermination of Jews, Roma (Gypsies), and members of other ethnic or religious groups. Under the slave-labor policy of the German government, at least 5 million persons had been forcibly deported from their homes to Germany. Many of them died because of inhuman treatment<sup>44</sup>. The tribunal also found that atrocities had been committed on a large scale and as a matter of official policy<sup>45</sup>.

The Tokyo trial opened on May 3, 1946, and held its final session on November 12, 1948. The conclusions reached by the 11-nation tribunal were in conformity with those embodied in the judgment given in Nuremberg<sup>46</sup>. Of the 28 defendants named in the indictment, seven were condemned to death by hanging, and all but two of the others were sentenced to life imprisonment. **Re Yamashita**<sup>47</sup>, the trial of a Japanese general, led to the establishment of the principle of “command responsibility”—the duty of a military or civilian commander to prevent military personnel from committing war crimes and crimes against humanity<sup>48</sup>. The importance of this decision is that it established that a commander’s actual knowledge of unlawful actions is sufficient to impose individual criminal responsibility. This principle resurfaced more than 50 years later in the trial of former Yugoslav president Slobodan Milošević<sup>49</sup>.

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<sup>43</sup> Ibid

<sup>44</sup> Supra note 10

<sup>45</sup> Ibid

<sup>46</sup> Ibid

<sup>47</sup> 327 US 1 (1946) 13 -14

<sup>48</sup> Command Responsibility, The Mens Rea Requirement, article by Eugenia Levine in Global Policy forum

<sup>49</sup> Ibid

The trials proceeded at remarkable pace. The trial began on November 20, 1945 and by 31<sup>st</sup> August 1946 all pleadings were completed<sup>50</sup>. Much of the evidence submitted by the prosecution consisted of original military, diplomatic, and other government documents that fell into the hands of the Allied forces after the collapse of the German government. The Tokyo trials against 28 former leaders of Japan started on 30<sup>th</sup> June 1946 and ended on 12<sup>th</sup> November 1948. The International Military Tribunal at Nuremberg pronounced 12 death sentences. It sentenced 3 Accused to life, four to prison sentences of 10 to 20 years and three were acquitted. The Tokyo tribunal for its part pronounced 7 death sentences, 16 life sentences, one sentence of 7 years and the other to 20years<sup>51</sup>.

## **RESULTING INTERNATIONAL LEGAL HERITAGE ON WAR CRIMES**

The experience of the Nuremberg and Tokyo appears to have been the impetus that led the United Nations and the International Committee of the Red Cross to launch initiatives to bring about codification through the adoption of treaties.

The evolution of international humanitarian law has been chronicled by Professor Greppi, who traces the developments from as early as 1946<sup>52</sup>.

On 11 December 1946 the UN General Assembly adopted by unanimous vote Resolution 95(I), entitled “Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal”<sup>53</sup>. After “having taken note” of the London

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<sup>50</sup> Supra note 10

<sup>51</sup> G. Schwarzenberger, 1968, International Law as Applied by International Courts and Tribunals, vol. II: The Law of Armed Conflict, Stevens, London

<sup>52</sup> D. Shindler/ J.Toman, 1988, The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and other Documents, Martinus Nijhoff/ Henry Dunant Institute, Dordrecht/ Geneva, 3<sup>rd</sup> ed.

Agreement of 8 August 1945 and its annexed Charter (and of the parallel documents relating to the Tokyo Tribunal), the General Assembly took two important steps.

The first one was of considerable legal importance: the General Assembly “affirmed” the principles of international law recognized by both the Charter and the Judgement of the Nuremberg Tribunal. This meant that in the General Assembly’s view the Tribunal had taken into account already existing principles of international law, which the court had only to “recognize”. The second was a commitment to have these principles codified by the International Law Commission (ILC), a subsidiary organ of the UN General Assembly. Through this resolution the UN confirmed that there were a number of general principles, belonging to customary law, which the Nuremberg Charter and Judgement had “recognized” and which it appeared important to incorporate into a major instrument of codification (either by way of a “general codification of offences against the peace and security of mankind” or even as an “international criminal code”). By the same token the resolution recognized the customary law nature of the provisions contained in the London Agreement<sup>54</sup>.

In 1950, the ILC adopted a report on the “Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal”<sup>55</sup>. The ILC report does not discuss whether these principles are part of positive international law or not, or to what extent. For the ILC, the General Assembly had already “affirmed” that they belonged to international law. The ILC therefore limited itself to drafting the content of these principles.

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<sup>54</sup> I. Brownlie, 1991, *Principles of Public International Law*, Oxford at pg. 562

<sup>55</sup> *Supra* note 23 at pg. 923

It is against the backdrop of the principles laid down by the ILC report that the four Geneva Conventions of 12 August 1949 were drafted on the initiative of the ICRC in the wake of the dramatic experiences of the Second World War. According to Common Article 1 of the four treaties, the parties to these Conventions undertake the basic general obligation “to respect and ensure respect” for the rules “in all circumstances”

The 1977 Additional protocols were later enacted to deal with the protection of victims as far as their physical and mental health is concerned.

## **CONCLUSION**

In the foregoing chapter the war crimes trials at Nuremburg and Tokyo that were held following the Second World War, have been discussed. This discussion has laid emphasis on the important principles established by the trials and the customary and treaty international law that emerged following the two tribunals. Through the International law commission report, the principle of individual criminal responsibility for crimes has been strengthened. This principle is indispensable in a discussion of this nature because it is the very cornerstone of international criminal law under which war crimes fall. The next chapter will be closer to the present times as it will cover the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) as well as the Special Court for Sierra Leone. The two ad – hoc tribunals and the Special Court are of critical importance because they were a bridge to the formation of the Permanent international Criminal Court.

