UNIVERSITY OF NAIROBI

Enforcement of International Humanitarian Law: A Critical Analysis of the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)

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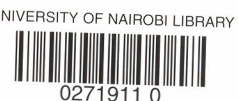
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Thesis Submitted in Partial Fulfillment of the Requirements for the Award of the Degree of Master of Arts at the Institute of Diplomacy and International Studies, University of Nairobi

OCTOBER 2005

Declaration

This thesis is my own original work and has not been presented for a Degree in any other university.

Choge Elizabeth Chemutai Nyangoro

Signature:..................................Date:..........................

This thesis has been submitted for examination with my approval as the Supervisor.

Makumi Mwagiru, Ph. D.

Signature:.......................................Date:........................

Dedication

To my beloved daughter Nikita for her love, kindness and patience; indeed she is the most special gift God blessed me with.

In Memory

In memory of my late daughter Nelly. I thank God for the life we shared together.

Acknowledgments

My sincere gratitude goes to all those who contributed to the realization of this work in various ways. I first wish to thank the Ministry of Foreign Affairs for the wonderful opportunity it gave me to pursue studies at the National Defence College (Kenya) and to also study for a Master's degree at the University of Nairobi.

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I thank all those who took a close interest in my work. May God bless you all.

Abstract

The research examines enforcement of international humanitarian law as codified in the four Geneva Conventions of 1949 and their two Additional Protocols of 1977. The study looks at early attempts to enforce international humanitarian law dating back to the Nuremberg and Tokyo Trials of 1945 and the implications they have had on trials that have come thereafter. In particular the study focuses on the jurisprudence of the International Criminal Tribunal for former Yugoslavia established by the United Nations Security Council on 25th May 1993 and the International Criminal Tribunal for Rwanda established on 8th November 1994. The main objective of the study is to analyze the contributions of the two *ad hoc* tribunals to the development and enforcement of international humanitarian law and to inquire as to status of this branch of the law within the wider frame of international law.

The study established that the two tribunals have contributed immensely to the enforcement of international humanitarian law and have brought to life provisions of the Genocide Convention of 1948 and the Geneva Conventions of 12th August 1949 plus their two Additional Protocols of 1977 that are the main sources of the law of armed conflicts. The study further established that the jurisprudence of the two tribunals has provided useful interpretation of international humanitarian law and the judicial precedents arising from the trials would offer useful guidelines to the interpretation of the law by the newly established International Criminal Court and national courts. The establishment of the two tribunals sent a signal that violations of international humanitarian law would no longer be tolerated by the international community whether they occur, whether during internal or international armed conflicts.

Abbreviations

CCL 10	Control Council Number 10
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
FAR	Forces Armées Rwandaises
FRY	Former Yugoslav Republic
ICC	International Criminal Court
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
IHL	International Humanitarian Law
IFFC	International Fact Finding Commission
IMT	International Military Tribunal
RTLM	Radio Television Libre des Mille Collines
SITY	Statute of the International Criminal Tribunal for former Yugoslavia
SS	Nazi Schutzstaffel
UN	United Nations
USA	United States of America
VRS	Bosnian Serb Army
WWI	First World War
WWII	Second World War

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Chapter One

Introduction

International humanitarian law is a branch of law that governs armed conflicts. It seeks to protect persons who are not or no longer taking part in hostilities and restricts the rights of warring parties to use methods and means of warfare of their choice in a bid to limit the suffering caused by armed conflicts. It is part of the universal international law whose purpose is to forge and ensure peaceful relations between peoples. International humanitarian law makes a substantial contribution to the maintenance of international peace by promoting humanity in times of war.

This study examines the basic principles of international humanitarian law and early attempts to enforce it dating back to the 1945 London Charter of the International Military Tribunal that guided the creation of the Nuremberg and Tokyo Tribunals of 1945 to 1947. In particular, the study will focus on the establishment of the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and the jurisprudence emerging out of the two tribunals. It will examine in detail the contributions of the two tribunals to the enforcement and development of international humanitarian law, especially considering the evolving nature of international criminal law which is closely related to international humanitarian law.

Background

Jurists and philosophers took an interest in the regulation of armed conflicts well before the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field of 22nd August 1864 was adopted and developed. For

everywhere that a confrontation arose between tribes, clans, followers of a leader or ruler, it did not result in a fight to the finish; rules emerged for purposes of limiting effects of the violence.[1] In the European Middle Ages, the knights of chivalry adopted strict rules on fighting, and agreements on the fate of prisoners would be reached. Explicit and identifiable rules came to be expected of knights on the battlefield. The discriminatory character of these rules allowed medieval knights to behave with charity toward one another and toward other persons of acceptable status and class.[2]

During the Peace of Westphalia in 1648, which is considered as the beginning of the era of the modern state, the rulers of governments resorted to professional military forces, who adopted their own rules and regulations for the conduct of war. These regulations arose out of past practices and traditions of war, and many of them addressed the treatment of civilians and prisoners of war. During the era after the Peace of Westphalia, the pragmatic customs and practices of *jus in bello* (laws relating to conduct of hostilities) came to constitute the core of the laws of war. [3]

The rules of international humanitarian law exist in cultures to date with no written heritage. More often than not they are embodied in major literary works of cultures such as the Indian epic *Mahabharata.* The Code of Manu, which is considered the source of laws, morals, and customs of the people of the India that developed between 200 B.C. and 200 A.D. also referred to protection of war victims. In its Chapter VII on the duty of a king, there are many detailed regulations which in part read as follows:

[1] International Committee of the Red Cross, *International Humanitarian Law: Answers to Your Questions,* 1998,pp 1-13
[2] Edwin M. Smith, " The Laws of War and Humanitarian Law: A Turbulent Vista," http://www.questia.com (Accessed on 11th February 2005)
[3] Ibid

> "A King must protect his people when an enemy declares war on them on the battle field; a soldier must not kill an enemy by using a hidden or poisonous weapon, or fire weapon; a soldier must not attack an enemy who has surrendered; a soldier must not attack an enemy who is not ready for combat, is severely wounded, is giving up the fighting or is fleeing."[4]

African customs and traditions relating to warfare contain some of the basic tenets of international humanitarian law, such as the prohibition of the destruction of crops and food stocks or the poisoning of drinking water.[5] In Papua where primitive tribes were constantly at war with each other, an adversary was always warned in advance when active hostilities were planned, and the fighting does not begin until both armies were ready. Arrow heads were not barbed so as to avoid causing too much injury and a battle stops for fifteen days as soon as a man is killed or injured.[6]

In 1762, Rousseau, a writer and philosopher, made a major contribution to humanitarian law when he formulated the following principle about development of war between states:

> "War is in no way a relationship between man with man but a relationship between states, in which individuals are enemies only by accident; not as men, nor even as citizens, but as soldiers…"

According to Rousseau, soldiers may only be fought as long as they themselves are fighting, once they lay down their weapons, they again become mere men, and hence their lives must be spared.[7] He thus laid a foundation for distinction between combatants, civilians of the enemy state and individual soldiers who have laid down their weapons or

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[4] The Laws of Manu, Oxford: Clarendon Press, 1886

[5] Hans-Peter Gasser, *International Humanitarian Law, An Introduction*, Henry Dunant Institute, Haupt, 1993, p 2

[6] Jean Pictet, *Development and Principles of International Humanitarian Law*, Dordrecht: Martinus Nijhoff Publishers, 1985, p 6

[7] Jean-Jacques Rousseau, *A Treatise on the Social Contract*, Book I, Chapter IV, Quoted in Hans-Peter Gasser, *International Humanitarian Law, An Introduction*, Henry Dunant Institute, Haupt, 1993, p 7

have been forced to do so because of injury, and this is a basic principle of modern international humanitarian law.

The eventual codification of international humanitarian law can be credited to the works of two individuals; Francis Lieber and Henry Dunant, who built on the intellectual foundation laid by Jean-Jacques Rousseau. Lieber drew up a Code at the request of President Abraham Lincoln, consisting of various instructions for Union Soldiers during the American Civil War. The Code which came to be known as the "Lieber Code" was promulgated by President Lincoln in 1863. Henry Dunant on the other hand is credited for the negotiation and subsequent adoption of the Geneva Convention of 1864.[8] While journeying on a business trip in Italy on 24th June 1859, Dunant chanced on the Battle of Solferino which was fought between the Austrian and French Armies near Castiglione della Pieve. He was deeply shocked by the absence of any form of help for the wounded soldiers who were left to suffer and die. Besides initiating relief on their behalf, Dunant proposed two practical measures for direct action: an international agreement on the neutralization of medical personnel in the field and the creation of a permanent organization for practical assistance to those who are wounded in war. The first proposal led to the adoption of the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, and the second led to the founding of the Red Cross organization.

The 1864 Convention provided for neutrality of army medical units in the battlefield and care for the sick and wounded combatants regardless of whatever nation they may belong. It protects from reprisal or punishment, inhabitants of a country that brings help to the sick and wounded combatants and those who take such persons into

[8] Henry Dunant, *A Memory of Solferino*, ICRC, 1986, pp 8-9

their care.[9] It is important to note that the 1864 Convention did not make any provision to protect prisoners of war from inhuman treatment.

Contemporary international humanitarian law is contained in the four 1949 Geneva Conventions and their two Additional Protocols of 1977. The first Convention protects the sick and wounded armed forces in the field while the second affords protection to the sick, wounded and shipwrecked military personnel at sea. The third Convention sets out the minimum treatment to be afforded to prisoners of war and the fourth articulates the protection of civilian persons in time of war. These four Conventions together with the two Additional Protocols of 1977 are the core instruments of international humanitarian law and are among the most ratified treaties in the world today. These Geneva Conventions are now considered as part of customary international law; therefore, even those states that have not ratified the conventions are expected to respect them.

The essence of these Geneva Conventions is the principle that people who are not actively engaged in conflicts should be treated humanely. A number of practices ranging from the taking of hostages to torture, illegal executions, reprisals against persons protected by the Conventions and indiscriminate destruction of property in occupied territory are prohibited. The First Protocol extends the application of the 1949 Geneva Conventions and the Protocol itself to struggles against colonial domination, alien occupation and racist regimes within the meaning of the United Nations Charter.

A variety of methods exist for the enforcement of international humanitarian law although generally, the use of reprisals is prohibited.[10] All states are expected to comply with this branch of the law by adopting legislative and statutory provisions to ensure

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[9] Articles 1-6 of the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded Armies in the Field

[10] See Articles 20 and 51(6) of the First 1977 Additional Protocol to the Geneva Conventions of 1949

compliance at all times. There is also the concept of the Protecting Power, which is appointed to look after and monitor the interests of nationals of one party to a conflict under the control of the other, whether as prisoners of war or as occupied civilians. Sweden and Switzerland performed this role during the Second World War.[11] There is also the International Fact Finding Commission (IFFC) that has competence to inquire into grave breaches of the 1949 Geneva Conventions and other serious violations of international humanitarian law. IFFC is mandated to facilitate through its good offices, respect for these instruments.[12]

Grave breaches of IHL may constitute war crimes and other crimes which would attract both national and universal criminal jurisdiction. The first major effort to curb war crimes arose after the First World War when an Allied Court was constituted to try German's Kaiser, Wilhelm II, for a "supreme offence against international morality and the sanctity of treaties."[13] After the Second World War, the Nuremberg International Military Tribunal for the Prosecution and Punishment of War Criminals was established under the London Charter of the International Military Tribunal of 1945.[14]

In 1993, the United Nations established the International Criminal Tribunal for former Yugoslavia (ICTY) under Security Council Resolution 827 of 25th May 1993 whose mandate is to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. The ICTY was the first *ad hoc* tribunal to be set up by the United Nations since it was founded in 1945. The tribunal is yet to conclude its work. Following the 1994 genocide in

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[11] Shaw Malcolm N, *International Law*, 4th ed, Cambridge University Press,1997, p 820
[12] Article 85 and 90, Protocol I, 1977
[13] Ferencz Benjamin B, "From Nuremberg to Rome: Towards an International Criminal Courrt," *Policy Paper No.8 of the Development of Peace Foundation*, 1998, p 2
[14] *Ibid.*,p 3

Rwanda that claimed thousands of lives, the United Nations Security Council once again created another *ad hoc* criminal tribunal, the International Criminal Tribunal for Rwanda (ICTR) to bring mass murderers to justice and restore peace. The ICTR was established on 8th November 1994 but its mandate was limited to the grave violations of international humanitarian law committed between 1st January 1994 and 31st December 1994.[15] The tribunal, based in Arusha, Tanzania, is yet to conclude its hearings.

On 17th July 1998, the statute of the International Criminal Court was adopted in Rome at a United Nations sponsored conference. The statute entered into force in July 2002 after the 60th ratification was deposited. The International Criminal Court has jurisdiction to try crimes such as genocide, crimes against humanity and war crimes.[16] It is a permanent court and it is expected that it would enhance enforcement of international humanitarian law and curb impunity.

The Research Problem

International humanitarian law is a branch of international law whose purpose is to forge and ensure peaceful relations between peoples. It does this by promoting humanity in times of war. It aims at preventing or hindering mankind's decline to a state of complete barbarity. This study focuses on the developments of international humanitarian law that emerge from the jurisprudence of the ICTR and the ICTY. Ever since the adoption of the Geneva Conventions of 1949 and the subsequent Additional Protocols of 1977, there had been no international trials for any breaches and violations of the treaties until the establishment of the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) by the United

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[15] United Nations Security Council Resolution 955 of 1994

[16] See, 1998 Rome Statute of the International Criminal Court (www.icc-cpi.int)

Nation's Security Council in 1993 and 1994 respectively. The mechanisms for prosecuting individuals for grave breaches of the 1949 Geneva Conventions remained remarkably untested. The provisions of the statutes establishing the two *ad hoc* tribunals and the jurisprudence emerging from their decisions has enhanced the salient provisions of the 1949 Geneva Conventions and the two Additional Protocols of 1977 and given useful interpretations of various aspects of international humanitarian law.

This study examines the enforcement of international humanitarian law through penal sanctions with particular reference to the main trials conducted by the two *ad hoc* tribunals; the ICTY and the ICTR. The implications of the creation of the ICTY and ICTR for the development of IHL would be explored, especially considering that the two tribunals were set up to address *inter alia* atrocities that were committed in purely internal conflicts that were seen as a threat to international peace and security. The study would explore the achievements and shortcomings of these two *ad hoc* tribunals through a critical study of the jurisprudence emerging from the tribunals' judgments.

A critical analysis of the main case law emerging from the ICTY and ICTR would be useful in understanding the various interpretations given to the provisions of the conventions and the contributions made by the trials towards the development and advancement of IHL. It will also reveal the status of the 1949 Geneva Conventions in international law and whether the same have risen to the level of *jus cogens* or peremptory norms of international law.[17]

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[17] Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory,* Oxford: Oxford University Press, 2001, p 29

Justification of the Study

For international humanitarian law to have any meaning, it must be capable of being implemented during armed conflicts, and failure to obey should attract penal sanctions. However the four Geneva Conventions of 1949 which constitute the core of international humanitarian law did not establish a mechanism for prosecution of violations and grave breaches of this branch of the law and left it to national governments to enact any legislation necessary to provide penal sanctions for persons committing or ordering to be committed any of the grave breaches.[18] The International Criminal Tribunal for former Yugoslavia was the first international tribunal that was created by the international community to try serious violations of international humanitarian law since the adoption of the four Geneva Conventions of 1949 and their two Additional Protocols of 1977. In 1994, the United Nations Security Council created the International Criminal Tribunal for Rwanda for purposes of prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda. It was the first time that an international tribunal was created to try violations arising out of a purely internal conflict.

A critical analysis of the jurisprudence emerging from the ICTY and ICTR will highlight the developments in international humanitarian law and the contributions of the tribunals to the enforcement and advancement of international humanitarian law.

Objectives of the Study

The study seeks to trace the origins and development of international humanitarian law and examine its basic principles as provided for in the Geneva Conventions of 1949 and the two Additional Protocols of 1977. Emphasis will be laid on enforcement of

[18] See Articles 49, 50, 129 & 146 of the First, Second, Third and fourth Geneva Conventions respectively.

international humanitarian law through tribunals, namely; the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The major aim of the study is to analyze the jurisprudence emerging from the two tribunals so as to determine the tribunal's contribution to the development of international humanitarian law.

Literature Review

This section will examine literature drawn from academic journals and scholarly books on enforcement of international humanitarian law in a bid to explore the jurisprudential contribution of the ICTY and ICTR to the development of international humanitarian law, especially as regards their interpretation of key provisions of the Geneva Conventions of the 1949 and the two Additional Protocols of 1977.

Principles of International Humanitarian Law

The idea and concept of international humanitarian law has been in existence since time immemorial. The basic principles of international humanitarian law are contained in the four Geneva Conventions of 1949 which are designed to safeguard military personnel who are no longer taking part in fighting and persons not actively involved in hostilities, particularly civilians. The two 1977 Additional Protocols to the Geneva Conventions strengthen protection of victims of international and non-international armed conflicts. The basic tenets of international humanitarian law can also be traced back to the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, the Hague Conventions of 1899 and 1907 concerning laws and customs of war

on land and the adaptation to maritime warfare of the principles of the 1864 Geneva Convention.[19]

The International Committee of the Red Cross (ICRC) in its numerous publications on international humanitarian law has given insights into the origins of this branch of the law dating back to the 18th Century. In one of its publications, "International Humanitarian Law: Answers to your Questions",[20] the ICRC discusses the origins, sources and basic principles of international humanitarian law. It also examines available measures for implementation and enforcement of IHL but observes that rules of IHL are not always observed and similarly violations are not repressed.

Dunant[21] who is regarded as a founder of contemporary international humanitarian law narrates his experience of war in 1859 that drove him to agitate for the formulation of some international convention that would constitute relief for those wounded in battlefield in the different European countries. This led to the Diplomatic Conference of 1864 that saw the adoption of the Geneva Convention for the Amelioration of the condition of the Wounded in Armies in the Field by 16 states. Dunant's work is only useful in understanding the origins of IHL and the reasons that guided its codification.

Gasser of the Henry Dunant Institute gives an insight into the principles governing international humanitarian law. He emphasizes the need for implementation of IHL. According to him, humanitarian law must stand the practical test of implementation, otherwise it is meaningless. He notes that it is important to disseminate the knowledge of IHL as far as is practically possible among the armed forces to promote its observance

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[19] United Nations Treaties; www.un.org
[20] International Committee of the Red Cross, *International Humanitarian Law: Answers to Your Questions*, 1998,pp 1-13
[21] Henry Dunant, *A Memory of Solferino*, ICRC, 1986, pp 8-25

during armed conflict. He argues that international humanitarian law will only be observed by those who know it; hence the dissemination of IHL knowledge to members of the armed forces is essential.[22] Gasser's book only sets out the principles of IHL and the modes of its enforcement; it does not examine enforcement through tribunals which is the main focus of this study.

Wallace[23] and Shaw[24] examine the principles of international humanitarian law and its theoretical foundations. They discuss the scope of protection provided by the 1949 Geneva Conventions in cases of armed conflicts. Shaw further examines the implementation of international humanitarian law through the concept of Protective Power appointed to look after interests of nationals of one party to a conflict under the control of the other, whether as prisoners of war or occupied civilians, and the role of the International Fact Finding Commission set up under Additional Protocol I of 1977. Wallace highlights the main principles of international humanitarian law as contained in the 1949 Geneva Conventions. Wallace and Shaw do not however analyze the jurisprudence of the ICTY and the ICTR, which is the central theme of this study.