## **CHAPTER THREE**

### **INTRODUCTION**

This chapter will cover the measures that have been implemented in recent times following the trials at Nuremburg and Tokyo and prior to the establishment of the Permanent international criminal court in dealing with the scourge of war crimes occurring in different theatres of war and during hostilities in general. It will in addition serve as a critical analysis of the failures and weaknesses of the ICTY and the ICTR as well as the Special Court for Sierra Leone that led to the overwhelming drive for the eventual establishment of the permanent International Criminal Court. This chapter will highlight the differences between the manner in which the ICTY and the ICTR were established as compared to the international military tribunals at Nuremburg and Tokyo following world war two.

As the chapter draws to a conclusion, an appraisal of the performance of these measures *i.e.* ad – hoc tribunals, will be done with a view to evaluating their contribution to the general body of international humanitarian law.

### **RECENT WAR CRIMES TRIBUNALS**

It will be noted that the International Military Tribunals at Nuremburg and Tokyo, were set up in response to the atrocities committed during the Second World War, which shocked the world into action, to try and ensure that those responsible for war crimes were punished and to act as a deterrent to future perpetrators of such atrocities.

After the Second World War and the trials that followed it there ensued a cold war between the capitalist oriented west led by the United States of America and the communist oriented Eastern bloc led by the Soviet Union, which was characterised by an arms build up by both sides as each attempted to stamp their ideology on the world<sup>56</sup>. The cold war appeared to have provided a counter balance of global power and as such there was what may be termed a ‘forced peace’ as both sides strove to avert a possible full scale nuclear war that threatened to obliterate the earth. With the ongoing cold war there appears to have been a closing of ranks amongst nations on either side, the consequence of which was that the intensity of international and internal conflicts was kept in check. There were nonetheless some conflicts that had cold war undertones such as the Vietnam war and the Soviet – Afghan war, but these perhaps did not result in war crimes tribunals because they represented the interests of the two major powers of the time<sup>57</sup>.

However the end of the cold war in 1990 following the collapse of the Soviet Union brought about new challenges for international peace and stability as the world became ‘uni-polar’, with the United States as the only super power. Part of the fallout from the collapse of the Soviet Union led to the dissolution of the Socialist Federal Republic of Yugoslavia caused by the weakening of the Communist system at the end of the cold war<sup>58</sup>. This led to the Bosnian-Croatian-Serbian War, during which atrocities were committed on a large scale, thereby leading to the establishment of the first ever international criminal tribunal, the International Criminal Tribunal for the Former Yugoslavia (ICTY), by the United Nations Security Council in 1993.

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<sup>56</sup> The Cold War’ in Wikipedia Encyclopedia, [www.wikipedia.com](http://www.wikipedia.com)

<sup>57</sup> Ibid

<sup>58</sup> Ibid

The international Criminal tribunal for Rwanda (ICTR) in its turn was established by the United Nations Security Council in 1994 in response to the civil war in Rwanda which saw one of the worst cases of genocide in history.

The Sierra Leone special court was established in 2000 to deal with war crimes committed during the protracted Sierra Leone Civil War that lasted from 1991 to 2000; however it is not an international criminal tribunal like the ICTY and the ICTR but rather merely a specialized part of the Sierra Leonean judicial system. The court was jointly established by the UN and the Sierra Leone government, following the Security Council resolution no. 1315 of 2000, which requested the Secretary General to negotiate an agreement with the Sierra Leone government for the creation of the court.

## **KEY CONTRIBUTIONS MADE TO THE GENERAL BODY OF INTERNATIONAL PENAL LAW**

### **ICTY**

The International Criminal Tribunal for the Former Yugoslavia is the first ever international criminal tribunal established, by the United Nations and differs from the post world war two trials in that it was set up while hostilities were still going on in the territory of the former Yugoslavia. The international military tribunals at Nuremburg and Tokyo on the other hand were military tribunals created by the victorious powers and only established after the complete surrender of Germany and Japan. With respect to the ICTY the Security Council of the United Nations expressed grave concern at continuing reports of widespread transgressions of international humanitarian law within the territory of the former Yugoslavia including reports of mass killings and ethnic cleansing. By

resolution 808 of 1993, the Security Council decided to establish an international criminal tribunal for the prosecution of persons responsible for grave violations of international humanitarian law in the territory of the former Yugoslavia since 1991. The Security Council subsequently adopted the statute of the ICTY by resolution 827 of 25<sup>th</sup> May 1993 and the tribunal commenced its work at The Hague on 17<sup>th</sup> November 1993. The tribunal was set up based on Chapter VII of the Charter of the United Nations which provides for “action with respect to threats to peace, breaches of peace and acts of aggression”.

The ICTY consists of 3 principal organs; the chamber, the office of the prosecutor and the registry. It has three trial chambers each comprised of 3 judges and an appeals chamber comprised of 5 judges.

Article 1 of the statute of the ICTY provides that the tribunal has jurisdiction in respect of four categories of what are termed “serious violations of international Humanitarian law” committed in the territory of the former Yugoslavia since 1991, therefore it has no time limitation and may assume jurisdiction over any acts that are committed in the territory of the former Yugoslavia even at present. By Article 2, the tribunal was empowered to prosecute persons committing or ordering to be committed, grave breaches of the 1949 Geneva Conventions against persons and property protected under the provisions therein. Article 3 provided for the prosecution of persons responsible for violations of the laws or customs of war which included, inter alia, employment of poisonous weapons or other weapons calculated to cause unnecessary suffering. Article 4 of the statute empowered the tribunal to prosecute persons committing genocide. The statute goes further under

Article 4(2) to give a broad definition of genocide which covers acts committed with intent to destroy in whole or in part a national, ethnic or religious group. It goes beyond the traditionally recognized definition of mass killing of members of a group to include *inter alia*, deliberately inflicting on the group conditions of life which are calculated to bring about physical destruction of a group in whole or in part as well as forcibly transferring children of the group to another group. Further sub article 3 provides for punishment not only for committing genocide but also *inter alia*, for conspiracy to commit, complicity in and attempt to commit genocide.

Article 7 deals with the issue of individual criminal responsibility which was first enunciated at Nuremburg and provides that the official position of any accused person whether as head of state or government shall not relieve that person of criminal responsibility nor mitigate punishment.

Pursuant to Article 9(1) of the statute of the tribunal, the ICTY and national courts have concurrent jurisdiction. However Article 9(2) stipulates that the ICTY has primacy over national courts. Furthermore given that the tribunal was established under chapter VII of the UN Charter, all UN member states are required to cooperate with it. At any stage of proceedings, the ICTY may formally request national courts to defer to the competence of the tribunal. Article 10 espouses the principle of *non-bis- in-idem* which states that a person shall not be tried twice for the same crime. Given the primacy of the ICTY, the principle of *non-bis- in-idem* would preclude subsequent trial of a defendant before a national court. Should the international tribunal decide to assume jurisdiction over a person who has already been convicted by a national court, it should take into

consideration the extent to which any penalty imposed by the national court has already been served.<sup>59</sup>

On 27 May 1999 the ICTY scored a first by issuing an indictment against a sitting head of state, Slobadan Milosovic, and several of his top aides with war crimes and crimes against humanity in relation to the conflict in Kosovo.

In a landmark judgment the tribunal stated in *The Prosecutor v. Tadic*<sup>60</sup> that it was now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict, or indeed any conflict at all

The legitimacy of the manner in which the tribunal was established came under examination and was dealt with in depth by the Appeals Chamber in the *Tadi Jurisdiction Case*<sup>61</sup>. The Defendant Dusko Tadi had argued, inter alia, that the Security Council had exceeded its power under Chapter VII of the Charter because that chapter did not authorize the council to create a judicial tribunal as a measure to address a threat to international peace and security. In ruling on the matter, the Appeals Chamber adopted a broad interpretation of Chapter VII of the Charter in general and Article 41 in particular, stating that it conferred on the Security Council a broad though not unlimited discretion regarding the measures which are appropriate to address a threat to international peace and security. The Judges further reasoned that since the Security Council had already determined that the war crimes committed in the former Yugoslavia were a serious threat to international peace and security and the concept of individual criminal responsibility has been seen as a means by which international law seeks to deter repetition of war crimes, thus the establishment of the tribunal could not be said to have been manifestly

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<sup>59</sup> Greenwood, Ch. The Development of International Humanitarian Law, 93AJIL (1999) p. 105

<sup>60</sup> (1995) Case No.It-94-1-AR72, 35 International Legal Materials (1996), p.32

<sup>61</sup> Ibid.

outside the scope of the Council's powers within the meaning of Chapter VII of the Charter. The tribunal is still ongoing as it still has a number of cases pending before it.

## **ICTR**

The setting up of the International Criminal Tribunal for Rwanda was precipitated by the genocide of Tutsis by the rival Hutu ethnic grouping in the 1994 Rwanda civil war. The civil war broke out in response to the death under suspicious circumstances of Rwandan President Juvénal Habyarimana and Burundi President Nyaryamirai, in a plane crash near Kigali Airport as they returned from a regional head of states summit in Dar-es- Salaam, Tanzania. The fact that both presidents belonged to the Hutu tribe appears to have sparked the mass murder of members of the Tutsi tribe as a full scale civil war ensued. The number of people killed, mostly Tutsi, during the genocide is estimated to range between 500,000 and 1 million people.<sup>62</sup> Apart from the mass killings it was established by the tribunal that Hutu soldiers had systematically raped Tutsi women with a view to eventually wiping out the tribe.<sup>63</sup>

Unlike the ICTY which was established at the Security Council's own instance, based on Chapter VII of the Charter, The ICTR was created partially in response to a request by the Rwandan government. The tribunal was therefore created following the United Nations Security Council resolution no. 955 of 8<sup>th</sup> November 1994. After having received various reports which indicated the occurrence of acts of genocide and other systematic, widespread and flagrant violations of International humanitarian law committed in Rwanda, the Security Council came to the conclusion that the situation in Rwanda

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<sup>62</sup> Cisse, C., *The End of a Culture of Impunity in Rwanda*, 1 Yearbook of International Humanitarian Law, pp 161 – 2 (1998)

<sup>63</sup> *Akayesu v. The Prosecutor*

constituted a serious threat to international peace and security within the meaning of Chapter VII of the Charter. The Security Council set a significant precedent in setting up the ICTR as it was the first tribunal to have been granted competence to deal with violations of international humanitarian law occurring during internal armed conflict.

The tribunal is composed of 3 main organs, namely; 3 trial chambers, the prosecutor and the registry; however it shares a common appeals chamber and a common prosecutor with the ICTY.