Establishment of International Criminal Tribunals (The Nuremberg War Crimes Tribunal, International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda)

Morris and Scharf[25] offer an insider's view of the facts leading to the creation of the International Criminal Tribunal for former Yugoslavia. Their book explores major

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[22] Hans-Peter Gasser, *International Humanitarian Law, An Introduction*, Henry Dunant Institute, Haupt, 1993
[23] Rebecca Wallace, *International Law*, 4th Edition, London: Sweet & Maxwell, 2002
[24] Malcolm N. Shaw, *International Law*, 4th Edition, Cambridge: Cambridge University Press, 1997
[25] Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary, History and Analysis,* (Volume 1), New York: Transnational Publishers, Inc., 1995

developments in the history of international criminal law since the adoption of the four Geneva Conventions of 1949 and their Additional Protocols of 1977. It gives a historical background of the conflict in the former Yugoslavia which conflict led to the establishment of the ICTY. Morris and Scharf examine in detail the legal basis for creation of the ICTY, the issues of individual criminal responsibility, territorial and temporal jurisdiction of the tribunal and cooperation and judicial assistance. They look into the contentious issues of death penalty and trials in *absentia* which were a common feature in the Nuremberg and Tokyo Trials and assesses the developments in international humanitarian law since Nuremberg. However, their book, although useful to this study, does not contain any jurisprudence of the tribunal since it was written before the trials began.

Bassiouni[26] provides a conceptual, doctrinal and policy analysis of international criminal law including its history, scope and content. He examines international crimes and international criminal investigations and prosecutions from Versailles to Rwanda which would be quite useful for this study. In what he refers to as the "Nuremberg Legacy" Bassiouni examines the legal, moral and ethical implications of the International Military Tribunals sitting in Nuremberg and Tokyo after the Second World War (1945-1946). He also looks at the issue of *jus cogens* and examines the legal basis for which crimes such as genocide, crimes against humanity, aggression, war crimes and slavery *inter alia* are considered as *jus cogens*. In the same book, Bertram Brown and Larry Johnson look at the establishment and jurisdiction of the International Criminal Tribunal for former Yugoslavia and the International Criminal Tribunal for Rwanda. They also

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[26] M. Cherif Bassiouni (Ed), *International Criminal Law*, 2nd Edition, Volume III, New York: Transnational Publishers Inc., 1999.

discuss the relationship between the two tribunals and national courts and examine some of the trials that have been undertaken by the two courts. However, the book was written in 1999 and since then, the two tribunals have delivered other judgments worth studying.

According to Bloxam,[27] the Nuremberg trials of major World War II criminals had great significance in the development of international humanitarian law. It was a multinational attempt to prosecute the leaders of a criminal regime for acts of state, thus extending the rule of international law beyond the existing jurisdiction by introducing individual criminal responsibility for acts of state. Bloxam analyses the achievements and shortcomings of the Nuremberg and Tokyo tribunals in light of the fact that they were created by the victors of the Second World War. Bloxam's book provides information on early attempts to enforce international humanitarian law through tribunals. However, it does not cover the main aspects of this study since the entire book dwells on the Nuremberg and Tokyo trials.

De Than and Shorts[28] specifically deal with international criminal law and expound on some of the main trials conducted by the ICTR and ICTY and their contribution to the development of international humanitarian law. They provide a detailed analysis of international crimes such as genocide, crimes against humanity and war crimes. The book examines the jurisprudence emerging from the two tribunals and highlights some of the salient issues that arose during the trials. This book will be useful in this study. It affirms that some aspects of international humanitarian law are now recognized under international customary law and have become part of *jus cogens* having been founded on

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[27] Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory,* Oxford, Oxford University Press, 2001.
[28] Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights*, 1st Edition, London: Sweet and Maxwell, 2003

principles of natural law. These include some war crimes and crimes against humanity such as torture.

There are writers like Kasto who regard international humanitarian law as a contemporary legal expression which means "the superior law that serves the common interest of mankind and its survival. It is the rules created by the legal conscience of humanity through practice, by custom and the needs of mankind."[29] The purpose of humanitarian law thus becomes the unity of the human race and its rules are essential to the co-existence of all societies in the international community. According to Kasto, the principles of humanity adopted in the 1949 Geneva Conventions and their two Additional Protocols of 1977 are imperative rules of general international law which are binding on all states as customary rules. They form the *jus cogens* of mankind.[30]

Ferencz[31] examines the Nuremberg and Tokyo tribunals, the reasons why they were formed, and identifies the shortcomings of the tribunals. He decries what he terms "victor's justice" that was reflected in the Nuremberg trials. He also examines the ICTR, ICTY and the International Criminal Court and the background to their establishment. Ferencz only gives a summary of the trials before the ICTR and the ICTY but does not examine in detail the tribunals' judgments.

Griffin[32] gives a brief history of the Nuremberg and Tokyo International Military Tribunals and modern international criminal tribunals such as the ICTY and ICTR. He analyzes the successes and failures of the tribunals in light of historical and political

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[29] Jalil Kasto, *Jus Cogens and International Humanitarian Law: International Law Series No. 2*, 1st Edition, Kingston: Jalil Kasto, 1994, p 53
[30] *Ibid.*, p 51
[31] Benjamin B. Ferencz, " From Nuremberg to Rome: Towards an International Criminal Court," *Development and Peace Foundation, Policy Paper No. 8*, May 1998
[32] James Blount Griffin, "A Predictive Framework for the Effectiveness of International Criminal Tribunals," *Vanderbilt Journal of Transnational Law*, Vol. 34, 2001

factors and then develops the factors into a predictive framework for the enforcement of international criminal law and the effectiveness of the permanent International Criminal Court (ICC).

Morris and Scharf,[33] in their two-volume work on the International criminal Tribunal for Rwanda provide information on the history, establishment and workings of the tribunal. Was the creation of the tribunal the best option available for responding to the 1994 genocide in Rwanda? What are its achievements? What problems has it encountered? These are some of the questions that Morris and Scharf attempt to address. They also address the general developments of international criminal law since Nuremberg.

Jurisprudence of the ICTY and ICTR

Kindiki[34] examines the contributions of the International Criminal Tribunal for Rwanda (ICTR) to the development of international humanitarian law. He examines the jurisprudential contribution of the ICTR and in the process, highlights the salient points of humanitarian law that the tribunal has clarified, reiterated, or emphasized. Kindiki's article is a major attempt to analyze the jurisprudence of the ICTR. Mchenry[35] provides a useful analysis of foundations of prosecutions of crimes against humanity by the ICTR and ICTY which this study will make reference to.

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[33] Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, New York: Transnational Publishers, 1998

[34] Kithure Kindiki, "Contributions of the International Criminal Tribunal for Rwanda to the Development of International Humanitarian Law," *33 Zambia Law Journal* (2002)

[35] James R. Mchenry III, "The Prosecution of Rape Under International Law: Justice that is Long Overdue," *Vanderbilt Journal of Transnational Law*, Volume 35, 2002

The jurisdiction of the ICTR and ICTY is examined in detail by Durham.[36] She explores challenges facing the two tribunals in carrying out their work, particularly, the reluctance of witnesses to give evidence for fear of victimization. The book examines the crimes that fall within the jurisdiction of the two tribunals such as genocide, crimes against humanity and other grave breaches of the Geneva Conventions of 1949.

Wagner[37] looks at the development of the grave breaches regime and individual criminal responsibility by the International Criminal Tribunal for the former Yugoslavia and pays particular attention to the interpretation given by the tribunal in adjudicating on the nationality requirement and the common purpose doctrine. She analyses the jurisprudence of the ICTY as relates to these two areas. According to Wagner the international community can only regulate human conduct through a reasonable as well as purposive interpretation of existing provisions of international customary law.[38]

Theoretical Framework

International humanitarian law is a branch of international law which governs relations between states and other subjects of international law. It comprises of rules which in times of armed conflicts, seek to protect persons who are not or are no longer taking part in hostilities and to restrict the means and methods of warfare to be employed. This study will be carried out within the guidance of the theory of natural law, which is one of the main paradigms of international law. Natural law is an old discipline that can be traced back to the evolution of the modern state system during the Peace of

[36] Hellen Durham & Timothy L. H. McCormack, *The Changing Face of Conflict and the Efficacy of International Humanitarian Law*, Hague: Kluiver Law International, 1999

[37] Natalie Wagner, "The Development of the Grave Breaches Regime and of Individual Criminal Responsibility by the International Criminal Tribunal for the Former Yugoslavia," *International Review of the Red Cross,* Vol. 85, No 850, June 2003.

[38] *Ibid.,* pp 351- 383

Westphalia Treaty of 1648. It is based on the idea of universal law reflected in nature. It is the law determined by man's human, spiritual and moral nature.[39]

Natural law scholars see natural law as the basis of obligation for international law. In Catholic theology, natural laws were ultimately derived from divine or God-given law consisting of a number of general principles that were supposed to guide the actions of men and the writings of the law. These laws were derived from man's observation of reality and his ability to see the operation of natural laws in the universe.[40] Natural law originated from Roman concepts and was based on the nature of man as a rational and moral being. It reflected reasonable principles that man could understand by applying human reason since it was reflected in nature itself.

The adoption of natural law brought with it the notion of natural rights that people have irrevocably as human beings, hence not even a state can take them away. According to Brierly,[41] natural law affirms that there is a purpose in the law since behind the letter of the law there are certain principles and purposes. Law should therefore be applied to serve that purpose which is the protection of the dignity of the individual. Brierly observed that natural law is founded on the dictates of right reason which signifies agreement or disagreement with the rational and social nature of man. St. Thomas Aquinas identifies the rational nature of human beings as that which defines moral law. To him, the law of nature was that part of the law of God which was discoverable by human reason, in contrast with the part which is directly revealed. Such an identification

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[39] J. E. Penner, *Morley & Whiteley's Law Dictionary*, 12th Edition, London: Butterworths, 2001, p 236
[40] William D. Coplin, *The Functions of International Law: An Introduction to the Role of International Law in the Contemporary World*, Chicago: Rand McNally & Company, 1966, pp 14-15
[41] James Leslie Brierly, *The Basis of Obligation in International Law and other Papers*, New York: Clarendon Press, 1958, p 24

of natural with divine law necessarily gave the former an authority, superior to that of positive law.[42] According to St Thomas Aquinas, an unjust law is no law at all.

This study seeks to show that international humanitarian law is part of natural law since it is derived from human nature and reason and seeks to uphold the dignity of the individual. The principles of IHL are considered to be part of international customary law which has evolved over the years mainly due to state practice and as result they are recognized in the international community. Accordingly, the adoption of the 1949 Conventions was merely a codification of existing international customary law.

This study further seeks to examine IHL within the broader concept of peremptory norms of international customs (*jus cogens*). The rules of *jus cogens* are rules of customary international law that are so fundamental that they cannot be modified by a treaty. Any treaty provision which conflicts with a rule of *jus cogens* is void regardless of whether the rule developed before of after the treaty came into force. These rules are so fundamental such that any act contrary to the rule is regarded as illegal no matter how often it is repeated.[43] This study therefore seeks to show that IHL has attained this status especially with regard to prohibition of genocide. The study presumes that the fundamental principles of IHL cannot be ousted by a subsequent treaty since they are deep rooted in customary international law and have attained the status of *jus cogens.* The rules of IHL must therefore be respected by all states regardless of whether they are parties to the relevant conventions or not, since they form part of customary international law. This proposition is reflected in the words of Article 1 common to the four Geneva Conventions of 1949 and the First Additional Protocol of 1977. It states,

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[42] St. Thomas Aquinas, Quoted in J. L. Brierly & Humphrey Waldock, *The Law of Nations: An Introduction to the Law of International Peace*, New York: Oxford University Press, 1963, pp 18-20
[43] Dixon Martin, *Textbook on International Law*, 4th Ed, London: Blackstone Press Limited, 2002, p 37-38

"The High Contracting Parties undertake to respect and to ensure respect for the present Convention/Protocol in all circumstances."

Hypotheses

This study assumes that the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for former Yugoslavia have made a positive contribution to the development and observance of international humanitarian law by reiterating, clarifying, or emphasizing its salient points. The study also assumes that the converse is true; i.e., the ICTY and ICTR have not contributed to the enforcement and development of international humanitarian law at all.

Methodology

This research would employ secondary data. Emphasis would be laid on the most current literature concerning the prosecutions and judgments of the ICTY and ICTR. The secondary data collection will involve library research that would include text books, journals, law reports, periodicals, newspapers, magazines, seminar papers, summit reports and other sources such as the internet. It will include UN reports, documents, and information from the International Committee of the Red Cross (ICRC) on the developments in IHL. The study will rely on secondary data since it consists of an analysis of decided cases, which form the mainstay of the jurisprudence of the two tribunals.

Chapter Outline

Chapter One of this study seeks to give a clear idea of the task the study is going to undertake and what it intends to achieve. Chapter Two will discuss the origins, sources and basic principles of international humanitarian law. It will discuss early attempts to

enforce international humanitarian law through the Nuremberg and Tokyo International Military Tribunals. It will also examine the philosophy and rationale for the creation of the International Criminal Tribunal for former Yugoslavia and the International Criminal Tribunal for Rwanda. Chapter Three will focus on the jurisprudence of the International Criminal Tribunal for former Yugoslavia while Chapter Four will examine the jurisprudence emerging from the International Criminal Tribunal for Rwanda. Chapter Five will critically analyze the jurisprudence of the two tribunals and its contribution to the enforcement of international humanitarian law. Chapter Six will consist of conclusions.

Chapter Two

International Humanitarian Law and the Establishment of International Criminal Tribunals (Nuremberg War Crimes Tribunal, International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda)

Introduction

This chapter examines the origins, sources and main principles of international humanitarian law. It will consist of the background, establishment and structure of the Nuremberg War Crimes Tribunal and the Court's influence on the development of international humanitarian law. This is especially due to the fact that the Nuremberg Tribunal was the first international court that tried individuals for violations of international humanitarian law. The tribunal was created to bring to justice individuals who had committed war crimes, crimes against peace and crimes against humanity during the Second World War.

After the Second World War, the United Nations adopted the 1948 Genocide Convention followed by the four Geneva Conventions of 12th August 1949. The latter became the backbone of contemporary international humanitarian law. In the few decades after the adoption of the Geneva Conventions of 1949, new forms of armed conflicts emerged, often sharp and violent but localized, involving troops and other combatants. This changing nature of armed conflicts called for further action which culminated in the Diplomatic Conference on the Reaffirmation and Development of International

Humanitarian Law that met in Geneva from 1974 to 1977.[1] The Conference adopted two Additional Protocols to the 1949 Conventions which deal with the protection of victims of international and internal armed conflicts. It is the basic principles contained in these four Geneva Conventions and their two Additional Protocols of 1977 that this chapter will focus on.

The background, structure and jurisdiction of the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) which constitute the main areas of this study will be discussed under this chapter. The ICTY, established on 25th May 1993 was the first judicial child of the United Nations Security Council. The Security Council is charged with maintenance of international peace and security; hence the prevention of armed conflicts is among its vital concerns.[2] The International Criminal Tribunal for former Yugoslavia was created to address atrocities that occurred in the territory of former Yugoslavia from 1st January 1991.

The United Nations also established the International Criminal for Rwanda (ICTR) on 8th November 1994 in response to the genocide in Rwanda that had led to the deaths of over 800,000 people in 1994. The aim of establishing the court was to bring mass murderers to justice and to restore peace.

Sources and Principles of International Humanitarian Law

International humanitarian law is the branch of international law which seeks to protect victims of armed conflicts from the cruel and inhumane consequences of war and

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[1] World Campaign for Human Rights, *"International Humanitarian Law and Human Rights: Fact Sheet No.13,"* United Nations, Geneva, July 1991, p 5

[2] See Article 24 of the Charter of the United Nations

protects human rights in times of armed conflicts.[3] It is also known as the law of armed conflicts or the law of war and can be seen as a specialized branch of international human rights law. It seeks to mitigate the effects of war by strengthening the protection of persons affected by hostilities such as civilian populations, prisoners of war, and combatants who are *hors de combat* by reason of sickness, injury or shipwreck. International humanitarian law does not concern itself with the question of whether states may or may not resort to the use of force. It acts on a different plane and steps in whenever war breaks out, whether or not such war was justified. It is an acceptance that although international law forbids the use of force in international relations(Article 2 (4) of the Charter of the United Nations), nevertheless in the exigencies of international life, sometimes states do go for war, hence international humanitarian law tries to regulate the conduct of such hostilities.

International humanitarian law was first codified in the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field adopted on 22nd August 1864 by 16 states, which formed a legal basis for the activities of army medical units in the battlefield. The adoption of the 1864 Geneva Convention can be traced back to the work of Jean Henry Dunant (1828-1910), a Swiss businessman, who is also known as the father of the Red Cross Organization.[4] The Convention entered into force on 22nd June 1865. It neutralized medical units and personnel in the battlefield and also provided that local inhabitants may not be punished for assisting the war wounded.[5] It made it clear that humanitarian work for the wounded and the dead, whether friend or foe, was

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[3] Kithure Kindiki, "Contributions of the International Criminal Tribunal for Rwanda to the Development of International Humanitarian Law," *33 Zambia Law Journal*(2001) p 34

[4] Henry Dunant, *A Memory of Solferino*, Geneva: International Committee of the Red Cross, 1986, pp 7-9

[5] Article 1-6 of the Convention

consistent with the law of war. It introduced the sign of the Red Cross on a white background for the identification of medical establishments and personnel.[6] The Organization was later expanded to include Muslim states who felt that they could not go to war protected by Christian symbols, hence the adoption of the use of the Red Crescent in conjunction with the Red Cross as a symbol of neutrality in battle fields and other situations of armed conflict. The Convention did not make any provision to protect the war wounded from ill treatment but only sets out the conditions in which such protection could be offered.