The statute of the tribunal is very identical to that of the ICTY with the only major difference being in the arrangement of articles and the subject matter. Article 1 deals with the competence of the tribunal and empowers it to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994. Article 2 dealing with genocide is identical to the genocide provisions under Article 4 of the ICTY statute. Articles 3 and 4 empower the tribunal to deal with crimes against humanity and violations of common article 3 of the Geneva Conventions and of additional protocol II. The tribunal, article 8 enjoys concurrent jurisdiction with national courts, though as with the ICTY the tribunal has primacy over national courts. The principle of *non bis in idem* is espoused under Article 9 thereby precluding the subsequent trial of a person convicted by the tribunal.

In May 1998 former Rwandan Prime Minister *Jean Kambanda*<sup>64</sup> pleaded guilty to multiple charges of genocide marking the first ever conviction for genocide by an international tribunal.

In *The Prosecutor v. Jean-Paul Akayesu*<sup>65</sup>, the Accused a Mayor of one of the towns in Rwanda, was tried and found guilty of genocide and crimes against humanity, for which he was sentenced to life imprisonment. The trial chamber in arriving at its decision adopted a broad interpretation of Article 2(2)(c) and held that rape amounts to genocide if committed with the intention of destroying a particular group in whole or in part. Further the Accused was convicted in line with Article 2(3)(c) because he did not himself commit the genocide but encouraged others in his capacity as mayor to commit it. This decision went a long way to enrich the body of international humanitarian law as the provisions invoked were being applied for the first time by an international tribunal in dealing with genocide. These convictions marked the first instances of an international court finding individuals guilty of the crime of genocide<sup>66</sup>.

## **SIERRA LEONE SPECIAL COURT**

The war in Sierra Leone broke out in 1991, 30 years after independence, when the Revolutionary United Front (RUF), a rebel group led by Foday Sankoh launched a reign of terror on the West African country in which thousands of people died, while others were raped and amputated<sup>67</sup>. The conflict was fuelled by glaring economic inequalities in the diamond rich country and a civil war in neighboring Liberia. The nine years of war

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<sup>64</sup> 1998, 37 international legal materials, p.1411

<sup>65</sup> 11 African Journal of International and Comparative Law (1999), p. 336

<sup>66</sup> Ibid.

<sup>67</sup> 'War Crimes Trials' in Encarta Encyclopedia (2005)

that left the immensely endowed country devastated, demonstrated the evil and savagery of war, with the majority of soldiers being children and teenagers.

The Sierra Leone government in June 2000 requested the United Nations to assist in setting up a special court to deal with the perpetrators of war crimes during the nine year long conflict. The Security Council in response to the request of the Sierra Leone Government, passed resolution 1315 (2000) requesting the Secretary General to negotiate an agreement with the government of Sierra Leone for the creation of the Court. The agreement between the United Nations and the Sierra Leone government was entered into on 16<sup>th</sup> January 2002 and had the statute of the court in annex. By Article 1 of the agreement, which established the court, it was empowered "...to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996."

The court is composed of the chambers, made up of one or two trial chambers and an appeals chamber, the prosecutor and the registry.

The subject matter jurisdiction of the court covers crimes against humanity, violations of common article 3 of the 1949 Geneva Conventions and additional protocol II, other serious violations of international humanitarian law and crimes under Sierra Leonean Law<sup>68</sup>. The principle of individual criminal responsibility is also affirmed under article 6 in like terms to the provisions of the ICTY and ICTR statutes.

Notable in the statute, given the peculiar circumstances in which the civil war was fought, is Article 7 which relates to the court's jurisdiction over of 15 years of age, and states that the court shall have no jurisdiction over a person who was below the age of 15 when the

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<sup>68</sup> Articles 2,3,4 and 5 of the Special Court Statute

alleged crime was committed and with respect to a person who was aged between 15 and 18 at the time of the commission of the crime they are to be treated with dignity taking into account their young age and the need for the to be rehabilitated and re-integrated into society. The above provision takes into account the use of child soldiers by rebels during the war. By article 8 of the statute the court has concurrent jurisdiction with other national courts and as in the case of the ICTY and ICTR has primacy, as it may at any stage of proceedings request national courts to its competence.

The Special Court however is not an international criminal tribunal in the style of the ICTY and the ICTR as it was not established directly by the Security Council. Given this state of affairs, the special court can not assert primacy over the national courts of other states, thereby precluding it from ordering the surrender of war suspects that may have taken refuge outside Sierra Leone<sup>69</sup>. In this regard, Professor Anyangwe asserts that this is one reason why the special court failed to have Charles Taylor, who had sought asylum in Nigeria, extradited to be tried by it<sup>70</sup>. In addition the territorial jurisdiction of the court is limited to Sierra Leone meaning that the court cannot prosecute international crimes or atrocities committed by a Sierra Leonean national outside the country.

The court issued its first indictments in 2003, charging seven people, including rebel leader Foday Sankoh and Internal Affairs Minister Sam Hinga Norman, with murder, rape, extermination, sexual slavery, conscription of children into an armed force, and other crimes.<sup>71</sup> Former Liberian president Charles Taylor is among those charged as “bearing the greatest responsibility for violations of international humanitarian law and Sierra Leonean Law..” . Prosecutors have accused Taylor of providing money, guns,

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<sup>69</sup> Anyangwe, C., Introduction to Human Rights and International Humanitarian Law, UNZA Press, (2004)

<sup>70</sup> Ibid

<sup>71</sup> Supra note 10

military training and personnel to rebels in Sierra Leone in return for access to Sierra Leone's diamond wealth<sup>72</sup>. The allegations state that Taylor was responsible for mass killings, thousands of rapes, mutilations, and abductions. In addition, he faces charges that he encouraged the use of child soldiers, directed the use of forced labor, and ordered the looting and burning of civilian houses.