There are two basic sources of contemporary international humanitarian law. The first and principal source is referred to as the 'Geneva Law" which consists of the four Geneva Conventions of 12th August 1949 and their two Additional Protocols of 8th June 1977. The Conventions are; the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, the Convention Relative to the Treatment of Prisoners of War; and the Geneva Convention Relative to the Protection of Civilian Persons in Times of War. The four Conventions are considered to be some of the most ratified treaties having been ratified by 188 states, which represents almost all the world's states.[7] The First Additional Protocol strengthens the protection of victims of international armed conflicts. The Second Additional Protocol concerns the protection of victims of internal armed conflicts, including those between the armed forces of a government and dissidents or other organized groups, which control part of its territory. It

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[6] Article 7 of the 1864 Geneva Convention for the Amelioration of the Wounded Armies in the Field

[7] International Committee of the Red Cross, " *International Humanitarian Law: Answers to Your Questions,*" 1997, p 14

does not deal with internal disturbances and tensions in the form of riots, or other sporadic acts of violence.[8]

The first three Conventions offer protection to the wounded and sick of armed forces in the field and shipwrecked members of the armed forces at sea and also prisoners of war, respectively. The fourth Geneva Convention breaks new ground in that it protects civilian persons who have fallen into enemy hands from arbitrary treatment and violence. It is a realization by the international community that the worst crimes during the Second World War were committed against civilian persons in occupied territory.[9] The Conventions apply in all cases of declared war or any other armed conflict which may arise between two or more states even if the state of war is not recognized by one of the parties.[10] The application ceases at the general close of military operations, and in occupied territories, at the end of the occupation except for those categories of people whose final release, repatriation or resettlement takes place at a later date.[11] The Geneva Conventions prohibit reprisals and violations of the law in response to similar violations against protected persons, civilian and cultural property and the natural environment.[12]

To ensure that the Geneva Conventions are respected, parties to the conflict are required to cooperate and admit the supervision of Protecting Powers, usually neutral states appointed to safeguard the interest of the parties to the conflict in enemy countries. If such appointments have not been made, the International Committee of the Red Cross (ICRC) will offer the parties to the conflict its help in the designation of Protecting

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[8] Hans-Peter Gasser, *International Humanitarian Law: An Introduction*, Berne: Paul Haupt Publishers, 1993, p 77
[9] Ibid., p 12
[10] See Article 2 of the four Geneva Conventions and Article 1 of Additional Protocol I
[11] See Article 5 of the 1st & 3rd Convention and Article 6 of the 4th Convention.
[12] Article 46, 47, 13, & 33 of the Conventions I, II, III and IV respectively and Art. 20, 51&56 of Additional Protocol I

Powers.[13] The ICRC delegates are in particular authorized to go to all places where there are protected persons, prisoners of war or civil internees and to talk to them without witnesses. The ICRC is to be given all facilities to carry out its humanitarian work.[14]

Grave breaches of the Geneva Conventions involve any of the following acts, if committed against persons or property protected by the Conventions as supplemented by the Additional Protocol I, namely; willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or injury to body or health, any willful omission seriously endangering the physical or mental health or integrity of a person in the power of a party other than the one on which he depends, illegal detention, taking hostages and destruction of property among others.[15] The Conventions require governments to enact legislation necessary to provide effective penal sanctions for persons committing or ordering the commission of any of the grave breaches.[16]

The second source of international humanitarian law is the 'Hague Law', which consists of rules of customary international law on the means and methods of warfare to be adopted. These laws are laid down in the 1899 and 1907 Hague Conventions on the Laws and Customs of War and the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict. International humanitarian law also emanates from other instruments such as the 1868 Declaration of St. Petersburg which prohibited the use of projectiles weighing less than 400 grammes, the 1988 Ottawa Treaty banning anti-personnel landmines, the Chemical Weapons Treaty of 1993 that prohibits not only the use but also production of chemical weapons, and the 1998 Rome Statute of the

[13] Art 8 of Convention I, II & III and Articles 9 & 5 of the Convention IV and Additional Protocol I
[14] Article 10 of Convention I, II, III & Article 11& 143 of Convention IV, & Art 81of Additional Protocol I
[15] Articles 50, 51, 130, 147 of Convention I, II, III & IV respectively & Articles 11 & 85 of Protocol I
[16] Articles 49, 50, 129 & 146 of Convention I, II, III & IV respectively.

International Criminal Court among others. There is also the Convention of 14th May 1954 for the protection of cultural property in the event of armed conflicts which provides further protection to cultural objects in times of war.

The International Committee of the Red Cross[17] has summarized the fundamental rules of international humanitarian law to include rules for the protection of persons *hors de combat* and those who do not take a direct part in hostilities. Such persons are entitled to respect for their lives and physical and moral integrity and are to be protected and treated humanely in all circumstances without any adverse distinction. The wounded and sick are to be collected and cared for by the party to the conflict who has them in its power. Medical personnel and medical establishments, transports and equipment must be spared. The rules provide for respect for the Red Cross or Red Crescent on a white background as the sign of protection for protected persons and property. Captured combatants and civilians who find themselves under the authority of the adverse party are to be protected against all acts of violence or reprisal and should not be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment. Such persons are entitled to fundamental judicial guarantees and respect for their life and dignity.

The Geneva Conventions recognize the need to safeguard human rights even during wartime. Common article 3 of the four Geneva Conventions of 1949 provides that in times of armed conflict, persons protected by the Conventions should "in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria." The rules of

[17] International Review of the Red Cross, 1978, pp 248-249 and the International Committee of the Red Cross, "*International Humanitarian Law: Answers to Your Questions*", 1997, p 6

international humanitarian law as contained in either treaties or customary international law specifically limit the rights of warring parties to use means and methods of warfare of their choice, prohibits the use of weapons that may cause unnecessary losses or excessive suffering and protects civilians and civilian property that may be affected by armed conflicts.

However, inspite of these clear principles, the enforcement of international humanitarian law has often been hampered by the lack of international cooperation, absence of any proper legal enforcement mechanism and the principle of non-intervention in internal affairs of a state as enshrined in Article 2(7) of the UN Charter. The latter provision however, does not prohibit intervention under the auspices of the United Nations for protection of international peace and security, and protection of human rights which are considered the *raison d'etre* of contemporary international law. After the First World War, most states signed non-aggression pacts with their neighbours. Germany for instance signed such pacts with Czechoslovakia and Poland, although it later failed to respect it.[18] War was generally regarded as a legitimate means of resolving disputes, but in 1928, it was renounced by the Kellogg-Briand Pact. The Pact, signed in Paris on 27th August 1928, also renounced the use of war by states as an instrument of foreign policy. It provided that disputes of whatever nature between states should be settled through pacific means.[19] The Kellogg-Briand Pact was repudiated when Hitler invaded Poland and Czechoslovakia leading to the Second World War.[20] The spirit of the Pact however, lives on in Article 2(4) of the UN Charter. The inability to bring to justice

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[18] Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* ,1st Ed, London: Sweet and Maxwell, 2003, P.272
[19] Article I and II, The Kellogg-Briand Pact, 1928
[20] Howard S. Schiffman, "The Kellogg-Briand Pact," 2003, Sourced at http://www.internationallawhelp.com , (Accessed on 2nd August 2005)

perpetrators of war and its atrocities emphasized the need to create a more effective system of international criminal justice and this informed the formation of the Nuremberg and Tokyo Tribunals after the Second World War.

The Nuremberg War Crimes Tribunal

The Nuremberg International War Crimes Tribunal was created in response to the atrocities and violations of international humanitarian law that had taken place during the Second World War. Millions of Jewish men, women and children, gypsies and any perceived adversaries were murdered by Nazi Germany, prisoners of war were executed or starved to death, and civilians were forced into slave labour. Concentration camps such as Auschwitz in Poland and Flossenburg in Germany were described as factories dealing in death; although they had the primary objective of perpetrating mass slave labour, the conditions under which these people worked made labour and death synonymous.[21] Japanese troops also committed many atrocities in areas they occupied.

When the Second World War ended, the Allied Powers consisting of Britain, USA, Soviet Union and later France created the Nuremberg Tribunal under the London Charter of the International Military Tribunal of 1945 to try and punish government and military officials who had committed war crimes and all persons involved in humanitarian crimes against civilians.[22] It began its trials on 20th November 1945. Prior to Nuremberg, military tribunals and national courts dealt with the prosecutions of high ranking military and government officials for violations of international law during wartime. At most, a conquering army would court-martial the soldiers of a vanquished army. This proved

[21] Trial of *Rudolf Franz Ferdinand Hoess*, Commandant of the Aushcwitz Camp, Supreme National Tribunal of Poland, 11th-29th March, 1947, p 4 & 7
[22] Article 1, Charter of the International Military Tribunal

largely unsatisfactory as a deterrent to potential warmongers and war criminals.[23] Besides, the acts of the Nazis called for the establishment of an international tribunal to prosecute violations of universally accepted norms.[24]

There was also the International Military Tribunal for the Far East that was established in Tokyo on 19th January 1946 by the military order of General Douglas MacArthur pursuant to his authority as the Supreme Allied Commander for the Pacific. The Charter of the Tokyo tribunals was based on the Nuremberg Charter.[25] Other war crimes proceedings were conducted by the Allies under Control Council Number 10 (CCL 10) that permitted them to conduct prosecutions in their respective zones of occupation. Nuremberg was the first multinational criminal tribunal to try violations of international humanitarian law. By creating the Nuremberg tribunal, the Allies sought to punish not only those government and military officials directly connected with the war, but also all persons who had committed humanitarian crimes against civilians irrespective of where the crimes were committed.[26] The first trials were held at Nuremberg while subsequent trials were to be held at such other places as the tribunal deemed fit.[27]

Structure, Jurisdiction and Penalties

The Nuremberg tribunal consisted of four members and four alternates appointed by the four signatories to the Charter, namely; USA, Soviet Union, United Kingdom and France, on an equal basis. The four signatories appointed a Chief Prosecutor each and the

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[23] Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights*, 1st Ed, London: Sweet and Maxwell, 2003, P.271.
[24] Douglas W. Cassel, Jr., "Judgement at Nuremberg: A Half-Century Appraisal," *Christian Century*, December 6th 1995, pp 2-3. (http://www.findarticles.com)
[25] Charter of the International Military Tribunal for the Far East of 19th January 1946, Revised on 26th April 1946 (The Tokyo Charter)
[26] *Ibid, p* 273
[27] Article 1, Charter of the International Military Tribunal,1945

duties of the four prosecutors included the approval of indictments and drawing up rules of procedure.[28] The tribunal was to ensure that all accused persons were accorded a fair trial. However the judges and prosecutors were all appointed by the signatories to the Charter who were the victors of the Second World War, unlike either the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for the former Yugoslavia whose judges were appointed by the United Nations. The defendants and their counsel were neither allowed to challenge the tribunal nor its members and critics see this as an infringement on the fairness of the tribunal. [29]

The Charter empowered the tribunal to try three crimes, namely; crimes against peace, war crimes and crimes against humanity. Crimes against peace included the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances. This provision was aimed at addressing pre-war Nazi atrocities against German Jews which could not be treated as war crimes but which could be punishable as initial steps in a conspiracy to commit war crimes.[30] War crimes consisted of violations of customs of war, while crimes against humanity included murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war.[31] The Tribunal declared that crimes against humanity must in one way or another be connected with war crimes and any crimes within the jurisdiction of the tribunal.[32] This was done so as to

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[28] Article 14 of the Charter of the International Military Tribunal
[29] Article 3 of the Charter of IMT(1945)
[30] Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for former Yugoslavia: A Documentary, History and Analysis*, Volume 1, New York: Transnational Publishers, Inc., 1995, p 7
[31] Ibid, Article 6
[32] "The Nuremberg Trials," (1947) 41 AJIL 249

ensure that the offence does not face the *ex post facto* problem since in international law there can be no crime that is not earlier established by law.

The Charter of the International Military Tribunal made each individual responsible for his or her own commissions and omissions and the official position of defendants whether as heads of state or government officials could neither absolve them from criminal responsibility nor mitigate punishment.[33] The tribunal could try defendants *in absentia* and pass judgments if the persons had not been found or if the tribunal found it necessary to do so.[34] One defendant Martin Bormann was charged with conspiracy to wage aggressive war, war crimes, and crimes against humanity. He was directly linked to orders for enslaving and annihilating people in the occupied territories including issuing orders with respect to slave labour programmes and for prisoners of war. His trial proceeded in his absence and he was found guilty of war crimes and crimes against humanity and sentenced to death by hanging. The defence argued during the trial that the accused was already dead but the court relied on article 12 of the Nuremberg Charter and proceeded with the trial.[35] The tribunal's judgments were final and not subject to review or appeal. Article 9 introduced a new concept of group criminality. It declared Nazi organizations such as Nazi Schutzstaffel (SS), Gestapo and the Leadership Corps of the Nazi Party illegal and an individual could be tried for being a member of such an organization.

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[33] Articles 7 and 8 of the Charter of the International Military Tribunal
[34] Ibid, Article 12
[35] *The Nuremberg Trials: IMT Charter, Indictments, Verdicts and Sentencing of Major War Figures*, http://www.law.umkc.edu/faculty/projects (Accessed on 2nd August 2005)

Contributions of the International Military Tribunal at Nuremberg to the Development of International Humanitarian Law

In addition to restating war crimes, the Nuremberg Charter defined for the first time, "crimes against humanity" and "crimes against peace." However, crimes against humanity were limited to those committed in connection with other Nuremberg offences such as crimes against peace and war crimes.[36] Individuals were also held accountable, not only for specific war infringements contrary to international humanitarian law, but also for conduct amounting to crimes against humanity. All the accused before the tribunal argued that states, not individuals, were subjects of international law, and therefore individuals neither had obligations nor could be punished. They emphasized that their only obligations were to the Nazi state, which according to them was liable in international law. They further argued that the acts they committed were acts of state and consequently, they were not liable because of the doctrine of sovereignty of the state. These arguments were rejected by the tribunal which ruled that the accused were individually liable under international law.[37]

The Nuremberg and Tokyo Tribunals were the first international tribunals in history ever established to try major war criminals.[38] The world's attention was focused for the first time on the general principles of international law regarding war crimes and this sent out a signal that the international community would no longer tolerate man's "inhumanity to man."[39] The fate of defeated political leaders was decided in a court of

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[36] Article 6 of the Charter of International Military Tribunal

[37] (1947) 41 AJIL 172 [The *Allied nations* v *Nazi Leaders*, International Military Tribunal at Nuremberg]

[38] M. Cherif Bassiouni, " The Nuremberg Legacy," in M. Cherif Bassiouni,(Ed), *International Criminal Law: Enforcement,* 2nd Ed, New York: Transnational Publishers, Inc., 1999, p 196

[39] Claire de Than & Edwin Shorts, *International Criminal Law and Human Rights*, 1st Edition, London: Sweet and Maxwell, 2003, p 276

law instead of resort to other methods such as summary executions and court martials.[40] The victors left the punishment of individuals to the determination of judges guided by legal principles and having due regard to evidence for the defence and the prosecution, and the proceedings were taken in public. The accused were, for the most part, persons whose leadership responsibility for many atrocities before and during the war was notorious. Nevertheless, critics consider the selection of the twenty-four accused to have been arbitrary. This is because no industrialist was prosecuted even though many had used "slave labour" and could have been charged with crimes against humanity.[41] The Nuremberg Tribunal dealt with the matter of official position held by the defendants in the Nazi Government and also the issue of 'superior orders.' Article 7 of the Charter specifically provided that the official position of the defendants, whether as head of state or an official in the government would neither exonerate them from responsibility nor mitigate the punishment.[42]

The Charter of the International Military Tribunal was affirmed by the General Assembly of the United Nations as a valid expression of international law.[43] The jurisprudence of the Nuremberg Tribunal laid the foundation for other subsequent war crime trials conducted under Control Council Law No. 10 by military tribunals in occupied zones in Germany and other trials in liberated and allied nations. The tribunals provided a legal precedent for the setting up of the *ad hoc* International Criminal Tribunal

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[40] Virginia Morris & Michael P. Scharf , *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, Volume 1, New York: Transnational Publishers, Inc., 1995, p 8

[41] Ibid p 19, see also Bradley F. Smith, *Reaching Judgment at Nuremberg*, New York: Basic Books, Inc., 1977, pp 304-305

[42] Alina Kaczorowska, *Public international Law: 150 Leading Cases*, London: Old Bailey Press, 2002, p 410.

[43] See Resolution 95(1) of the United Nations General Assembly adopted on 11th December 1994

for the former Yugoslavia and the International Criminal Tribunal for Rwanda more than 50 years later.

Nuremberg's definition of persecution as a crime against humanity led to the adoption of the Genocide Convention of 1948, which recognizes the possibility of trial of alleged perpetrators before an international tribunal. The Charter's definition of war crimes was developed and codified in the four 1949 Geneva Conventions. The principles embodied in the Nuremberg Charter influenced considerably the development of rules of international law concerning the extradition of war criminals, the non-applicability of statutory limitations to war crimes and the increase in the number of crimes that can be termed "crimes against humanity."[44] It demonstrated the feasibility of an international criminal court and guided efforts within the United Nations to establish a permanent international criminal court that culminated in the adoption of the Rome Statute of the International Criminal Court in 1998 that created the International Criminal Court.

The Question of "Victor's Justice"

Under article 6 of the Nuremberg Charter, the jurisdiction of the Nuremberg Tribunal was limited to "persons who, acting in the interests of the European Axis countries," committed the acts enumerated in the provision and defined as international crimes. This was clearly aimed at punishing Germany and its allies who had lost the war and this raises the question of victor's justice since the USA, Russia and other victors were expressly excluded from the jurisdiction of the tribunal. It is also argued that the Nuremberg Tribunal administered justice only as the victorious World War II Allies defined it, since the defendants were prosecuted and punished for crimes defined in an

[44] Igor P. Blishchenko, "Responsibility in Breaches of International Humanitarian Law,"in *International Dimensions of Humanitarian Law*, Henry Dunant Institute, Dordrecht: Martinus Nijhoff Publishers, 1988, p 286

instrument (International Military Tribunal Charter) adopted by the victors.[45] However, although the Charter was adopted by four states, it was later acceded to by 19 other countries. It is further argued that the tribunal was a victors' tribunal before which only the vanquished were called to account for violations of international humanitarian law even though allied personnel had also committed serious violations during the war. Furthermore, the prosecutors and judges were drawn from the victorious states. Basically the entire process was in the hands of the victors.[46]

The principal prosecutor, Robert Jackson of the USA declared in his speech at the opening of the trials that few neutral states remained after the Second World War, therefore, either the victors try the vanquished or their own people try the vanquished. He however dismissed the latter option as useless considering the experience of the First World War.[47] The judges had a right to determine penalties to be imposed on the defendants as they deemed just that included death.[48] The rights of an accused were limited considering that the Nuremberg Charter allowed for trials in the absence of the accused, and a judgment delivered by the tribunal was final and not subject to any review.[49] For instance, one of the accused persons Martin Bormann was convicted and sentenced to death although his whereabouts were unknown.[50] Any challenges relating to

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[45] Julia Preston,"UN Creates Tribunal to Try War Crimes in Yugoslav Warfare," *Washington Post*, 23rd February 1993

[46] M. Cherif Bassiouni, " The Nuremberg Legacy," in M. Cherif Bassiouni,(Ed), *International Criminal Law: Enforcement,* 2nd Ed, New York: Transnational Publishers, Inc., 1999, p 10

[47] *Proceedings of the trial of the Major War Criminals at the International Military Tribunal*, Nuremberg, 14th November 1945-1st October 1946, Nuremberg, 1947, Volume 2, p 110

[48] See Article 27

[49] Article 12 and 26 of the Charter of International Military Tribunal

[50] Virginia Morris & Michael P. Scharf , *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, Volume 1, New York: Transnational Publishers, Inc., 1995, p 332. See also Bradley F. Smith, *Reaching Judgment at Nuremberg*, New York: Basic Books Inc. Publishers, 1977, p 301-302

the tribunal or its judges were not allowed either.[51] The tribunal over-simplified the evidentiary requirements by precluding the technical rules of evidence developed under the common law system of jury trials as this was deemed unnecessary. It could admit any evidence, which it considered to have a probative value. It allowed the prosecutor to use *ex-parte* affidavits against the accused regardless of objections from their attorneys.[52]

It has been argued that some of the applicable laws such as crimes against peace were formulated to fit the facts then and were in part *ex post facto.* Most defendants submitted that crimes against peace were not considered as crimes under customary international law and there was no specific convention declaring aggression a justiciable international crime for which individual criminal responsibility could be ascribed; hence it was improper to include it in the Nuremberg Charter. The Allies countered this by arguing that those states which attack others in contravention of existing treaties such as the Pact of Paris (Kellogg-Briand Pact) and the Hague Convention of 1907, contravene international law, and therefore their conduct was illegal.[53] However it has been argued that reliance on several previous treaties such as the Pact of Paris, which did not criminalize war, was not adequate to satisfy principles of legality and hence crimes against peace were a form of *ex post facto* legal application of questionable legal norms.[54]

It has also been contended that the allies set up the tribunals for political purposes and revenge motives. The bombing of Hiroshima and Nagasaki caused immense destruction, but the allies defended them on the grounds of military necessity. They

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[51] See Article 3
[52] See Article 19
[53] Claire de Than & Edwin Shorts, *International Criminal Law and Human Rights*, 1st Ed, London: Sweet and Maxwell, 2003, pp 274 - 275
[54] M. Cherif Bassiouni, " The Nuremberg Legacy," in M. Cherif Bassiouni,(Ed), *International Criminal Law: Enforcement,* 2nd Ed, New York: Transnational Publishers, Inc., 1999, p 205

argued that the bombings were conducted legitimately against the enemy and this is regardless of the destruction caused.[55] In *Shimoda v. The State*,[56] Japanese citizens brought a claim against the USA for dropping atomic bombs on Hiroshima and Nagasaki in violation of the laws and customs of war. The atomic bombs killed and injured thousands of innocent civilians. The case, which was the only one brought against World War II allies for war crimes was rejected by the Supreme Court of Japan on 7th December 1963 on technical jurisdictional grounds.