### **Analysis of the Role and Performance of International Tribunals in repressing War Crimes World Wide**

From as far back as the end of the Second World War there have been calls for the establishment of a permanent international criminal court to try alleged perpetrators of war crimes and crimes against humanity. However those calls were only answered in February 2002 when the International Criminal court based at The Hague was finally established. Thus, prior to the establishment of the international criminal court, in the field of international humanitarian law, the mechanism of ad – hoc tribunals has been used in order to prosecute those accused of having committed atrocities both during armed conflicts and also for the crime of genocide.

The use of ad – hoc tribunals has come under attack as being ineffective for a number of reasons which will be outlined below, not least of which is that they have limited jurisdiction. As much as this may be the case certain lessons and progressive developments can be derived from use of international criminal tribunals in the past so as to enrich the general body of international criminal law.

The major criticism of the international war crimes tribunals dating back to the tribunals at Nuremburg and Tokyo is that they only provide justice for the victors of the particular

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<sup>72</sup> 'The Special United Nations Tribunals' on CBS online

conflict. The Nuremburg and Tokyo tribunals were special military tribunals set up by the victorious powers namely; the United States, Britain, France and Russia, to try German and Japanese officials for war crimes. It is curious to note that officials and soldiers from among the allied powers were never tried for war crimes, a case in point being the atomic bombing of Hiroshima and Nagasaki by the US, whose adverse effects on the population remained evident for many years to follow. While it is important to try perpetrators of war crimes and ensure that they are punished, it is an essential element of the rule of law that the law should be certain and that it should apply equally to all people to whom it is addressed.

However the recent international criminal tribunals set up by the United Nations Security Council cannot be accused of meting out victor's justice because they were not set up by or for the victorious parties but in the general interest of saving humanity from serious atrocities such as those that occurred in the former Yugoslavia and in Rwanda. The main criticism against the international criminal tribunals though is that they provide for selective application of the law as they are not set up for all conflicts to ensure the uniform application of international humanitarian law to all. A key example is the armed conflicts, or more aptly the invasions of Afghanistan and Iraq led by the United States, which ought to have precipitated the setting up of war crimes tribunals to investigate and prosecute numerous allegations of war crimes committed by the 'Coalition of the willing'. In addition the United Nations Security Council has been castigated for not acting quickly enough to set up tribunals and to ensure that some of these atrocities are

stopped in time. For instance the ICTR was only set up after more than a hundred days of the Rwandan Genocide which led to the death of between 500,000 and 1 million people<sup>73</sup>.

In fact, one of the reasons that the United States has so far failed to support the establishment of the International Criminal Court, is fear that U.S. officers would be found guilty by the court<sup>74</sup>. The United States also fears that this Court could be used for political revenge against it as the world's only superpower. It is submitted that following the fall of the Soviet Union after the end of the cold war there has been a rise of what may be termed as American hegemony, the result of which is that tribunals would only be targeted at countries and individuals that are opposed to the interests of the United States.

Despite the shortcomings of the international criminal tribunals of the past, they have provided a key stepping stone in the eventual establishment of the permanent international criminal court. One need only peruse the provisions of the various statutes setting up the tribunals, outlined previously in this chapter, to realize that the Tribunals have gone a long way in strengthening the normative edifice of international humanitarian law dealing with war crimes and crimes against humanity, especially with respect to individual criminal responsibility. The effect of this is that, as will be seen in the next chapter, the Rome statute of the International Criminal Court is very elaborate and offers great optimism as to the future of international humanitarian law and its attendant application.

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<sup>73</sup> Supra note 5

<sup>74</sup> Other Countries that have not ratified the Rome statute include Germany and China

In addition war crimes tribunals have been shown to be a critical tool in nation building as they offer nations a chance to break with the past as punishment is meted out against those that perpetrated serious atrocities. War crimes tribunals have been shown to have the potential to help post war states discover the benefits of a strong legal system, with an entrenched sense of the rule of law, while reconciling past atrocities.<sup>75</sup>

## CONCLUSION

The central theme of this chapter has been the assessment of the role and performance of international tribunals of the recent past in shaping the current legal regime dealing with war crimes and crimes against humanity. It has been shown that despite their shortcomings and the strong reservations towards them expressed by many, they have nonetheless provided a stepping stone, through the contribution of a rich normative framework, for the establishment of the International Criminal Court, which it is hoped will provide a more even playing field for the future application of international Humanitarian Law.

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<sup>75</sup> Kritz, Neil J. *Transitional Justice: How emerging democracies reckon with former regimes.* (Washington: USIP, 1995)

## CHAPTER 4

### THE INTERNATIONAL CRIMINAL COURT

#### Background

There have been calls for the establishment of a permanent international criminal court since as early as the 19<sup>th</sup> century. In 1872 Gustav Moynier, one of the founder members of the International Committee of the Red Cross (ICRC) proposed the establishment of a permanent court in response to the Franco – Prussian War<sup>76</sup>. The end of the Second World War also led to heightened calls for the establishment of such a court. As was earlier stated the post world war II tribunals had been criticised as being victor's justice, hence the need to have a permanent and independent international judicial organ to deal with perpetrators of war crimes, wherever they may be found.

The United Nations first took cognisance of the need for the establishment of an international criminal court in 1948 in the context of the adoption of the Convention on the prevention and punishment of the crime of genocide<sup>77</sup>. In resolution 260 of 9<sup>th</sup> December 1948, which adopted the Genocide Convention, the General Assembly invited the international law commission (ILC) “to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide...” The international law commission later concluded that the establishment of an international judicial organ was both desirable and possible. The General Assembly, in response to the report of the commission set up a committee to prepare proposals relating to the establishment of an international criminal Court. The committee then prepared a draft statute in 1951 and a revised draft statute in 1953. However consideration of the

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<sup>76</sup> Coalition for an International Criminal Court (CICC) Hand out on the history of the international criminal court: at a glance

<sup>77</sup> “The establishment of the International Criminal Court - overview” at [www.un.org](http://www.un.org)

draft statute was postponed pending the adoption of a definition for aggression<sup>78</sup>. In addition there were many differences in opinion among states on the form and structure that such a court should take.

Despite the vacillations of the community of states in trying to find common ground on the setting up of the court, atrocities continued to be committed with impunity in such places as Cambodia, Sierra Leone, the former Yugoslavia and Rwanda. It was recognised therefore that the measures in place at the time were not adequate in dealing with perpetrators. A case in point is the fact that there was no war crimes tribunal to deal with atrocities committed by the Khmer Rouge in Cambodia, and even though tribunals were set up in the former Yugoslavia and Rwanda, as was discussed in the previous chapter ad-hoc tribunals had many drawbacks, not least of which was their limited jurisdiction of time and place. It was felt therefore that a permanent international criminal court would eliminate the problems that had hitherto been associated with ad-hoc tribunals. In this regard the general assembly asked the international law commission (ILC) to complete its work on the draft statute, which it did, and in 1994 submitted the draft to the general assembly.

## **CREATION OF THE COURT AND ITS STRUCTURE**

The *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* was held in Rome, Italy from 15<sup>th</sup> June to 17<sup>th</sup> July 1998, “to finalise and adopt a Convention on the establishment of an international criminal court.”<sup>79</sup> The statute of the court, which was later to be called the *Rome Statute*

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<sup>78</sup> Ibid

<sup>79</sup> Ibid

was adopted after 120 countries voted in favor, 7 against, and 21 abstained. The statute took effect on 1<sup>st</sup> July 2002 when the threshold of 60 ratifying states was reached, as required by Article 126 of the statute<sup>80</sup>.

Along with the Rome Statute, the diplomatic conference also adopted three additional documents that comprise the basic legal texts of the court that set out its structure, jurisdiction and functions. These are the rules of procedure and evidence, the elements of crimes and the regulations of the court<sup>81</sup>.

The Court is a treaty based independent, apolitical and representative international court managed by the Assembly of State Parties (ASP) to the statute. It is Located at The Hague but may sit elsewhere whenever it considers it desirable so to do as provided by the statute<sup>82</sup>. The Assembly of State Parties is composed of representatives of countries that have ratified and acceded to the Rome Statute. The Assembly of States Parties decides on various items, such as the adoption of normative texts and of the budget, the election of the judges and of the Prosecutor and the Deputy Prosecutor(s)<sup>83</sup>.

The Court is composed of four organs, namely; the presidency, the registry, an appeals division along with trial division and pre-trial division and the office of the prosecutor.<sup>84</sup>

The Court has 18 full time judges, elected by states parties to the statute for a limited term of nine years, and no two judges can be from the same country.<sup>85</sup>

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<sup>80</sup> Anyangwe C, Introduction to Human Rights and International Humanitarian Law, 2004, UNZA Press

<sup>81</sup> Articles 51 and 52

<sup>82</sup> Article 3

<sup>83</sup> Article 112(2)

<sup>84</sup> Article 34

<sup>85</sup> Article 36(1)

## JURISDICTION

Article 1 of the statute of the court provides that it has jurisdiction over persons for the most serious crimes of international concern, as referred to in the Statute, and shall be complementary to national criminal jurisdictions. The principle of complimentary jurisdiction entails that national courts shall be the courts of first instance and will only defer their competence to that of the international criminal court when they are unable or unwilling to act for whatever reasons. However this is in contrast to the jurisdiction of the ICTY and the ICTR that have concurrent jurisdiction with national courts and may assume jurisdiction over a matter that is before a national court.

The subject matter jurisdiction of the court relates to genocide, crimes against humanity and war crimes.<sup>86</sup> The definition of war crimes under the statute is based on the grave breaches provisions of the Geneva Conventions of 1949 against persons and property.<sup>87</sup>

The war crimes jurisdiction applies to both internal and international armed conflict and is very elaborate as laid down under article 8 of the statute. When compared to Article 6 of the Nuremburg Charter and the war crimes covered thereunder, it will be realised that the process of defining various acts as war crimes has developed immensely and led to a more detailed codification under the Rome Statute.

The court only has jurisdiction over crimes committed after the statute came into force and with respect to such crimes over which the court has jurisdiction; the court is not bound by any statute of limitation.<sup>88</sup> The Court under article 26 excludes itself from jurisdiction over person that were under the age of 18 at the time of the commission of

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<sup>86</sup> Articles 6,7 and 8

<sup>87</sup> As elaborately laid down under Article 8

<sup>88</sup> Article 11

the crime. The Court would therefore not intervene to prosecute child soldiers as is the case with the Sierra Leone Special Court.