International Criminal Tribunal for the Former Yugoslavia

The International Criminal Tribunal for former Yugoslavia (ICTY) was created in 1993 through United Nations Security Council Resolution 827. The creation of the ICTY was based on the Security Council's determination that widespread atrocities in the territory of the former Yugoslavia constituted a threat to international peace and security. Consequently the tribunal was established under Chapter VII of the United Nations Charter, which authorizes the Security Council to decide what measures not involving use of armed force are to be employed to give effect to its decisions.[57] Although the Charter does not expressly authorize the Security Council to establish an international tribunal, Chapter VII has been interpreted to confer on the Security Council the powers necessary to fulfill its primary responsibility of maintaining international peace and security including the establishment of international tribunals, subject to the principles

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[55] Claire de Than & Edwin Shorts, *International Criminal Law and Human Rights,* 1st Ed, London: Sweet and Maxwell, 2003, p 275

[56] [1965] AJIL 759

[57] See Article 41 of the UN Charter

and purposes of the United Nations.[58] In the *Tadic* Case,[59] the trial chamber ruled that the Security Council had power to set up the ICTY, given that the threat to peace posed by the conflict in former Yugoslavia arose because of large scale violations of international humanitarian law by individuals. It was therefore necessary for action to be taken against such individuals.

The Statute of the International Criminal Tribunal for former Yugoslavia[60] sets out the offences that fall within the tribunal's jurisdiction. It gives the ICTY the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia since 1st January 1991. The violations include grave breaches of the Geneva Conventions of 1949 such as torture and inhumane treatment, biological experiments, taking of civilian hostages, violation of the laws and customs of war, genocide, murder, extermination, rape, enslavement, imprisonment, persecution and other inhuman acts. The seat of the tribunal is at The Hague.

Jurisdiction of the ICTY

The jurisdiction of the ICTY is limited to natural persons.[61] While the Nuremberg tribunal was empowered to try only persons acting in the interests of the Axis countries, the personal jurisdiction of the ICTY extends to any person regardless of nationality, alleged to have committed the crimes referred to in the tribunal's statute, within the territory of the former Yugoslavia since 1991.[62] This category is wide enough to include

[58] Virginia Morris & Michael P. Scharf , *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis,* Volume 1, New York: Transnational Publishers, Inc., 1995, p 18

[59] Para 36, *Prosecutor v. Dusco Tadic*, Case No. IT-94-1-T(International Criminal Tribunal for the former Yugoslavia)

[60] The Statute was adopted vide UN Security Council Resolution 827 of 25th May 1993

[61] See Article 6 of the Statute of the International Criminal Tribunal for Former Yugoslavia

[62] See Article 6 of the International Military Tribunal Charter

even mercenaries. Articles 1 to 5 of the statute of the tribunal, gives the tribunal jurisdiction over war crimes, crimes against humanity and genocide, committed in the territory of the former Yugoslavia. The wording of article 3 ensures that all relevant, well-established international law including laws or customs of war fall within the tribunal's jurisdiction.

However, article 1 of the ICTY Statute sets out three limitations to the jurisdiction of the tribunal. These include territorial limitation; which requires that acts committed must have been committed within the territory of the former Yugoslavia; the temporal jurisdiction; meaning that those acts must have been committed since the beginning of 1991; and lastly the acts must constitute serious violations of international humanitarian law. All crimes within the jurisdiction of the ICTY except genocide must be committed in the context of an "an armed conflict."[63] For a crime to fall within the jurisdiction of the ICTY there has to be a nexus between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law.[64] Article 5 of the tribunal's statute clearly stipulates that the acts listed in it constitute crimes against humanity within the jurisdiction of the tribunal only if committed in an armed conflict, whether internal or international in character, and directed against a civilian population.

Article 4 of the ICTY Statute adopts *verbatim* the definition of genocide in the 1948 Genocide Convention which defined genocide as an attempt to eliminate, in whole or in part, a "national, ethnical, racial or religious group" by killing members of the group, causing them serious bodily or mental harm, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,

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[63] See *The Prosecutor v. Dusko Tadic*, Case No. IT-98-1-A, Para 70

[64] *Tadic* Case, Case No. IT-98-1-T, para 568

imposing measures intended to prevent births within the group or forcibly transferring children of the group to another group. Since genocide requires proof of the intention to destroy a group in whole or in part, it is usually the most difficult charge to prove, particularly against lower-level persons whose connection to a policy may be hard to determine.

Article 3 of the statute of the tribunal is broad enough to encompass any serious violations of international humanitarian law not covered by the more specific articles as mentioned earlier as long as the persons to be prosecuted are those violating the laws and customs of war. Violations of common article 3 of the Geneva Conventions of 1949 can be prosecuted under this article. For instance in *Prosecutor v. Furundzija,*[65] the accused was charged *inter alia* with aiding and abetting outrages on personal dignity including rape which is a reflection of the provisions of common article 3 (1) (c) of the 1949 Geneva Conventions. As discussed in Chapter Three, the jurisprudence of the tribunal has developed the definitions of basic crimes such as grave breaches, violations of the laws and customs of war, and crimes against humanity.

The statute of the ICTY recognizes the principle of concurrent jurisdiction where the tribunal and national courts have jurisdiction to prosecute persons for serious violation of international humanitarian law although the tribunal has primacy over national courts.[66] Primacy means that at any stage of the proceedings, the international tribunal may formally request a national court to defer to it competence.[67] The rationale for granting international tribunals primacy over national courts is to prevent multiple

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[65] International Criminal Tribunal for former Yugoslavia, IT- 95-17/1(Trial Chamber II)
[66] Article 9 of the Statute of International Tribunal for Former Yugoslavia (ICTY)
[67] Bartram S. Brown, "The International Criminal Tribunal for Former Yugoslavia," in M. Cherif Bassiouni,(Ed) *International Criminal Law: Enforcement*, 2nd Edition, Volume III, New York: Transnational Publishers, Inc., 1999, p 504

courts from simultaneously exercising jurisdiction over an accused as this would cause evidentiary problems resulting from different investigative procedures from each individual system.[68] The trial chamber is supposed to ensure that a trial is fair and expeditious, and that proceedings are conducted in accordance with the tribunals' rules of procedure and evidence, with full respect for the accused and due regard for the protection of victims and witnesses.[69] Unlike the Nuremberg Tribunal, the ICTY does not provide for trials *in absentia* as this would be inconsistent with international fair trials standards although the laws of civil law countries provide for such trials.[70]

Individual Criminal Responsibility

Individual responsibility for unlawful behaviour is the essence of international criminal law and the principles of individual criminal responsibility are intended to ensure that all those who contribute to the commission of a crime are held accountable. According to Morris and Scharf, national law cannot preclude the imposition of criminal responsibility.[71] The defendants before the Nuremberg Tribunal defended themselves by arguing that the acts in question were acts of the state and therefore those who carry them out are not personally responsible but are protected by the doctrine of sovereignty of state. The tribunal rejected this argument and ruled that international law imposes duties

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[68] *Radovan Karadzic & 2 Others, Prosecutor, v*, ICTY (Case No. IT-95-5-D,T, Submissions by the Prosecutor, para 24

[69] Ibid Art. 20, 21 (3)

[70] Bartram S. Brown, "The International Criminal Tribunal for Former Yugoslavia," in M. Cherif Bassiouni,(Ed) *International Criminal Law: Enforcement*, 2nd Edition, Volume III, New York: Transnational Publishers, Inc., 1999, p 513

[71] Virginia Morris & Michael P. Scharf , *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, Volume 1, New York: Transnational Publishers, Inc., 1995, p 92

and liabilities upon individuals and states and hence individuals can be punished for any violations.[72]

Article 7 of the statute of the ICTY establishes individual criminal responsibility. Under this provision a person who plans, instigates orders, commits or otherwise aids and abets in the planning, preparation or execution of the crimes set out in the statute is individually liable. The official position of any accused person whether as head of state or government or other official shall not relieve such person of criminal responsibility. The fact that any of the prescribed offences was committed by a subordinate does not relieve his superior of criminal responsibility if the superior knew or ought to have known that the subordinate was about to commit such acts or had done so and the superior failed to take necessary and reasonable measures to prevent such acts or punish its perpetrators. The purpose of individual criminal responsibility relating to official position, command responsibility and superior orders is to ensure the criminal responsibility of all persons through the chain of command who contributed directly or indirectly to the commission of war crimes or crimes against humanity. This may include senior government officials who formulated the policy, superiors who ordered subordinates or looked the other way when such acts were being committed, accomplices, perpetrators and co-conspirators.

According to Morris and Scharf,[73] a superior is liable in international law if the person; fails to take necessary or reasonable measures available at the time to prevent the

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[72] The *Allied nations* v *Nazi Leaders* (International Military Tribunal at Nuremberg) [1947] 41 AJIL 172
[73] Virginia Morris & Michael P. Scharf , *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, Volume 1, New York: Transnational Publishers, Inc., 1995, p 100

subordinate from committing the crime; fails to stop the subordinate from committing the crime and fails to punish the subordinate for the crime and thus deter criminal activity. However if a defendant can demonstrate that the act in question was not committed out of his own free will but rather as a result of the compulsory nature of the order of the superior, it may be a mitigating factor, but it does not completely absolve the person from liability. The true test is whether indeed moral choice was possible at the time the order was issued.[74]

Penalties by the ICTY

The statute of the ICTY limits the tribunal's penalties to imprisonment, which marks a departure from the Nuremberg Charter that provided for death as one of the penalties. The Second Optional Protocol to the International Convention on Civil and Political Rights prohibits the death penalty as it is considered inhuman. This is why it is not provided for as a means of punishment in both the ICTY and the ICTR Statutes. In determining the prison terms, the ICTY has to have recourse to the general practice regarding prison sentences in the courts of former Yugoslavia and such other factors as the gravity of the offence and individual circumstances of the accused person may dictate.

The International Criminal Tribunal for Rwanda

On 8th November 1994, the Security Council adopted Resolution 955 (1994) that established the International Criminal Tribunal for Rwanda (ICTR). The main purpose of

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[74] Farhad Malekian, *International Criminal Law: The Legal and Critical Analysis of International Crimes*, Volume 1, Uppsala: Farhad Malekian, 1991, p 136

the tribunal is to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states between 1st January and 31st December 1994. The statute of the tribunal was adopted under Chapter VII of the UN Charter vide United Nations Security Council Resolution 955 (1994). It borrows heavily from the Statute of the International Criminal Tribunal for former Yugoslavia that had been adopted eighteen months earlier, but with some marked elementary and essential differences.

After the creation of the ICTR, there were questions as to whether the establishment of such a tribunal by a Chapter VII resolution was legally justified. Unlike the ICTY, which had been established while the conflict was still underway and as a measure to prevent and deter further atrocities, the ICTR was established at a time when, although peace and national reconciliation had not been achieved, the civil war, at least, was virtually over. It was argued that the establishment of the tribunal by means of a Chapter VII resolution was nevertheless necessary to ensure Rwanda's continued cooperation in all circumstances and also to ensure the cooperation of third states, in particular those in whose territories former leaders and principal planners of the genocide had sought refuge.[75]

Jurisdiction of the ICTR

The scope of the territorial jurisdiction of the ICTR extends to the territory of Rwanda, and to the territories of neighboring states in respect of genocide and other

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[75] Wang Tieya & Sienho Yee (Editors), *International Law in Post Cold War World: Essays in Memory of Li Haopei*, London: Routledge, 2001, p 374

serious violations of international humanitarian law committed by Rwandan citizens between 1st January 1994 and 31st December 1994.[76] This differs with the ICTY that only has power to prosecute persons responsible for violations of international humanitarian law committed in the territory of former Yugoslavia.[77] In the Rwandan case, the extension of jurisdiction to the territories of neighboring states by the Security Council was intended to cater for serious violations of international humanitarian law that were alleged to be taking place in refugee camps situated in the adjoining territories where remnants of the defeated Hutu army, including units responsible for the massacres in Rwanda had taken refuge. The extended territorial jurisdiction of the tribunal was also designed to encompass the broadcasting from radio stations, which throughout the conflict were alleged to have incited the genocide, and after the fall of the Hutu regime, they had reportedly broadcast from mobile bases outside Rwanda.

The temporal jurisdiction of the tribunal is limited in that it runs from 1st January 1994, to 31st December 1994.[78] This is unlike the ICTY whose temporal jurisdiction commences on 1st January 1991 and continues thereafter.[79] In determining the commencement date to be 1st January 1994, rather than 6th April 1994, when the civil war broke out followed by genocide, the Security Council intended to encompass the planning stage of the crime of genocide, and thus ensure that the leaders and principal planners of the genocide were caught within the temporal jurisdiction of the tribunal. It was also designed to address violations that may have been committed by the Tutsi Government, which had come to power in July 1994. The Rwanda Government had

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[76] See Article 1 of the Statute of the International Tribunal for Rwanda (as amended)
[77] See Article 1, Statute of the International Criminal Tribunal for Former Yugoslavia
[78] See Article 7 of the Statute
[79] Ibid, Article 9

suggested that 1st October 1990 be determined as the commencement date in order to cater for the massacres of 1991, 1992 and 1993, which preceded the major genocide of April 1994. The end date of 31 December 1994 was thus established as a compromise between the limited approach of the Rwandan Government, which was unacceptable to members of the Security Council, and the open-ended formula adopted in the Yugoslav Tribunal, which was not appropriate in the context of Rwanda.[80]

Due to the non-international character of the Rwanda conflict the jurisdiction of the tribunal is limited in scope. It has powers to prosecute persons committing the crime of genocide, crimes against humanity and violations of common Article 3 of the Geneva Conventions of 1949 and Additional Protocol II of 1977. In its definition of the crime of genocide, article 2 of the statute of the ICTR replicates Article II of the Genocide Convention of 1948.[81] Article 3 reproduces the list of crimes against humanity provided for in article 5 of the Statute of the ICTY originally established in article 6 (c) of the Nuremberg Charter.

Unlike in the Nuremberg Tribunal where crimes against humanity were linked to other war crimes, the Statute of the Rwanda Tribunal recognizes them as a separate category of crime. Crimes against humanity were customarily recognized as applicable in international armed conflicts until, in the statute of the ICTY, where they were extended to apply to non-international armed conflicts as well. In omitting any reference to an armed conflict of any kind from the statute of the Rwanda tribunal, the Security Council extended its application to times of peace. This is a positive development in the field of

[80] Wang Tieya & Sienho Yee, (Editors), *International Law in the Post Cold War World: Essays in Honour of Li Haopei*, London: Routledge, 2001, p 374
[81] See also Article 4 of the Yugoslav Statute

international humanitarian law although it has not been declared a settled rule of international customary law.

Article 4 of the Statute of the ICTR gives the tribunal power to prosecute violations of article 3 common to the four Geneva Conventions of 12th August 1949 and of Additional Protocol II of 8th June 1977. These violations include violence to life or physical or mental well being of persons, in particular, murder, and cruel treatment, collective punishment, taking of hostages and acts of terrorism. In empowering the ICTR to prosecute persons responsible for violations of article 3 common to the Geneva Conventions and article 4 of Additional Protocol II, the Security Council elected to follow less strict criteria for the choice of the applicable law than that which it adopted in the Statute of the ICTY. Unlike the ICTY that was empowered to apply provisions of a customary international law nature entailing the criminal responsibility of the perpetrator of the crime, the Rwanda tribunal is empowered to apply provisions of Additional Protocol II. The article also places acts of terrorism within the competence of the tribunal and also the taking of hostages.[82]

Following the precedent of the statute of the ICTY, the statute of the Rwanda tribunal excludes the death penalty from the list of penalties the tribunal is empowered to impose. The penalties imposed by the trial chamber are limited to imprisonment. The Second Optional Protocol to the International Convention on Civil and Political Rights prohibits the death penalty as it is considered an inhumane form of punishment. For the government of Rwanda, however, the death penalty was the only punishment befitting the crime of genocide. In its view, the exclusion of the death penalty from the list of penalties the tribunal is empowered to impose and its continued existence under

[82] See Article 4 of the Statute of the International Criminal Tribunal for Rwanda

national law, created a situation where the leaders and the principal planners of the crime of genocide could be prosecuted and sentenced to life imprisonment, while thousands of common civilians, who for the most part were manipulated by their leaders, could be subject to the death penalty.[83] Furthermore, it was argued that persons convicted by the international tribunal would enjoy relatively comfortable conditions of detention in territories of third states and a prospect of pardon or commutation as might be permitted under the laws of the detaining state.

Since the Security Council could not compromise on principle on the issue of the death penalty, the provisions on enforcement of sentences, pardon and commutation were modified to take into account some of Rwanda's concerns. Thus, whereas the statute of the ICTY expressly excludes the former Yugoslavia as one of the places where prison sentences may be served, article 26 of the Statute of the ICTR provides that imprisonment shall be served in Rwanda, as a first priority, or in any of the states which have indicated to the Security Council their willingness to accept convicted persons.

The United Nations Security Council also modified the provision on pardon and commutation slightly to emphasize that although the process of pardon and commutation is triggered by the law of the state in whose territory the convicted person is imprisoned, the decision on pardon and commutation can only be made by the President of the tribunal, in consultation with the other judges. The Council had furthermore decided in its resolution 955 (1994) that the government of Rwanda should be notified prior to the taking of decisions under articles 26 and 27 of the ICTR statute.

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[83] See Statement by the Permanent Representative of Rwanda following Voting at the Security Council in 1994, UNSC Provisional Verbatim Record, 3453, UN DOC. S/PV.3453 (1994)

The creation of the ICTY and ICTR has contributed significantly to the enforcement of international criminal law since the time of the Nuremberg trials. At Nuremberg, the judges were drawn from the four super powers (USA, Russia, France and Britain). The composition of the ICTR and ICTY judges has changed dramatically, they are chosen by the United Nations from various states. Unlike Nuremberg there is no death penalty in the current tribunals and there are also no trials *in absentia* which characterized the Nuremberg trials. However the ICTR began the trial of *Andre Rwamakaba*[84]in his absence on 9th June 2005, but this was due to the fact that he refused to attend the proceedings. The judgments of the trial chamber in both the ICTY and the ICTR are liable to appeals, but at Nuremberg, the judgments of the International Military Tribunal were final.