There are 3 ways in which the courts may assume jurisdiction over crimes under the statute, and these are outlined under article 13 as;

- i. a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14,
- ii. a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations;
- iii. or where the prosecutor initiates investigations *proprio motu* based on information of crimes having been committed within the territory of the court.

## **INDIVIDUAL CRIMINAL RESPONSIBILITY AND COMMAND RESPONSIBILITY**

The statute embodies these two key principles that have been the hallmark of international penal law since the Nuremberg tribunal following world war two. The two principles are provided for under Articles 25 and 28 respectively. Article 25 states that a person who commits a crime under the jurisdiction of the court shall be individually and punished in accordance with the statute. The statute further provides that a person shall be liable for complicity in committing a crime either by soliciting, aiding or ordering others to commit a particular crime under the jurisdiction of the court<sup>89</sup>.

Article 28 dealing with the principle of command responsibility it states *inter alia*, that a military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces

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<sup>89</sup> Article 25(3)

under his or her effective command and control, or effective authority and control as the case may be

## **INVESTIGATIONS AND PROSECUTION**

This is covered under article 5 of the statute of the court. Once the prosecutor begins an investigation as provided under article 13, he may ask the pre-trial chamber to authorize an investigation. During the duration of an investigation, each situation is assigned to a Pre-Trial Chamber. The Pre-Trial Chamber is responsible for the judicial aspects of proceedings. Among its functions, the Pre-Trial Chamber, on the application of the Prosecutor, may issue a warrant of arrest or a summons to appear if there are reasonable grounds to believe a person has committed a crime within the jurisdiction of the Court<sup>90</sup>.

Once a wanted person has been surrendered to or voluntarily appears before the Court, the Pre-Trial Chamber holds a hearing to confirm the charges that will be the basis of the trial.

Once the charges have been confirmed the case is assigned to the trial chamber which is comprised of three judges. The trial chamber conducts the trial with full respect for the right of the Accused to either defend himself or be represented by counsel of his choice. The court applies the criminal law standard of proof and the prosecutor must prove the case against the Accused beyond reasonable doubt in order to secure a conviction.

If convicted the Accused is entitled to the right of appeal and may do so to the Appeals Chamber which is comprised of five judges<sup>91</sup>.

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<sup>90</sup> Article 57

<sup>91</sup> Article 81

## **WORK AND PERFORMANCE OF THE COURT THUS FAR**

Since the creation of the Court on 1<sup>st</sup> July 2002, it has considered four situations that have been referred to the Prosecutor. Three of the situations have been referred to it by state parties in relation to their territories; these are Uganda, Democratic Republic of the Congo and Central African Republic<sup>92</sup>. The other situation was the Darfur, Sudan, a non state party, which was referred to the court by the United Nations Security Council, acting under Chapter VII of the Charter<sup>93</sup>.

After analyzing the referrals for jurisdiction and admissibility, the Prosecutor began investigations in three situations – Uganda; Democratic Republic of the Congo and Darfur, Sudan<sup>94</sup>.

On 8 July 2005, the Court issued the first arrest warrants with regard to the situation in Uganda, among those indicted was rebel leader Joseph Kone. However the court has faced difficulties in effecting arrests. This has been due to the fact that the conflict is still on going, thus making it difficult to find and arrest the suspects because they are in rebel controlled areas. The government of Uganda has since offered to withdraw the charges against Kone Subject to the conclusion of a peace accord.

According to the official ICC website the prosecutor continues to monitor situations in other countries including Cote D'voire a non state party that has accepted the jurisdiction of the court on its territory<sup>95</sup>

With regard to the situation in the Democratic Republic of the Congo, the Court made headway towards conducting its first trial when the Prosecutor presented evidence to the

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<sup>92</sup> International Criminal Court Official website, [www.icc.org](http://www.icc.org), "The Court Today"

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid

pre trial chamber in a case against Lubanga Dyilo a former leader of a militia group in the Ituri district of the Democratic Republic of the Congo (DRC), is charged with enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities<sup>96</sup>. The Accused has the opportunity to challenge the charges and the pre trial chamber has 60 days from the last date of hearing to determine whether the case should proceed to trial<sup>97</sup>. Such determination is yet to be made by the pre trial chamber.

The international criminal court represents a landmark in the evolution of the international criminal justice system. The Rome Statute which provides a normative edifice for the court is very elaborate and encompasses all the developments in international humanitarian law since the Second World War. As earlier noted, the provisions on war crimes have been broadened from those under the Nuremburg statute so as to take into account new situations that have arisen. For instance under the rubric of *“other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law”* which falls under Article 8 dealing with war crimes, the list of such violations is very detailed and consists of 26 possible situations or behaviour. It is the longest list ever included in an internationally binding treaty<sup>98</sup>.

With regard to the Court’s assumption of jurisdiction, Article 13(b) which empowers the Security Council acting under Chapter VII to refer a situation to the Prosecutor entails that the Court would be able to exercise jurisdiction over crimes allegedly committed on

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<sup>96</sup> “Prosecutor presents evidence that could lead to first ICC trial” ICC official website, [www.icc.org](http://www.icc.org) visited

<sup>97</sup> Ibid

<sup>98</sup> Greppi, E “The evolution of individual criminal responsibility under international law” in International Review of the Red Cross, 1999

the territory of a non state party or by nationals of a non state party. Therefore there should be no country or situation that is beyond the reach of the international criminal court.