The creation of the ICTR recognized the international criminalization of serious violations of international humanitarian law in an internal armed conflict.[85] The two tribunals have helped to clarify the definition and scope of crimes related to serious violations of international humanitarian law which include grave breaches of the Geneva Conventions of 1949, violations of the laws and customs of war, genocide and crimes against humanity. The ICTR has shown substantial reliance on the jurisprudence of the ICTY and vise versa. This has led to the development of the principle of *stare decisis* as contained in Article 38 of the Statute of the International Court of Justice. The establishment of the ICTY and ICTR has shown that that an international criminal court can enforce the fundamental international norms which prohibit atrocities in armed conflict.

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[84] *Prosecutor v. Andre Rwamakuba*, Case No. ICTR-98-44-T

[85] Kathure Kindiki, "Contributions of the International Criminal Tribunal for Rwanda to the Development of International Humanitarian Law," *33 Zambia Law Journal*, 2001, p 38

Chapter Three

Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY)

Introduction

The International Criminal Tribunal for former Yugoslavia was established by the United Nations Security Council to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia since 1991 in order to deter future violations of this branch of the law.[1] Article 2 of the Statute of the International Tribunal for former Yugoslavia (SITY), requires that the acts committed should constitute grave breaches of the Geneva Conventions of 12th August 1949 and must be against protected persons or property and be closely related to the armed conflict.

The case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) has provided and incrementally expanded definitions of rape and sexual violence which have become part of international criminal law. Among the main issues that arose for consideration before the ICTY is the question of whether or not article 2 of the tribunal's statute applies solely to international armed conflicts or if it can be applied to internal armed conflicts. Under customary international law it has been judicially decided that certain rules and principles protecting the civilian population apply to both internal and international conflicts.[2] The International Court of Justice in its *Namibia Advisory*

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[1] United Nations Security Council Resolution 872 of 1993 Adopted on 25th May 1993 (UN Doc.S/RES/872 (1993). See also *Prosecutor v. Mucic et al*, Case No. IT – 96 – 21(Appeals Chamber), February 20, 2001, para 801

[2] *Prosecutor v Dusko Tadic*, Case No. IT; 94-1, (Appeals chamber) Judgment of 15th July 1999

Opinion[3] of 1996 on the legality of the use of nuclear weapons affirmed that principles of international humanitarian law constitute intransgressible principles of international customary law.[4] It also held in the *Nicaragua*[5] case, that common article 3 of the 1949 Geneva Conventions, though conventional in origin, has crystallized into customary international law and sets out the mandatory minimum rules applicable in armed conflicts.

This chapter will examine the main jurisprudence emerging from the International Criminal Tribunal for former Yugoslavia (ICTY). It will cover salient issues of international humanitarian law that the tribunal has clarified, reiterated, developed or emphasized in its main decisions or judgments. The tribunal is required to respect the international human rights standards set out in the International Covenant on Civil and Political Rights (ICCPR) in developing rules of international criminal law and procedure.[6]

Jurisprudential Contribution of the ICTY

In the *Prosecutor v Dusko Tadic,*[7] the judgment offers insights into international criminal law and procedure. The tribunal heard the first ever testimony given of rape as a war crime. It also dealt extensively with the issue of individual criminal responsibility and addressed the requirement of a nexus between acts charged and the armed conflict in question.[8]

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[3] (1971) ICJ 16, 45
[4] [1996] ICJ Rep; 256-259.
[5] [1986] ICJ 4
[6] See Article 21 of the Statute of the Tribunal and Article 14 of ICCPR
[7] *Prosecutor v. Dusko Tadic*, Case No. IT – 94-1)
[8] Bartram S. Brown, "The International Criminal Tribunal for Former Yugoslavia," in M. Cherif Bassiouni (Ed) *International Criminal Law: Enforcement*, 2nd Ed, Volume III, New York; Transnational Publishers, Inc., 1999, p 494.

The accused Dusko Tadic, a Bosnian Serb, who was a karate instructor and part-time traffic policeman, was charged with participating in killings, torture, sexual assaults and other physical and psychological abuse of Muslims and Croats within the Omarska, Keraterm and Trnopolje Camps and outside. He was alleged to have participated in the attack, destruction and plunder of Bosnian Muslim and Croat residential areas, and the seizure, deportation and imprisonment of Muslims and Croats by Serb forces.[9] Many of the prisoners were tortured and killed, and women were sexually assaulted and raped. Tadic was charged with a total of 31 different counts that included willful killing, murder, crimes against humanity, cruel treatment and inhumane acts among others.[10] The trial chamber found him guilty on eleven counts and acquitted him of 20 counts.

One of the issues that arose for consideration was whether or not article 2 of the tribunal's statute, that gives the tribunal power to prosecute persons responsible for grave breaches of the Geneva Conventions of 1949, applies only to international armed conflicts as opposed to internal conflicts. The trial chamber held that the jurisdiction of the tribunal extends to serious violations of international humanitarian law that are part of customary international law, regardless of whether they arise from international or non-international armed conflicts. The trial chamber further held that the character of the conflict, whether international or internal, does not affect the subject–matter jurisdiction of the tribunal to try persons charged with violations of customs or laws of war. [11]

The tribunal considered it necessary to establish that an armed conflict existed at all relevant times in the territory of the Republic of Bosnia and Herzegovina, and that the

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[9] *Prosecutor v. Dusko Tadic*, Case No. IT- 94-1(Trial Chamber), May 7, 1997, para. 38
[10] *Ibid* para 46
[11] *Prosecutor v. Dusco Tadic*, Case No. IT – 94 - 1 T (Trial Chamber), Decision on the Defence Motion on Jurisdiction, August 10, 1995, para 58. See also Article 3 of ICTY Statute

acts of the accused were committed within the context of that armed conflict in order for it to assert its jurisdiction.[12] It held that an armed conflict occurs when there is resort to armed force between states or protracted armed violence between government authorities and organized armed groups or between such groups within a state.[13] The trial chamber found that an armed conflict was taking place between the parties to the conflict in the Republic of Bosnia and Herzegovina of sufficient scope and intensity to warrant application of the laws or customs of war embodied in article 3 common to the four Geneva Conventions of 1949.[14] The tribunal further set out conditions under which a *prima facie* internal conflict becomes international in character, and this includes when another state intervenes in the conflict through its troops and when some of the participants in the internal armed conflict act on behalf of another state.[15]

The tribunal stressed the need for nexus between the acts charged and the armed conflict in question which then gives rise to applicability of international humanitarian law.[16] It found that the acts of the accused were directly connected with the armed conflict.[17] The appeals chamber clarified that for article 2 to apply, the prosecutor had to demonstrate that the victims of the defendant's alleged crimes were protected persons by virtue of being in the hands of a country of which they were not nationals and that the conflict itself must possess the essential elements of being international. It ruled that the victims were protected persons under the 1949 Geneva Conventions (IV) of 1949 notwithstanding the fact that all parties to the conflict were nationals of Bosnia –

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[12] *Tadic*, Case No. IT – 95 – 1(Trial Chamber) Judgment of May 7, 1997, para 560
[13] *Tadic,* Case No. IT – 94 – 1 – A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, at para 70
[14] *Ibid* para 568
[15] *Prosecutor v. Dusko Tadic*, Case No. IT-94-1 (Appeals Chamber), July 15" 1999, para. 84
[16] *Ibid* para 572
[17] *Ibid* para 575

Herzegovina. It defined "protected persons" as those persons who do not enjoy diplomatic protection and are not subject to the allegiance and control of the state in whose hands they may find themselves in.[18] In this case the tribunal seems to have considered that modern warfare unlike past conflicts, mainly centre around ethnicity rather than nationality, thus making the requirement of nationality less adequate to define "protected persons." This decision was confirmed in the *Celebici*[19] case where the appeals chamber held that in the face of the changing nature of armed conflicts, it was incumbent upon the tribunal to evaluate, where applicable, the ethnic or religious status of the populous when determining the nationality of "protected persons." The tribunal considered this interpretation to be in line with the objects and purpose of the fourth Geneva Convention of 1949 which deals with protection of civilian persons in time of war.

This position was also adopted in *Prosecutor v Mucic, Delic & Ladzo*[20] where the appeals chamber held that determination of nationality for purposes of protection under the Geneva Conventions should not be based on formal national characterizations, but rather on an analysis of the substantial relations, taking into consideration the different ethnicity of the victims and the perpetrators, and their bonds with the foreign intervening state. The court held that to deprive victims who are of the same nationality as their captors of protection would be inconsistent with the object and purpose of the 1949 Geneva Conventions.[21]

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[18] *Tadic*, Case No. IT – 94 – 1 (Appeals Chamber), Judgment of July 15, 1999, para 168
[19] *Prosecutor v Delalic, Mucic, Delic & Land*, ("the *Celebici* Case"), Case No IT-96-21-T, Judgment of 20th February 2001.
[20] Case No. IT-96-21(Appeals Chamber) Judgment of 8th april 2003
[21] *Mucic et a,l* Case No. IT-96-21(Appeals Chamber) Judgment of 8th april 2003, para 81 & 84

Violations of Laws or Customs of War

In *Tadic,* the trial chamber set out four conditions which a particular law or custom of war must meet to fall within the tribunal's jurisdiction as set out under article 3 of the tribunal's statute, namely; "the violation must constitute an infringement of a rule of international humanitarian law; the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; the violation must be "serious", thus, it must constitute a breach of a rule protecting important values whose breach would involve grave consequences for the victim; and the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[22] The tribunal's jurisdiction under article 3 is wide enough to include the provisions of article 3 common to all the four Geneva Conventions of 1949 and not only covers international armed conflicts, but also internal insurrections and hostilities. The International Court of Justice in *Nicaragua*[23] applied customary international law in determining that the rules contained in common article 3 constitute a minimum yardstick applicable in both international and non-international conflicts. The appeals chamber in *Tadic* concluded that customary rules relating to protection of civilians in internal conflicts have developed, hence, civilians and civilian objects are currently protected from indiscriminate attacks in international and internal armed conflicts.[24]

Sexual Offences

The indictment against Tadic alleged that he participated in, and aided and abetted the commission of rape, sexual mutilation, and other forms of sexual violence. Rape was

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[22] *Tadic*, Case No. IT – 94 – 1, (Trial Chamber) para 610
[23] *Nicaragua – Vs – US* [1986] ICJ 4 (27. 6. 86
[24] *Tadic*, Case No. IT – 94 – 1 (Appeals Chamber), Judgment of July 15, 1999, para 127

widespread in the camps where Tadic was assigned.[25] However, what would have been the first case in which rape was prosecuted as a war crime by the ICTY failed because the prosecutor was forced to drop the rape charges when its only rape witness suddenly refused to testify, claiming that threats were waged against her person and her family.[26] Tadic was also acquitted of the charges relating to sexual mutilation and sexual violence against a male detainee due to lack of sufficient evidence.[27]

The Tadic trial chamber however heard the first ever testimony of rape as a war crime. Although the rape charges were withdrawn, witness testimony about rapes was used as part of the evidence against Tadic in relation to the other charges that he faced such as "inhumane acts" including sexual mutilation as a war crime. The tribunal stated that rape and other forms of sexual violence were pervasive and had devastating effects on the victims and the community; thus even a non-state actor or a minor official may be convicted as a perpetrator or an accomplice in sexual violence.[28]

Crimes against Humanity

The trial chamber in *Tadic* held that crimes against humanity as contained in article 5 of the ICTY statute apply only when such crimes are "committed in armed conflicts" and "directed against any civilian population." The first requirement necessitates the existence of an armed conflict and a nexus between the act and the conflict, while the second includes a broad definition of the term "civilian" and requires that the acts be undertaken on a widespread systematic basis and in furtherance of a

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[25] *Prosecutor v. Tadic*, IT-94-1, Second Amended Indictment, counts 2-4, 8-9 (Dec. 14, 1995)
[26] *Tadic* case, IT-94-1, (Trial Chamber),para 154 & 165, See also Rana Lehr-Lehnardt, "One Small Step for Women: Female Friendly Provisions in the Rome Statute of the International Criminal Court", *B.Y.U. Journal of Public Law*, Volume XVI, (2002).
[27] *Tadic Case*,(Trial Chamber), para 206
[28] *Ibid.,* para 539

policy.[29] The trial chamber was of the opinion that the relevant acts must be undertaken on discriminatory grounds and the perpetrator must have knowledge of the wider context in which his act occurs.[30] Such intent was not required by customary international law neither was it contained in the Nuremberg Charter, which clearly recognized two categories of crimes against humanity: those related to inhumane acts such as murder and, extermination, enslavement and deportation and those related to persecution on racial, political or religious grounds.[31]

Contrary to the trial chamber's finding, the appeals chamber ruled that article 5 of the tribunal's statute does not require all crimes against humanity to have been perpetrated with a discriminatory intent. Such intent was only necessary for the crime of "persecution" under article 5 (h) of the statute.[32] This interpretation is still restrictive in nature. The experience of Nazi Germany demonstrated that crimes against humanity may be committed on discriminatory grounds other than on political, racial and religious grounds as enumerated under article 5(h) of the ICTY statute.[33] Such grounds may include mental or physical disability, age or infirmity, or sexual preference. The strict enumeration under article 5 (h) means that persecution based on the above grounds would not fall within the ambit of crimes against humanity.

Genocide

In the *Prosecutor v Krstic*,[34] the defendant General Radislav Krstic was charged with genocide and in the alternative, complicity in genocide, in relation to the mass

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[29] *Ibid.*para 627
[30] *Ibid,* para 626
[31] *Ibid,* para 650 & 651
[32] *Tadic* Case No IT - 94 – 1 (Appeals Chamber) Judgment of July 15 1999, para. 283 & 293
[33] Alina Kaczorowska, *Public International Law: 150 Leading Cases*, 1st Edition, London: Old Bailey Press, 2002, p 428
[34] Prosecutor v Krstic, IT-98-33-T, (Trial Chamber)

execution of Bosnian men in Srebrenica between 11th July and 1st November 1995.[35] He was further charged with crimes against humanity, including extermination, murder, persecution and deportation (forcible transfer) and murder as a violation of laws or customs of war.[36] It was submitted at the hearing that General Krstic who was the Chief of Staff of the Drina Corps,a unit of the Bosnian Serb Army (VRS) participated in the criminal enterprise to kill Bosnian Muslim men from Srebrenica in July 1995. He was said to have "remained largely passive in the face of his knowledge of what was going on." It was also alleged that he assisted in deploying some men to carry out the executions.[37] Krstic was accused of responsibility for these acts as a result of his individual participation pursuant to article 7 (1) of the statute of the tribunal and also pursuant to the doctrine of command responsibility.

The trial chamber found General Krstic guilty of genocide, persecution, murder, cruel and inhumane treatment, forcible transfer and destruction of property of Bosnian Muslim civilians and murder as a violation of laws or customs of war. He was sentenced to a total of thirty-five years imprisonment. This was the first conviction by the ICTY for genocide. The trial chamber examined the specific elements of the crime of genocide. However, one of the main issues that arose for consideration by the tribunal was whether the acts allegedly committed by General Krstic were covered by article 4 of the tribunal's statute which defines genocide to cover "certain acts done with intent to destroy in whole or in part a national, ethnical, racial or religious group." The article does not require that the genocidal acts be premeditated over a long period of time.[38] It was alleged that Krstic

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[35]Ibid., Para 3
[36] *Ibid* para 1 & 2
[37] *Ibid.,* Para 600, 685 & 687
[38] See *Krstic*, (Trial Chamber), August 2, 2001, para 572

intended to destroy a part of the Bosnian Muslim group. The trial chamber determined that the Bosnian Muslims were a specific, distinct national group, and therefore covered by article 4.[39] It stated as follows;

> "Intent to destroy a group even if only in part means seeking to destroy a distinct part of the group, as opposed to an accumulation of isolated individuals within it. Although the perpetration of genocide need not seek to destroy the entire group protected by the Genocide Convention, they must view the part of group they wish to destroy as a distinct entity which must be eliminated as such."[40]

The prosecution argued that causing death to at least 7475 Bosnian Muslim men in Srebrenica out of a total population that numbered approximately 38,000 to 42,000 amounted to destruction of a substantial part of the group and that such offensive was aimed at ethnically cleansing the Bosnian Muslims.[41] The defense on their part argued that the acts of the Bosnian Serb Army at Srebrenica do not fall under the legal definition of genocide because there was no proof that they were committed with intent to destroy the group of Bosnian Muslim Serbs as an entity.[42]

The tribunal found that the VRS forces intended to destroy the group of Bosnian Muslims in Srebrenica as a community and this constituted genocide.[43] It cited the ICTR judgment in *Kayishema* and *Ruzindana*[44] in which it was held that intent to destroy a part of a group must affect a "considerable" number of individuals. In *Prosecutor v Ignace Bagilishema,* the ICTR recognized that the destruction sought must target at least a substantial part of the group.[45] The mental element of genocide differs from other

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[39] *Ibid.*, para 598
[40] *Ibid.*, para 590
[41] *Ibid.*, para 592
[42] *Ibid.*, para 593
[43] *Ibid.*, para. 605
[44] *Ibid.*, para 586, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, (Appeals Chamber) June 1, 2001
[45] *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T(Trial Chamber) June 7, 2001, see also *Prosecutor v Radislav Krstic*, Case No. IT- 98 – 33 – A, para 20

international crimes in that it requires specific intent (*dolus specialis*). In order for this specific intent to be established, it must be shown that the act was directed against a national, ethnical, racial or religious group and was carried out with the clear objective of destroying in whole or in part that particular group. Anything different may constitute another offence such as crimes against humanity and not genocide.[46] Acts which destroy a protected group in whole or in part but were not committed with intent to destroy that group would not constitute genocide. In the ICTR case of *Prosecutor v Akayesu*[47] it was held that proof of specific intent can be determined from the circumstances of a particular case. The tribunals have however not given any specific guidelines regarding the circumstances under which such intent can be drawn. In the ICTR case of *Kayishema and Ruzindana*,[48] it was held that "specific intent can be inferred from words and deeds and may be demonstrated by a pattern of purposeful action." In this case, Kayishema was the *prefect* of Kibuye where thousands of people were massacred in specific crimes sites. The tribunal found that the methodological manner in which these atrocities were committed was evidence of specific intent to commit genocide.[49]

The appeals chamber in *Krstic* set forth a number of considerations that may be used to determine whether the targeted part is substantial enough, and these include; the numeric size of the targeted part of the group as a starting point; the number of the group should be evaluated not only in absolute terms but also in relation to the overall size of the entire group; and the prominence of the targeted portion within the group. If a specific part of the group is emblematic of the overall group, or is essential to its survival, it may

[46] Claire de Than & Edwin Shorts, *International Criminal Law and Human Rights*, 1st Edition, London: Sweet & Maxwell, 2003, p 73
[47] Case No ICTR-96-4-1, Judgment of 2nd September 1998, para. 523
[48] Case No. ICTR-95-1-A, (Appeals Chamber) June 1, 2001
[49] *Ibid.*, para 527

make that part qualify as a substantial part.[50] Genocide is a unique crime whose aim is to physically or biologically destroy a targeted group. In *Krstic,* the tribunal noted that attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.[51]

Individual Criminal Responsibility

Article 7(1) of the ICTY statute states that "a person who planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of a crime referred to in articles 2 to 5 shall be individually responsible for the crime." The trial chamber found that Krstic exercised "effective control" over the Drina Corps troops and assets throughout the territory on which the detentions, executions and burials were taking place. He was aware of the piteous conditions of the civilians and their mistreatment by VRS soldiers.[52] The tribunal also found that the defendant shared the genocide intent to kill the Muslim men as he was aware that the killing of the Bosnian Muslim men of fighting age would result in the annihilation of the entire Bosnian Muslim community at Srebrenica. Although he did not conceive the plan to kill the men, the trial chamber found that he played a key coordinating role in its implementation and therefore found him guilty of the crime of genocide.[53]

Joint Criminal Enterprise

In *Krstic*, the trial chamber enumerated the three elements that must be proved for joint criminal enterprise liability to arise, thus, there has to be; a plurality of persons; the

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[50] *Ibid.*, para 12
[51] *Ibid.*, para, 580
[52] *Krstic* Case, Trial Chamber, para 631
[53] *Ibid.*,para 633

existence of a common plan, which amounts to or involves the commission of a crime provided for in the statute; and the common plan or purpose may have been previously arranged or may materialize extemporaneously and be inferred from the fact that a plurality of persons act in unison to put into effect a joint criminal enterprise.[54] If a crime falls within the object of the joint criminal enterprise, it must be established that the accused shared the same state of mind required for that crime with the person who personally perpetrated the crime. If the crime charged went beyond the object of the joint enterprise, the prosecution needs to establish only that the accused was aware that the further crime was a possible consequence in the execution of that enterprise.[55] Krstic was found guilty of aiding and abetting genocide pursuant to article 7(1) of the statute of the tribunal since he was aware of the intent to commit genocide on the part of some members of the VRS main staff but did nothing to prevent the use of Drina Corps personnel and resources to facilitate the killings.[56]

Extermination

Article 5 of the tribunal's statute describes the crime of extermination as a crime against humanity. It requires that, the accused or his subordinates participated in the killing of certain named or described persons; the act or omission was unlawful and intentional; the unlawful act or omission must be part of a widespread or systematic attack, and the attack must be against a civilian population.[57] According to the trial chamber, the crime of extermination may be applied to acts committed with the intention of bringing about the death of a large number of victims either directly, or less directly by

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[54] *Ibid,* para 613
[55] *Ibid*, para 613
[56] *Ibid* para 238
[57] Ibid, para 492

creating conditions that lead to the victim's death. This is in line with the definition given to the crime by the Rome Statute of the International Criminal Court which defines the term "extermination" to include "the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of the population."[58] For the crime of extermination to be established, there must be further evidence that a particular population was targeted, and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population.[59] However, although extermination generally involves a large number of victims, it may still be constituted even where the number of victims is limited.[60] In *Vasiljevic*, the trial chamber took a different position. It ruled that criminal responsibility for extermination "only attaches to those individuals responsible for a large number of deaths, even if their part therein was remote or indirect." Accordingly, responsibility for one or for a limited number of such killings is insufficient."[61]

The trial chamber in *Krstic* found that a crime of extermination took place at Srebrenica where thousands of Bosnian Muslim men were killed. The screening process at Potocari, the gathering of men at detention sites, and their transportation to execution sites, demonstrated beyond doubt that all the Bosnian Muslim males that were captured or fell otherwise in the hands of the Serb forces were systematically executed.[62] This was the first time the ICTY determined the crime of extermination. Krstic was found guilty of

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[58] Ibid para 498. See also Statute of the International Criminal Court, Article 7 (2) (b)
[59] *Krstic*, (Trial Chamber), August 2, 2001, para 503
[60] Ibid para 501
[61] *Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, (Trial Chamber), November 29, 2002
[62] Ibid para 504

aiding and abetting extermination and persecution as crimes against humanity, and murder as a violation of the laws and customs of war.

Torture and outrages on Personal Dignity

In *Prosecutor v Anto Furundzija*[63] the accused was charged with torture and outrages on personal dignity, including rape, which constitutes serious violations of international humanitarian. Furundzija was also charged with aiding and abetting outrages on personal dignity and was accused of being a co-perpetrator of torture as a violation of the laws or customs of war.[64] In its judgment, the trial chamber confirmed that the prohibition against torture has acquired the status of *jus cogens*.[65] It defined the offense of torture under international humanitarian law and provided important clarifications in respect of rape and other serious sexual assaults.[66]

Furundzija was a commander of a special unit of the military police of the Bosnian-Serb forces, known as "Jokers." In May 1993, at the Jokers headquarters in Nadoci, in his capacity as local commander, he interrogated Witness A. Furundzija was accompanied by another soldier (Accused B) during the interrogation. In the course of the questioning, Witness A had a knife rubbed against her inner thigh and lower stomach, and was threatened that the knife would be put inside her vagina should she not tell the truth. Furundzija was accused of failing to intervene in any way even when Witness A was being forced to have oral sex and vaginal sexual intercourse with Accused B. He was

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[63] "Lasva Valley" [1999] 38 ILM 317 (IT – 95 – 17/1)
[64] *Prosecutor – Vs – Anto Furundzija*, Appeals Chamber Judgment of 21. 7. 2000, p 1 (http://www.un.org./icty.htm)
[65] Statement of the Trial Chamber at the judgment hearing (*Prosecutor – Vs – Furundzija*, 10th December 1998), Page 2 (available on http://www.un.org/icty/pressreel.htm, Accessed on 22nd July 2005
[66] *Ibid.*

therefore charged with co-perpetrating, aiding and abetting acts of torture and outrages upon personal dignity, including rape and found guilty.[67]

In *Furundzija* both the trial and appeals chamber agreed that the definition of torture set out in the Convention against Torture[68] reflects customary international law and has acquired the level of *jus cogens.* The trial chamber stated that;

> "..Because of the importance of the values it protects, this principle (prohibition against torture) has evolved into a peremptory norm or *jus cogens,* which is a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The consequence of this, is that the principle at issue cannot be derogated from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force."[69]

The tribunal defined the crime of torture in a situation of armed conflict as "the intentional infliction, by act or omission, of severe pain or suffering, whether mental or physical, for the purpose of obtaining information or a confession or of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating on any ground against the victim or a third person." For such an act to constitute torture, one of the parties must be a public official or must, at any rate, act in a non-private capacity. Such party may be acting as a *de facto* organ of state or any other authority-wielding entity.[70] The trial chamber further stated that for an act or omission to constitute torture, it must give rise to severe pain or suffering, whether physical or mental.[71] It found that the

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[67] Alina Kaczorowska, *Public International Law: 150 Leading Cases*, London: Old Bailey Press, 2002, pp 414-416

[68] Article 1, Convention against Torture

[69] *Furundzija Case*,(Trial Chamber), para 153

[70] See *Furundzija*, Case No. IT-95-17/1(Appeals Chamber) July 21, 2000, para 111, and *Furundzija*,(Trial Chamber), para 159. See also Article 1 (1), 1984 Convention Against Torture

[71] *Furundzija*,(Trial Chamber) para 162

acts charged, namely of rubbing a knife against a woman's thighs and stomach, coupled with a threat to insert a knife into her vagina are serious enough to constitute torture.[72]

In the *Aleksovski*[73] case, the trial chamber defined the crime of outrage on personal dignity. It stated that an "outrage against personal dignity" is an act which is animated by contempt for the human dignity of another person. The corollary is that the act must cause serious humiliation or degradation to the victim. It is not necessary for the act to directly harm the physical or mental well-being of the victim. It is enough that the act causes real and lasting suffering to the individual arising from the humiliation or ridicule.[74] The humiliation of the victim must be so intense that a reasonable person would be outraged. As for the issue of intent (*mens rea*), the accused must have committed the act with intent to humiliate or ridicule the victim.[75] In *Aleksovski,* it was found that the use of detainees as human shields or trench- diggers constituted an outrage upon personal dignity.[76] The form, severity and duration of the violence, and the intensity and duration of the physical or mental suffering, seem to be the basis for assessing whether the crime of outrage on personal dignity has been committed.

Rape and Enslavement

In *Furundzija*, the tribunal considered the issue of whether rape can be considered to constitute torture. Article 4 (1) of Additional Protocol II states that all persons are entitled to respect for their persons and honour, while article 76(1) of Additional Protocol I, expressly requires that women be protected from rape, forced prostitution and any other

[72] *Furundzija* Case,(Appeal Chambers), para 114.
[73] *Prosecutor v. Aleksovski,* Case No. IT-95-14/1(Trial Chamber), June 25, 1999
[74] *Prosecutor v. Aleksovski,* Case No. IT-95-14/1(Trial Chamber), June 25, 1999, para 56
[75] Ibid para 57
[76] *Ibid* para 229

form of indecent assault. The tribunal defined rape under international law to include the following elements:

> "The sexual penetration, however slight, either of vagina or anus of the victim by the penis of the perpetrator, or any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator, where such penetration is effected by coercion or force or threat of force against the victim or a third person."[77]

This definition is very important since it extends the crime of rape to cover both female and male victims. It marks a departure from traditional definitions in national jurisdictions which describe rape as "non-consensual sexual intercourse that involves penetration of vagina of the victim by the penis of the perpetrator."[78] The above definition of rape also expanded the definition of rape in the ICTR's case of *Prosecutor v Akayesu.* In that case, the ICTR described rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[79] In *Furundzija* the court officially included rape as torture. The tribunal observed that soldiers do not use rape merely as a way fulfilling unrestrained sexual appetites (which is also unacceptable); it is used "as a means of punishing, intimidating, coercing or humiliating the victim, or obtaining information, or a confession, from the victim or a third person."[80]

The trial chamber noted that rape is a despicable act which strikes at the very core of human dignity and physical integrity. It was held that rape by or at the instigation of a public official or with consent or acquiescence of a public official constitutes torture especially in a situation of armed conflict. It is a forcible act that is accomplished by force or threats of force against the victim or a third person, such threats being express or

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[77] *Prosecutor v. Anto Furundjiza*,(Trial Chamber) para 174
[78] *Prosecutor v Akayesu*, Case No. ICTR-96-4—T, Judgment of 2nd September 1998(Trial Chamber), para 686
[79] *Ibid.*, para 688
[80] *Prosecutor* v *Furundzija*,(Trial Chamber) para 163

implied and must place the victim in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression.[81] Although Furundzija was not the soldier who performed the rapes, he as the commanding officer was present at the time of the abuses, and did nothing to stop them. As such, he was found guilty of aiding and abetting outrages upon personal dignity, including rape and sexual violence as a violation of the customs of war. He was also found guilty as a co-perpetrator of torture against Witness A as a violation of the customs of war.[82]

In the case of *Prosecutor v Delalic, Mucic, Delic and Land* (the *Celibici* Case)[83], the ICTY recognized rape as torture even when it occurs outside circumstances of interrogation. The tribunal noted that rape causes both physical and psychological suffering to the victim and to others. It found that rape which occurs in armed conflict almost automatically has the purposes required for a finding of torture, and these include punishment, coercion, intimidation or discrimination.[84]

In the *Prosecutor v Kunarac, Kovac, and Vukovic* case,[85] the ICTY successfully convicted perpetrators of rape and enslavement as a crime against humanity. The trial chamber developed rape law at the international level by modifying the *Akayesu* definition of rape. It broadened the element of coercion from an act of "coercion or force or threat of force against the victim or a third person" to a "non-consensual or non-voluntary" sexual act.[86] Thus, the definition of rape at international tribunals was broadened to reflect rape laws in jurisdictions around the world and to require unwanted

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[81] *Ibid*, para 174
[82] *Ibid.*, para 76-89, See also Part IX (Disposition)
[83] Case No. IT-96-21-T, (Trial Chamber)Judgment of 16th November 1998
[84] *Ibid.*, para 494-496
[85] Case No IT-96-23 & IT-96-23/11(Trial Chamber) Judgment of 22nd February 2oo1
[86] See *Prosecutor v Akayesu*, Case No. ICTR-96-4—T, Judgment of 2nd September 1998(Trial Chamber), para 686

sexual penetration instead of the narrower and more difficult to prove element of coercion or force. Although force or threat of force provides clear evidence of lack of consent, the tribunal held that force is not an element of rape *per se* since there are factors other than force that would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim. It observed that a narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.[87]

Most importantly, the appeals chamber in the *Kunarac* case outlined the factors that constitute the crime of rape in international law. It held that *actus reus* of rape is constituted by the "sexual penetration, however slight, of the vagina or anus by the penis of the perpetrator or any other object used by the perpetrator, or the mouth of the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim." Consent for this purpose must be given voluntarily as a result of the victim's free will, assessed in the context of surrounding circumstances.[88] The tribunal further held that the *mens rea* for this offence is the intention to effect such sexual penetration and the knowledge that it occurs without the consent of the victim.[89]

The *Kunarac* case strengthened the *Furundzija* finding by holding, as Furundzija did, that, "rape and other forms of sexual violence, including forced public nudity, cause severe physical or mental pain and amount to outrages upon personal dignity."[90] Kunarac and Kovac were found guilty of enslavement for detaining girls for prolonged

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[87] *Prosecutor v Kunarac, Kovac & Vukovic*, Case No. IT-96-23/1(Appeals Chamber), Judgment of 12th June 2002, para 127-132

[88] *Ibid.*

[89] *Kunarac* (Appeals Chamber) para 132

[90] *Kunarac,* IT-96-23, IT-96-23/1, (Trial Chamber), paras 766-774.

periods of time, forcing them to clean and cook, raping them while detained, and selling the right to other soldiers to rape them. The trial chamber also found Kovac guilty of rape as a crime against humanity and as a violation of the laws or customs of war and outrages upon personal dignity as a violation of the laws or customs of war.

Command Responsibility

In *Prosecutor v. Zlatko Aleksovski,*[91] Aleksovski who was the commander of a prison facility at Kaonik was charged with inhuman treatment, willfully causing great suffering or serious injury to body or health and outrages on personal dignity allegedly committed between 1st January and 31st May 1993. He was charged on account of superior criminal responsibility as per article 2 and 3 of the ICTY statute. This is because he was the commander of Kaonik Prison where detainees were subjected to inhumane treatment, forced labour, and physical and psychological harm.[92]

The trial chamber established that the accused was responsible for the detention facilities at Kaonik Prison which had inadequate space, heating, medical care and nutrition.[93] Although there was no proof that the accused ordered the crimes which included insults, thefts, and assaults to be committed, the trial chamber held that the accused aided and abetted the commission of these acts. Several witnesses had testified that they suffered the insults, threats, thefts and assaults in the presence of the accused on 15th and 16th April 1993.[94] The trial chamber observed that being present and not objecting to the mistreatment notwithstanding the authority the accused had over the perpetrators, would be construed as a sign of his support and encouragement for these

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[91] Case No. IT-95-14/1(Trial Chamber) June 25, 1999
[92] *Ibid*, para 33-34
[93] Supra Para 40
[94] Ibid para 87

actions.[95] The decisive criterion for determining who is a superior seems to be not only the accused's formal legal status but also his ability, as demonstrated by his duties and competence, to exercise control. In *Celibici*[96], the trial chamber noted that the factor which determines liability for command responsibility is the actual possession of powers of control over the actions of subordinates. The level of control required to establish that the person against whom command authority is attributed has been the subject of differing interpretations. In the Nuremberg and Tokyo trials, the majority position taken was that a superior-subordinate relationship was necessary to entail superior responsibility. The level of control required was defined as the actual authority over offenders to issue orders to them not to commit illegal acts and to punish offenders.[97]

In order to determine whether the accused had authority over his subordinates the trial chamber in *Aleksovski* referred to article 7(3) of the statute which requires three criteria to be satisfied. First, there must be a superior-subordinate relationship. The defence submitted that the accused was just a warden and therefore, being a civilian he did not have authority over the guards who were answerable to the commander of the military police. Evidence was adduced at the trial to the effect that the guards at the prison facility acted pursuant to orders of the accused. The court noted that under article 7(3) of the statute, anyone including a civilian can be held responsible if it is proved that the individual had authority over the perpetrators of crimes. The term 'superior' was interpreted to encompass both military and civilian authority.[98] Secondly, it must be established that the superior knew or had reason to know that a crime was about to be

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[95] Para 103 & 104
[96] The *Celibici* Case No. IT-96-21
[97] Alina Kaczorowska, *Public International Law: 150 Leading Cases*, London: Old Bailey Press, 2002 p 404
[98] Para 106

committed or had been committed.[99] Thirdly, it should be proved that the superior failed to take all necessary and reasonable measures to prevent the crime or punish the perpetrator. The tribunal described necessary and reasonable measures as those measures which a superior can actually take, hence, a superior can only be held responsible for those measures that are within his material possibility and this must be assessed in the light of prevailing circumstances on a case-by-case basis.[100]

The trial chamber found that the accused knew that crimes were being committed in Kaonik Prison and he took no measures to prevent them in spite of the fact that he could order the guards to cease the assaults, he was therefore held responsible for the acts of his subordinates. The appeals chamber also ruled that it does not matter whether the accused was a civilian or military superior as long as it could be proved that he had powers to punish or prevent the commission of the crimes.[101]

In the *Prosecutor v Zdravko Mucic, Hazim Delic & Esad Ladzo*,[102] a superior or commander was described as one who possesses power or authority to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed. Since authority to exercise control does not always arise from authority conferred through official appointment, the critical factor is the actual possession, or non-possession, of powers of control over the actions of subordinates.[103] The trial chamber concluded that for the principle of superior responsibility to apply, it is necessary that the superior has effective control over the persons committing the underlying violations of international humanitarian law. It may extend to civilian superiors to the extent that they

[99] See Para 79
[100] See para 81
[101] *Ibid*, para 76
[102] Case No. IT-96-21
[103] Ibid, paras 192 - 194

exercise a degree of control over their subordinates which is similar to that of military commanders.[104] The appeals chamber held that a superior would be criminally responsible only if information was available that would have put him on notice of offences committed by subordinates.[105]

Crimes against Humanity

Article 5 of the ICTY statute gives a list of crimes which if committed in an armed conflict and as part of an attack directed against any civilian the tribunal will amount to crimes against humanity. They include murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial or religious grounds and other inhuman acts. In the case of *Prosecutor v Mitar Vasiljevic*[106], the accused was charged with ten counts of crimes against humanity under article 5 of the tribunal's statute.[107] It was alleged that the accused in concert with others planned, instigated, ordered, committed and otherwise aided and abetted in the planning, preparation and execution of crimes which included extermination as a crime against humanity, based on his participation in the killing of a significant number of Muslim civilians at Pionirska Street and the Drina River.[108]

The trial chamber assessed the general requirements of article 5 and set out five elements which the expression "an attack directed against any civilian population" encompasses, namely; there must be an attack; the acts of the offender must be part of the attack; the attack must be directed against any civilian population; the attack must be