However, when one examines the work of the court so far, selective application of the law in assumption of jurisdiction is apparent. So far only situations in Uganda, Democratic Republic of Congo, Sudan and Cote d'voire have been considered by the Court. This view is reinforced by the fact that there are other 'trouble spots' where crimes are allegedly being committed or were committed. These are Afghanistan, currently in Iraq and in Lebanon during the recent Israeli attack on Hezbollah. This though may not be the fault of the Court or the special prosecutor, but an unfortunate abdication of responsibility by the Security Council in referring situations to the court as and when they occur.

It is submitted that the undue political influence brought to bear by powerful nations on the Security Council and ultimately on the Court has ensured that these nations have their nationals and those of their allies protected from indictment and possible prosecution.

## **CONCLUSION**

The international criminal court represents a significant step in trying to end impunity and deter war criminals so as to ensure peace and justice for all people of the world. The Rome Statute goes to show the rich normative framework that is currently in place to cover possible transgressions. However more needs to be done to ensure that the law is applied equally to all and not be seen to be targeted at only nationals of seemingly economically and politically weak nations

## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS

#### SUMMARY

The laws of war or more aptly International humanitarian law consists of the limits set by international law within which the force required to overpower the enemy may be used and the principles there under governing the treatment of individuals in the course of the war or armed conflict. In the absence of such limits the savagery, suffering and destruction caused by war would know no bounds. The ultimate aim of international humanitarian law is not to provide a code to regulate war as one would regulate a sport but rather to limit the suffering caused to individuals. The rules of international humanitarian law are binding not only on states but on individuals, including members of the armed forces, senior government officials and heads of states.

This essay has traced the evolution of international humanitarian law with a view to evaluating the effectiveness of the current legal regime in dealing with perpetrators of war crimes.

The post world war two trials at Nuremburg and Tokyo were a significant milestone with regard to meting out sanctions against perpetrators of war crimes. They established the key principle of individual criminal responsibility that has come to be the cornerstone of international criminal law. The post world war two tribunals were also a catalyst to the codification of principles of international humanitarian law applied by them, in the four 1949 Geneva Conventions and subsequently the two additional protocols of 1977.

However the two tribunals suffered a legitimacy crisis in that they were considered as having meted out ‘victor’s justice’ given that they were set up by the victorious powers following the complete surrender of Germany and Japan. The two tribunals nonetheless laid the groundwork for the establishment of a strong normative framework of international humanitarian law dealing with war crimes.

The 1990s saw the setting up of international criminal tribunals for the Former Yugoslavia and Rwanda respectively. The two tribunals made strides in developing international humanitarian law, notably with regard to genocide which the Rwanda tribunal dealt with and which has been discussed in chapter three. However the mechanism of using ad hoc tribunals to deal with perpetrators of war crimes also raises the question of selective justice. This is because there have also been inconsistencies in the setting up of tribunals. The obvious question one would ask in light of the setting up of the ICTY and the ICTR is why there were no tribunals set up for the “killing fields” in Cambodia or in Afghanistan following the American attacks.

The deficiencies of Ad hoc tribunals led to increased calls and the eventual setting up of the permanent international criminal court. The statute establishing the court has taken account of all the major developments in international humanitarian law and thus led to the creation of a rich and elaborate normative framework. However a look at the work of the court so far reveals that though it is a permanent institution prosecution of alleged perpetrators may still be selective. An analysis of the work of the court so far has revealed that situations that have so far been considered do not seem to represent clear cross sections of situations occurring in all theatres of war. For example, the situation in

Iraq following the American invasion where there has been a reported estimated death toll of 56,000 to 58,000<sup>99</sup> or the recent Israeli attack on Hezbollah has not been considered. This is despite the fact that under Article 13(b) of the Rome Statute empowers the Security Council acting under Chapter VII of the Charter to refer a situation to the Prosecutor.

## **RECOMMENDATIONS AND CONCLUSION**

It is submitted that under the statute of the international criminal court (ICC) the United Nations Security Council would appear to hold the key to ensuring uniform application of the law to all international players. However, as stated in the previous chapter it seems as though powerful nations are able to bear undue influence on the Security Council so as to ensure that their nationals and those of their allies are not subjected to prosecution.

This essay has detailed the development of international humanitarian law especially following the Second World War and the setting up of the Nuremburg and Tokyo tribunals.

However, despite the changes and progress that has taken place in international humanitarian law since world war two, the make up and structure of the Security Council still reflects the immediate post world war two situation. This is evident in the fact that the Security Council is still made up of the '5 victorious powers' as its permanent members. The permanent members of the Security Council in wielding their veto power may abuse it and thereby hamper the prosecution of their nationals or those of their allies.

In this regard the following recommendations are hereby made with respect to the United Nations Charter.

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<sup>99</sup> Post Newspaper, "Search for Meaning in 2007" Article by Azwell Banda

1. Firstly, it is proposed that in light of the developments in the world following world war two that a wider representation of permanent members of the Security Council be constituted based on regional representation.
2. Secondly, more power should be given to the international Court of justice to enable it to compel errant states to appear before it and not only by relying on the consent of state parties.

In the final analysis, apart from the above recommendations it is submitted that political will of powerful states is needed to ensure international peace and stability. The powerful nations should not use their position of strength to trample on and attack weaker nations but rather to act responsibly and practice restraint. For the sake of entrenching the principles of international humanitarian law, no nation should appear to shield its own nationals or those of another from prosecution.

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