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[104] *Prosecutor v. Zdravko Mucic et al* , Case No Case No IT – 96 – 21(Trial Chamber), November 16, 1998, paras 377 & 378
[105] *Prosecutor v. Mucic et al*, Case No IT- 96 – 21(Appeals Chamber), February 21, 2001, para 241
[106] Case No. it – 98 – 32
[107] *Prosecutor v Mitar Vasiljevic*,Case No. IT – 98 – 32 –T, (Trial Chamber) Judgment of November 29, 2002, para 1
[108] *Ibid* para 9

widespread or systematic; and the perpetrator must know of the wider context in which his acts occur and know that his acts are part of the attack. If a state takes part in an attack, it includes that state's own civilian population; hence, it becomes unnecessary to demonstrate that the victims were linked to any particular side of the conflict. [109] The trial chamber found that there was an armed conflict in Visegrad and that the acts of the accused were closely related to the conflict. The evidence adduced showed that there was a widespread and systematic attack on the non-Serb civilian population at the municipality of Visegrad and that the accused took an active part in the attacks.[110]

The trial chamber held that an accused will incur criminal responsibility for aiding and abetting a crime under article 7(1) where it is demonstrated that he carried out an attack, which consisted of practical assistance, and encouragement or moral support to the principal offender of the crime.[111] Furthermore an accused will only incur individual criminal responsibility for committing a crime under article 7(1) where it is proved that he personally physically perpetrated the criminal act in question.[112] The act of assistance may be either an act or omission, and it may occur before or during the act of the principal offender.[113] The trial chamber further stated that to establish the *mens rea* of aiding and abetting, it must be demonstrated that the aider and abettor knew that their own acts assisted in the commission of the crime in question by the principal offender.[114]

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[109] Prosecutor v Mitar Vasiljevic,Case No. IT – 98 – 32 –T, (Trial Chamber) Judgment of November 29, 2002, para 28
[110] Ibid, para 57,58 & 60
[111] Ibid, para 70
[112] *Vasiljesivic* Case, para 62
[113] Ibid para 70
[114] Ibid para 71

Murder, Extermination and Persecution

In *Vasiljevic*, the trial chamber defined murder under customary international law as consisting of the following elements: the death of the victim; the death was caused by an act or omission of the accused, or of person or persons for whose acts or omissions he bears criminal responsibility; that act was done, or that omission was made, by the accused, or a person or persons for whose acts or omissions he bears criminal responsibility, with an intention to kill, or to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such act or omission was likely to cause death.[115] Murder has been consistently defined as the death of a victim resulting from an act or omission committed with the intention to kill or to cause serious bodily harm which, the perpetrator should have reasonably known might lead to death.[116]

The accused was also charged with extermination with regard to an incident in Pionirska Street in which a group of women, children and the elderly were bundled into a house that was later set on fire leading to approximately 65 deaths. The trial chamber defined the offence of "extermination" which first appeared in article 6(c) of the Nuremberg Charter as a crime against humanity, to consist of any one act or acts which contribute to the killing of a large number of individuals (*actus reus*). In order for an act to constitute extermination, the offender must intend to kill, inflict grievous bodily harm, or inflict serious injury, in the reasonable knowledge that such act or omission is likely to cause death, or otherwise intends to participate in the elimination of a number of

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[115] Ibid para 205

[116] See *Prosecutor v Krstic*, Case No IT-98-33(Trial Chamber)Judgment of 2nd august 2001, para 485

individuals, in the knowledge that his action is part of a vast murderous enterprise in which a large number of individuals are systematically marked for killing or are killed.[117]

According to the above definitions, criminal responsibility for extermination only attaches to those individuals responsible for a large number of deaths, even if their part was remote or indirect. The act must be collective in nature rather than directed towards singled out individuals. Responsibility for one or for a limited number of such killings is insufficient.[118] In *Vasiljevic*, the accused was acquitted of this charge since there was no evidence to show that he was part of a criminal enterprise to exterminate the Muslims locked at Pionirska. He was also acquitted of as an aider or abettor of the same crime as there was insufficient evidence to show that he was aware of the intent by the principal offenders to exterminate the Muslim population.[119]

The trial chamber in *Vasiljevic* also defined the crime of persecution pursuant to article 5(h) of the statute of the tribunal, to consist of an act or omission which discriminates in fact and which denies or infringes on fundamental rights laid down in international customary or treaty law. Such act should be carried out deliberately with the intention to discriminate based on one of the listed grounds, specifically race, religion or politics and this constitutes the *mens rea* of the offence. [120] The accused was found guilty of persecution and inhumane acts against two persons.[121] For these offences and for murder as a violation of the laws or customs of war in relation to the Drina River incident, the accused was sentenced to 20 years imprisonment.[122]

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[117] *Ibid*, para 229
[118] *Ibid*, para 227
[119] *Ibid,* para 231
[120] *Ibid*, para 244
[121] *Ibid* para 262
[122] Ibid para 282 & 283

Chapter Four

Jurisprudence of the International Criminal Tribunal for Rwanda (ICTR)

Introduction

In chapter two, the philosophy and rationale for the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were discussed. A comparison was made between these two tribunals and the Nuremberg and Tokyo International Military Tribunals that were established after the Second World War to try war criminals. In the third chapter the jurisprudence emerging from the International Criminal for the former Yugoslavia was examined with emphasis on its contribution to the enforcement of international humanitarian law.

This chapter will examine the main jurisprudence of the ICTR and its contribution to the development and enforcement of international humanitarian law. It will specifically look at the salient principles of international humanitarian law which the tribunal has clarified, reiterated or emphasized in the cases concluded by its trial and appellate chambers. The creation of the ICTR marked the first time that international humanitarian law was applied in a purely internal conflict. In the *Prosecutor v Akayesu*,[1] the ICTR became the first court that defined rape in international law and to find that if rape is committed with genocidal intent, it amounts to an act of genocide.

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[1] Case No ICTR-96-4-1

Jurisprudential contribution of the ICTR

In its landmark decision in *Prosecutor v. Jean Paul Akayesu,*[2] the accused was charged with genocide, crimes against humanity and violations of common article 3 of the Geneva Conventions of 1949 and Additional Protocol II of 1977. He served as *bourgmestre* of Taba commune from April 1993 up to June 1994. As *bourgemestre,* Akayesu was charged with the duty of maintenance of public order and the performance of executive functions in his commune subject to the authority of the *prefect*. He had exclusive control over the communal police and *gendarmes* who were responsible for the administration of justice in the commune, subject only to the *prefect's* authority.

Akayesu was charged with rape, extermination, murder, inhumane acts and torture as crimes against humanity, and violations against article 4(2) of the Geneva Conventions which deals with rape and other outrages on personal dignity. He was also accused of inciting systematic killings. The tribunal found Akayesu guilty of one count each of genocide and the incitement to commit genocide and several crimes against humanity. He was acquitted of the count of complicity in genocide. This is due to the fact that Akayesu had been found guilty of genocide as a principal perpetrator; hence the charge of complicity was overtaken by events.

The main issue that arose for determination in this matter was whether the events that took place in Rwanda in 1994 constituted genocide. The tribunal adopted the definition of genocide as set out in articles 2 and 3 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. It brought to life the law on genocide as first codified in the 1948 Genocide Convention and affirmed that the

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[2] Case No ICTR-96-4-1

Convention is considered part of customary international law.[3] The tribunal defined genocide as "any acts committed with intent to destroy in whole or in part, a national, ethnical, racial or religious group as such; killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group.[4]

One of the questions the tribunal had to answer was whether the Tutsi constitute a group protected against genocide. Article 2 of the tribunal's statute just like the Genocide Convention stipulates four types of victim groups, namely: national, ethnical, racial or religious groups.[5] The tribunal discerned that the intention of the drafters of the 1948 Genocide Convention was to protect not only the four groups, but any groups similar in terms of its stability and permanence, hence, the classification was not restrictive.[6] A common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members who belong to it automatically, by birth, in a continuous and often irremediable manner in contrast with the more mobile groups which an individual joins through individual voluntary commitment, such as political and economic groups.[7] The tribunal concluded that the Tutsi were a protected group because decades of discrimination had

[3] Case No. ICTR-96-4-T, Judgment of 2nd September 1998, para 495
[4] See Article 2 of the Tribunal's Statute
[5] Akayesu Case, para 510
[6] *Ibid.*, para 511. The Tribunal cited the summary records of the meetings of the sixth committee of the UN General Assembly Pt.1, 21 September 1948
[7] *Akayesu*, para 511

led them to be regarded as a distinct, stable and permanent group and the victims were selected in 1994, not as individuals but because of this perceived difference.

The tribunal defined a "national group" as a collection of people who are perceived to share a legal bond based on common citizenship, with a reciprocity of rights and duties.[8] An ethnic group was defined as a group whose members share a common language or culture.[9] In the case of *Prosecutor v. Kayishema* and *Ruzindana*, the trial chamber elaborated on this issue further by bringing in an element of self-identification and identification by others. An ethnic group was defined as a group whose members share a common language or culture or which distinguishes itself as such or is identified as such by others including perpetrators of the crimes.[10] The definition of a racial group was based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.[11] In this particular case the tribunal established that it was the Tutsi ethnic group that was targeted and the victims were chosen because they were members of the selected group.[12]

The tribunal defined complicity to commit genocide under Article 2 (3) of the ICTR statute to include the following: "procuring means such as weapons, instruments or other means, used to commit genocide, with the accomplice knowing that such means would be used for such purpose; aiding a perpetrator of genocide in the planning or enabling acts; complicity by instigation, through giving instructions to commit genocide through gifts, promises, threats, abuse of authority or power, machinations or culpable

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[8] *Ibid.*, para 512
[9] *Ibid.*, para 513
[10] *Prosecutor v. Kayishema and Ruzindana,* Case No ICTR-95-1-T, Trial Chamber (Judgment of 21st May 1999, para 98
[11] *Ibid.*, para 514
[12] *Akayesu Case*, para 122 & 124

artifice, or who directly incited to commit genocide."[13] The tribunal generally held that a person is liable as an accomplice if he or she knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such persons were committing genocide, even though the accused did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.[14]

With regard to 'direct and public incitement to commit genocide', the tribunal held that the offence is committed when a person in a public place encourages or persuades another to commit genocide with the specific intent that the person's acts contribute to the mass destruction of a protected group. This can be done through speeches, shouting or threats uttered in public places or at public gatherings or through the sale or dissemination or such other means of mass communication.[15] It has to be proved that the words were uttered in a public place; the speaker intended the words to provoke immediate genocidal violence; and the speaker had conveyed this intent to the listeners in a direct manner. The *mens rea* required is the intent to directly prompt or provoke another to commit genocide. The person inciting another to commit genocide must have the specific intent of committing genocide, namely to destroy, in whole or in part, a national, ethnical, racial or religious group as such.[16] The tribunal found that Akayesu engaged in direct and public incitement to commit genocide which led to destruction of a great number of Tutsi in the commune of Taba.[17]

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[13] Ibid., para 537
[14] Ibid., para 545
[15] *Akayesu Case*, para 559
[16] *Ibid.*, para 560
[17] *Ibid.*, para 675

Rape and Sexual Violence

The ICTR in *Akayesu* clarified the principle that rape can constitute a crime against humanity and genocide since it can form an integral part of the process of destruction of a group.[18] This principle is codified in Article 3(g) of the statute of the ICTR. Since there is no common definition of rape in international law, the trial chamber defined rape as a "physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[19]

Historically rape has been defined in national jurisdictions as non-consensual sexual intercourse. The indictment in the *Akayesu* case however defined sexual violence to include forcible sexual penetration of the vagina, anus or oral cavity by a penis and the penetration of the vagina or anus by some other object.[20] In the tribunal's view the act of thrusting a piece of wood into the sexual organs of a woman by the *Interahamwes* as she lay dying constituted rape.[21] Rape was considered a form of aggression and therefore the central elements of the crime of rape cannot be captured in a mechanical description of objects or body parts. Rape was found to be a violation of personal dignity, and constitutes torture when inflicted by, or at the instigation of, or with the consent or acquiescence of a public official.[22] The definition of rape in the *Akayesu* case has been developed further by the ICTY in the case of *Prosecutor v. Anto Furundzija.*[23] In that

[18] *Ibid.*, para 731
[19] *Ibid.*, para 598
[20] *Ibid., para 10A*
[21] *Ibid., para 686*
[22] *Ibid.*, para 687
[23] *Prosecutor V. Anto Furundzija*, Case No. IT-95-17/1, (Trial Chamber), Judgemnt of 10th December 1998, para 174

Case, the trial chamber defined rape to include the following elements:

> "The sexual penetration, however slight, either of vagina or anus of the victim by the penis of the perpetrator, or any object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator, where such penetration is effected by coercion or force or threat of force against the victim or a third person."

This elaborate definition broadens the definition of rape and frees it from the traditional descriptions that required penetration of the vagina by the penis. It captures all the situations cited by the ICTR in the *Akayesu* case including the act of the *Interehamwes* of thrusting a piece of wood into a woman's vagina as she lay dying.[24] It is a useful development of international humanitarian law, and this has set a precedent for future trials. The ICTR and ICTY have shown sensitivity to the needs, dignity and suffering of victims of sexual violence in armed conflicts.

The ICTR further defined the offence of "sexual violence" as any act of a sexual nature which is committed on a person under circumstances which are coercive and this includes rape. Akayesu was charged with rape as a crime against humanity. It was alleged that Akayesu knew of and encouraged acts of rape and sexual violence against Tutsi women who had sought refuge at the *bureau communal* at Taba, where he was *bourgemestre.* The tribunal found that Akayesu's words of encouragement facilitated the commission of acts of sexual violence which included the rape of fifteen girls and women by *Interehamwes* within the *bureau communal.* He was accordingly convicted of rape. Most importantly the tribunal elaborated that sexual violence (including rape) amounts to serious bodily harm and this constitutes genocide under article 2(2) of the statute. It also constitutes an inhuman act which is a crime against humanity under article 3(i) of the

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[24] See the *Akayesu* case, para 686

statute. Sexual violence amounts to an outrage on personal dignity thus constituting a serious violation of article 3 common to the Geneva Conventions of 1949 and Additional Protocol II which is punishable under article 4(e) of the ICTR statute.[25] Article 4(e) gives the ICTR power to prosecute persons committing or ordering to be committed outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault. The tribunal stressed that coercion includes not only physical force but also threats, intimidation, extortion and other forms of duress such as the existence of armed conflict and the presence of militia.[26]

Torture

The trial chamber in the *Akayesu* case provided a definition of torture. Whilst torture is prohibited absolutely during war and peace time, there is no definition of it under international humanitarian law, save that provided for under Article 1 of the Convention against Torture which was adopted by the ICTR in this case. The tribunal defined torture as "any act by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession." For an act to amount to torture, the perpetrator must intentionally inflict severe physical pain or suffering on the victim for purposes of obtaining information or a confession from the victim or a third person, punishing the victim or a third person for an act committed or suspected of having been committed by either of them, intimidating or coercing the victim or the third person for any reason based on discrimination of any kind. Moreover the perpetrator should be an official or

[25] Case No. ICTR 96-4-1, Judgment of 2nd September 1998 reproduced in *" 37 International Legal Materials* 1399(1998)," *11 Africa Journal of International and Comparative Law 336*, 1999, para 64 & 77
[26] *Ibid.*

have acted at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity.[27]

However, for an act of torture to amount to a crime against humanity, it must be committed against a civilian population.[28] This is because article 3 of the ICTR's statute requires that for an act to constitute a crime against humanity it must be committed as a widespread or systematic attack against any civilian population on national political, ethnic, racial or religious grounds. Such an act must be inhumane in nature and character, causing great suffering or grievous bodily harm. These conditions serve to exclude isolated or random inhumane acts committed for purely personal reasons. Under customary international law, it is now well established that a distinction must be made between armed forces involved in a particular conflict and the civilian population caught up in the hostilities.[29] Article 48 of Additional Protocol I of 1977 requires that parties to a conflict must direct their operations only against military objectives in order to ensure respect for and protection of the civilian population. Civilians in this case include non-combatants and those who are *hors de combat* or persons no longer taking part in the hostilities.

The trial chamber in the ICTY case of *Prosecutor v. Anto Furudzija* also dealt with the issue of torture and ruled that the act or omission constituting torture must be linked to an armed conflict and at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity such as a *de facto*

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[27] *Akayesu Judgment*, para 594
[28] *Ibid.*, para 683-684
[29] Claire de Than & Edwin Shorts, *International Criminal Law and Human Rights*, 1st Edition, London: Sweet & Maxwell, 2003, p 93

organ of the state or any other authority-wielding entity.[30] This is mainly because torture is considered a grave breach of the Geneva Conventions, specifically article 3 common to the four Geneva Conventions of 1949 which prohibits torture and cruel treatment in armed conflicts. In *Prosecutor v. Kunarac*, the trial chamber declared that the following purposes of torture cited in article 1 of the Convention against Torture form part of customary international law; obtaining information or a confession, punishing, intimidating or coercing the victim or a third person and discriminating on any ground, against the victim or a third person.[31]

In *Akayesu,* the ICTR detailed the elements that constitute serious violations of common article 3 of the Geneva Conventions as strengthened by article 3 of the Additional Protocol II.[32] The basic aim of these provisions is to protect victims and potential victims of armed conflicts. Article 3 applies once it has been established that there exists an internal armed conflict.[33] It is designed to constrain the activity of persons who by virtue of their authority are responsible for the outbreak of, or are otherwise engaged in armed hostilities. This encompasses all military personnel and some civilians. The latter however must have been legitimately mandated and expected to act as public officials or agents of persons otherwise holding public authority or representing the government to support or fulfill the war efforts.[34] On this basis, the tribunal found that there was insufficient proof that Jean Paul Akayesu fell within this category as he was not a member of the armed forces, neither was he legitimately mandated as a public official

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[30] *ProsecutorV. Anto Furundzija*, Case No. IT-95-17/1(Trial Chamber judgment of 10th December 1998, para 162

[31] *Prosecutor V. Kunarac, Kovac and Vulkovic*, Case No. IT-96-23, Trial Chamber Judgment of 22nd February 2001, para 407

[32] Criminalized under Article 4 of the ICTR Statute

[33] *Akayesu* Case, para 603

[34] *Ibid.*, para 631

to support or fulfill war efforts. He was subsequently acquitted of these charges.[35] The *Akayesu* Case has however been criticized for setting a particularly high standard of civilian liability in that it exonerates Akayesu, a public official who held executive power in his community, who was a local representative of the national government and who gave assistance to the government's war effort.[36]

Both the prosecution and the defence appealed against the sentence. The prosecution argued that the trial chamber erred in law in applying a "public agent of government representative test" in determining who can be held responsible for serious violations of common article 3 and Additional Protocol II and further in finding that Akayesu did not fall within the category of persons who could be responsible under article 4 of the statute of the tribunal.[37] The issue was whether this interpretation is consistent with the provisions of the ICTR statute in particular and international humanitarian law in general. The appeals chamber held that the minimum protection provided for victims under common article 3 implies necessarily effective punishment on persons who violate it. Such punishment must be applicable to everyone without discrimination, as required by the principles governing individual criminal responsibility. The appeals chamber also held that international humanitarian law would be lessened and called into question if it were to be admitted that certain persons be exonerated from individual criminal responsibility for a violation of common article 3 under the pretext that they did not belong to a specific category.[38] The trial chamber was found to have

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[35] *Ibid.*, para 643
[36] D.M. Ayam, "Prosecutor v. Akayesu, ICTR-96-4-T", *American Journal of International Law 195-199*, 1999.
[37] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, (Appeals Chamber) Judgment of 1st June 2001, para 11 & 12
[38] *Ibid.*, para 443

erred on a point of law in restricting the application of common article 3 to a certain category of persons.[39]

The appeals chamber further ruled that article 3 of the statute of the ICTR does not require that all crimes against humanity be committed with a discriminatory intent. Article 3 however restricts the jurisdiction of the tribunal to crimes against humanity committed in a specific situation, that is, "as part of a widespread or systematic attack against any civilian population" on discriminatory grounds.[40]

The *Kambanda* Trial

Two days after the judgment in *Akayesu*, the ICTR delivered judgment in the case of the *Prosecutor v. Jean Kambanda*.[41] Jean Kambanda, former Prime Minister of Rwanda was arrested by Kenyan authorities on the basis of a formal request submitted by the prosecutor of the ICTR on 9th July 1997.[42] He pleaded guilty to all the charges against him which included genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and murder and extermination as crimes against humanity.[43] He was sentenced to life imprisonment. This was the first time a high ranking government official was held accountable for violations of international humanitarian law since the Nuremberg and Tokyo trials.

During the sentencing hearing the tribunal examined the rules governing imposition of penalties under the statute of the ICTR. On war crimes, the tribunal held that despite the gravity of the violations of article 3 common to the Geneva Conventions

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[39] *Ibid.*, para 445
[40] *Ibid.*, para 469
[41] ICTR NO. 97-23-S, Judgment of 4th September 1998
[42] ICTR Case No. 97-23-S, Judgment of 4th September 1999(*Kambanda* Judgment), sourced from (www.ictr.org/english/judgments/html), accessed on 5th May 2005, para 1
[43] *Ibid.,* paragraph 3

of 1949 and of Additional Protocol II, they are considered lesser crimes than genocide or crimes against humanity.[44] Although the trial chamber found it difficult to rank genocide and crimes against humanity in terms of their respective gravity, it found that both crimes shock the collective conscience of mankind.[45] The tribunal cited the Genocide Convention which recognizes that the crime of genocide has inflicted great losses on humanity and reiterates the need for international cooperation to liberate humanity from this scourge.[46] The tribunal remarked that the crime of genocide constitutes the "crime of crimes" which must be taken into account when deciding the sentence to be imposed on the accused. The crime is unique because of its element of *dolus specialis* (special intent) which requires that the crime be committed with intent to destroy in whole or in part, a national ethnic, racial or religious group as such.[47]

The *Kambanda* judgment appears to suggest that crimes against humanity constitute violations of international law and are derived not only from international law but also from the domestic criminal law of all civilized nations.[48] The tribunal defined crimes against humanity as "serious acts of violence which harm human beings by striking at what is most essential to them: their lives, liberty, physical welfare, health, and or dignity. They are inhuman acts that, by their extent and gravity, go beyond the limits tolerable to the international community, which must demand their punishment. Crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack. It is therefore the concept of humanity as victim which

[44] *Ibid.*, paragraph 14
[45] *Ibid.*
[46] *Ibid.* para 16; See also Preamble to the Genocide Convention of 1948
[47] *Kambanda* Judgment, para 16
[48] *Ibid.* Para 15

essentially characterizes crimes against humanity."[49] The trial chamber concluded that crimes against humanity are conceived as offences of the gravest kind against the life and liberty of the human being.[50]

Jean Kambanda who was the prime minister of the interim government of Rwanda from 8th April 1994 to 17th July 1994 was held accountable for violations of international humanitarian law in Rwanda on grounds of superior responsibility since he exercised *de facto* and *de jure* control over the members of his government and authority over civil servants and senior officers in the military.[51] He admitted that during meetings of the Council of Ministers between 8th April and 17th July 1994, he as prime minister instigated, aided and abetted the *prefets, bourgmestres* and members of the population to commit massacres and killings of civilians, in particular Tutsi and moderate Hutu. He also acknowledged that in June 1994, he gave support to *Radio Television Libre des Mille Collines* (RTLM) with the knowledge that the radio station's broadcasts incited the killing and persecution of moderate Hutus.[52]

The tribunal noted that the above crimes were committed during the time when Jean Kambanda was prime minister, and he and his government were responsible for the maintenance of peace and security. Kambanda was found to have abused his authority and the trust of the civilian population and he personally participated in the genocide by distributing arms, making incendiary speeches and presiding over cabinet and other meetings where the massacres were planned and discussed, and also failed to take

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[49] *Ibid.*
[50] *Ibid.* Para 43
[51] *Kambanda* Judgment, para 39(ii)
[52] *Ibid.* paragraph 39(vii) & (viii)

necessary and reasonable measures to prevent his subordinates from committing crimes against the population.[53]

Inspite of the fact that a prompt guilty plea entered by the accused constitutes a major mitigating factor, the tribunal held that it does not reduce the degree of the crime. The court must consider the degree and magnitude of the offence as a criterion for evaluating the sentence to be imposed.[54] The tribunal held that the sentence must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender. This is because just sentences contribute to respect for the law and the maintenance of a just, peaceful and safe society.[55] The aim for the establishment of the tribunal by the UN Security Council was to prosecute and punish the perpetrators of the atrocities in Rwanda in such a way as to end impunity and promote national reconciliation and the restoration of peace.[56] Kambanda was accordingly sentenced to life imprisonment.

Kambanda appealed against the judgment and sentence of the trial chamber to the ICTR appeals chamber at The Hague. His appeal was based on the grounds that he was denied the right to be represented by counsel of his own choice, that the trial chamber failed to consider the appellants unlawful detention outside the detention unit of the tribunal, and that the trial chamber accepted the validity of the plea agreement without a

[53] *Ibid.* paragraph 44
[54] *Ibid.* paragraphs 52 & 57
[55] *Ibid.* paragraph 58
[56] United Nations Security Council Resolution No. 955 of 8th November 1994.

thorough investigation as to whether it was voluntary or unequivocal. The appeal was unsuccessful.[57]

On 21st May 1999, the ICTR delivered judgment against another government official, *Clement Kayishema* who was jointly charged with one *Obed Ruzindana,* a commercial trader in Kigali [58] for genocide and other related offences. The two accused persons were charged with involvement in the massacres which took place in the *préfecture* of Kibuye in Rwanda where Kayishema was the *prefect*. Kayishema was charged under both article 6 (1) and article 6 (3) of the ICTR statute with involvement as a superior in four sets of massacres that occurred at the Catholic Church, Home St. Jean Complex, the Stadium, Mubuga and Bisesero within the Kibuye *prefecture* on diverse dates in April 1994. Ruzindana was charged with genocide, crimes against humanity, pursuant to articles 3 (a), 3 (b) and 3 (i) of the statute and violations of article 3 common to the Geneva Conventions of 1949 and violations of Additional Protocol II, pursuant to Article 4 of the Statute. He was accused of personally attacking and killing persons who had taken refuge in Biserero.[59]

The trial chamber noted that the crime of genocide has risen to the level of *jus cogens*.[60] The chamber argued that for the crime of genocide to occur, the intent must be formed prior to the commission of the genocidal acts. The individual acts themselves do not require premeditation, but the act should be done in furtherance of a genocidal intent. The distinguishing characteristic of genocide is the specific intent (*dolus specialis*) to

[57] *Jean Kambanda v. The Prosecutor*, Case No. ICTR 97-23-A, Judgment of 19th October 2000, para 10, http://www.Afrol.com/countries/Rwanda/htm,(Accessed on 5th May 2005)
[58] Case No. ICTR-95-1-T, Judgment of 21st May 1999.

[59] *Ibid.*, para 35
[60] *Ruzindana & Kayishema*, para 88

destroy a group in whole or in part.[61] The chamber ruled that intent can be inferred from either words or deeds and may be demonstrated by a pattern of purposeful action. It was of the view that it is not necessary for the accused to have all the details of a genocidal plan or policy since it is not possible for the crime of genocide to be committed without some direct or indirect involvement on the part of the state given the magnitude of the crime. The tribunal examined all the elements of the crime of genocide and followed the definitions of terms set out in the A*kayesu* case. The chamber ruled that what constitutes destruction of part of the group should be interpreted broadly so as to encompass acts that are undertaken not only with intent to cause death, but also encompasses acts that are undertaken without the intent to cause death such as sexual violence.[62] As regards the destruction in whole or in part it was held that the intention to destroy a considerable number of individuals who are part of the group is required.[63]

According to the tribunal, the *actus reus* of genocide includes the act of killing members of the particular national, ethnical, racial or racial religious group as such and the act of causing serious bodily or mental harm to the members of the group. Causing serious bodily harm was construed to mean harm that seriously injures the health, causes disfigurement or causes any serious injury to the external and internal organs or senses.[64] Under article 2(2) of the ICTR statute, the act of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part also constitutes genocide. This concept was interpreted to include circumstances which will lead to a slow death such as lack of proper housing, clothing, hygiene and medical care or

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[61] *Ibid.*, para 91
[62] *Prosecutor v Kayishema & Ruzindana, para 95*
[63] *Ibid.*, Para 96
[64] *Ibid*. Para 109

excessive work or physical exertion. It also includes acts which do not immediately lead to the death of members of the group, such as rape, starvation and reducing medical attention to a bare minimum.[65]

Extermination

In *Prosecutor v Kayishema and Ruzindana,* the tribunal defined the requisite elements of extermination, which includes not only the implementation of mass killing or the creation of conditions of life that leads to mass killing, but also the planning thereof. In case of the latter, the prosecutor must prove a nexus between the actual killing and the planning thereof. Extermination would occur where the actor kills a single person provided the person is aware that the acts or omissions form part of a mass killing event.[66] The Statute of the International Criminal Court offers an illustrative rather than definitive statement regarding extermination. It defines extermination to include "the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population."[67]

In *Prosecutor v. Ignace Bagilishema*[68] the trial chamber defined the crime of extermination as the unlawful killing on a large scale where "large scale" does not suggest a numerical minimum. It must be determined on a case- by-case basis using a common-sense approach. A perpetrator may nonetheless be guilty of extermination if he kills, or creates the conditions of life that kill a single person, providing that the perpetrator is aware that his or her acts or omissions form part of a mass killing event,

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[65] Ibid. Paras 115 & 116
[66] *Ruzindana and Kayishema*, para 146-147
[67] See Article 7 (2) (b) of the Rome Statute of the International Criminal Court (ICC)
[68] Case No. ICTR-95-1A-T

namely; mass killings that are proximate in time and place and thereby are best understood as a single or sustained attack.[69]

Violations of Article 3 Common to the Geneva Conventions of 1949 and Additional Protocol II

In order for common article 3 to apply, the tribunal held in *Bagilishema*, that first, it must be established that the armed conflict in Rwanda was of a non-international character. Secondly, there must be a link between the accused and the armed forces and the crimes must be committed *ratione personae* and *ratione loci*. *Ratione personae* refers to the class of victims, that is, the civilian population, and the class of perpetrators, while *ratione loci* refers to the area in which the hostilities took place. Thirdly, there must be a nexus between the crime and the armed conflict.[70] In relation to the first requirement, there must be in existence a non-international armed conflict. An armed conflict that takes place between the armed forces of a particular state and dissident armed forces or other organized armed groups is considered to be non-international under Additional Protocol II. Situations such as riots, isolated and sporadic acts of violence and other acts of a similar nature are excluded.[71] According to the appeals chamber in *Akayesu*, common article 3 seeks to extend to non-international armed conflicts, the provisions that apply to international armed conflicts. The article broadens and extends the application of international humanitarian law to victims of internal conflicts and sets out the rules applicable during such armed conflicts.[72]

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[69] *Bagilishema*,Para 87
[70] Ibid., Para 169
[71] Ibid. para 171
[72] *Akayesu*, Appeals Judgment, para 442

On the second issue of the link between the accused and the conflict, the tribunal ruled that the nexus need not be formal. It can apply to military commanders, government officials and civilian populations who are *de facto* acting on behalf of, or supporting the government or other armed forces.[73] On the third issue, the tribunal considered the civilian population to be those persons who are not at the time of the armed conflict members of the armed forces. It is not necessary that the perpetrator must be involved in some illegal act in the same place where the hostilities occurred, but there must be a direct link between the offence and the armed conflict.[74]

In the *Prosecutor v Bagilishema*,[75] the ICTR held that for a crime to constitute a serious violation of common article 3 and Additional Protocol II, there must be a nexus between the offence and the armed conflict. The "nexus" requirement is met when the offence is closely related to the hostilities or committed in conjunction with the armed conflict. It was held in *Tadic* that it is "sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict."[76]

The trial chamber in the *Kayishema* case found that the massacre of the Tutsi population was planned meticulously and systematically coordinated by extremists in the former Rwanda government and this is evidenced by the large number that were killed within just three months.[77] It ruled that there was sufficient proof that the accused Clement Kayishema was present and participated in the massacres that took place at the

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[73] *Kayishema & Ruzindana* para 175
[74] *Ibid.*, para 180 – 182 & 189
[75] Case No. ICTR-95-1A-T
[76] The *Prosecutor v. Tadic*, "Decision on the defence motion for interlocutory appeal on jurisdiction" of 2nd October 1995 para. 70

[77] *Ibid.*, para 289

Home St Jean Catholic Church Complex, the Kibuye Stadium, and at the Mubuga Church. Kayishema and Ruzindana participated in the massacres at Bisesero Area which included murder at a Cave and at Muyira Hill.[78] Kayishema was found to have exercised *de jure* power over the *Bourgmestres*, communal police, *gendarmes* and other law enforcing agencies at the massacre sites.[79]

On the question of *de facto* control, the tribunal held that no legal or formal position of authority needs to exist between the accused and the perpetrators of the crimes. The influence that an individual exercises over the perpetrators of the crime may provide sufficient grounds for the imposition of command responsibility if it can be shown that such influence was used to order the commission of the crime, or that despite such *de facto* influence the accused failed to prevent the crime.[80] The trial chamber made reference to the *Celibici* (ICTY) and *Roechling* (Nuremberg) cases that dealt with the imposition of superior responsibility on the basis of *de facto* power of control exercised by civilians.[81] It found Kayishema individually responsible under article 6 (3) of the statute for the crimes committed by his subordinates at Home St. Jean and Catholic Church Complex and the Bisesero area. He was also found to have known and failed to prevent those under his control from slaughtering thousands of innocent civilians.[82]

Although the accused were found to have committed genocide and crimes against humanity based on murder and extermination, it was ruled that it would be improper to convict the accused for the three offences since the latter two offences were absorbed by

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[78] *Ibid.*, para 404 & 438
[79] *Ibid.*, para 489
[80] *Kayishema Case,* Para 492
[81] *Celibici* judgement, ICTY, para 354
[82] *Kayishema,* para 515

the crime of genocide.[83] The counts for the two crimes were based on the same facts and the same criminal conduct. The crimes were committed at the same massacre sites, against the Tutsi ethnic group with the same intent to destroy this group in whole or in part. Consequently, Kayishema and Ruzindana were found guilty of various counts of genocide and acquitted on account of crimes against humanity and other inhumane acts, violations of article 3 common to the Geneva Conventions and violations of Additional Protocol II to the Geneva Conventions. Kayishema was sentenced to life imprisonment while Ruzindana was imprisoned for twenty five years.

Incitement to Commit Genocide

In the case of the *Prosecutor v. Georges Ruggiu,*[84] Ruggiu a Belgian national was sentenced to twelve years imprisonment on account of direct and public incitement to commit genocide and for persecution as a crime against humanity. Ruggiu was arrested by Kenyan authorities in Mombasa pursuant to a formal request by the Prosecutor of the ICTR made on 9th July 1997.[85] He was a social worker who worked with the Belgian Social Security Administration and became interested in Rwandan politics when he associated with Rwandan students studying in Belgium in 1992.[86] In November 1993, he left Belgium to go and settle in Rwanda. Due to his association with president Habyarimana, he was employed at the *Radio Television Libre des Milles Collines* (RTLM) where he worked as a journalist and broadcaster for RTLM radio from 6th January 1994 to 14th July 1994.[87]

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[83] *Kayishema*, para 577
[84] Case No. ICTR-97-32-I, Judgment of 1st June 2000.
[85] *Ibid.*, para 1 & 3
[86] *Ibid., para 38*
[87] *Ibid.* para 42 & 43

Ruggiu was accused of direct and public incitement to commit genocide. His acts allegedly constituted an incitement to kill and cause serious bodily or mental harm to members of the Tutsi population and were perpetuated by intent to destroy, in whole or in part an ethnic or racial group as stipulated under articles 2(3) (c) of the ICTR statute. He was also accused of persecution as a crime against humanity on account of the same acts. Ruggiu pleaded guilty to all the counts. He admitted that all broadcasts of the RTLM were directed towards rallying the population against the Rwanda Patriotic Front (RPF) and their accomplices including civilian Tutsi population.[88] The tribunal ruled that the *mens rea* required for this crime lies in the intent to directly prompt or provoke another to commit genocide. The person who incites another to commit genocide must have the specific intent to commit genocide, namely to destroy in whole or in part a national, ethnic, racial or religious group as such.[89] The tribunal referred to the *Akayesu* case where it was held that the crime of genocide is so serious that the direct and public incitement to commit genocide must be punished as such, even if the incitement failed to produce the result expected by the perpetrator.[90] In the *Ruggiu* case his acts were found to constitute public incitement since they were broadcast in a media forum and to members of the general public.[91] The trial chamber ruled that the requisite *mens rea* for crimes against humanity is the *intent* to commit the underlying offence, combined with the *knowledge* of the broader context in which that offence occurs.[92]

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[88] *Ruggiu,* para 44
[89] *Ibid.*, para 14
[90] *Ibid.*, para 16
[91] *Ibid.,* para 17
[92] Ibid.,para 20

The *Ruggiu* case is important in that the ICTR convicted the accused who neither held an official position of authority in Rwanda or a senior position within the RTLM. He did not play a role in the organization, the technical services, or the administration of RTLM. He exercised no influence over the content of the programme broadcasts. He was a subordinate with no decision-making or autonomous powers unlike Jean Kambanda who was the Prime Minister.[93] This absence of authority was only considered as a mitigating factor but the accused was penalised on account of individual criminal responsibility. [94]

Individual Criminal Responsibility

In the *Prosecutor v. Ignace Bagilishema*,[95] the tribunal explored the issue of individual criminal responsibility and ruled that an individual, who participates directly in planning to commit a crime under the statute, incurs responsibility for that crime even when it is actually committed by another person.[96] The level of participation must be substantial, such as formulating a criminal plan or endorsing a plan proposed by another.[97] However proof of a causal connection between the instigation and the commission of the crime is required. The principle of criminal responsibility applies also to an individual who is in a position of authority, and who uses that authority to order, and compel a person subject to that authority, to commit a crime.[98]

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[93] See the *Kambanda* Case

[94] Ruggiu, para 75

[95] Case No. ICTR-95-1A-T

[96] See *Prosecutor v. Ignace Bagilishema*, para 30 & 31

[97] *See Prosecutor v. Zlatko Aleksovski*, Judgement of 25 June 1999 (Trial Chamber), para. 61.

[98] See *The Prosecutor v. Georges Rutaganda*, Judgment of 6 December 1999 [Rutaganda] para. 39.

The tribunal referred to the ICTY and ICTR cases of *Furundzija* and *Akayesu* and agreed that presence, when combined with authority, may constitute assistance (the *actus reus* of the offence) in the form of moral support.[99] In *Furundzija* the trial chamber held that an "approving spectator who is held in such respect by other perpetrators that his presence encourages them in their conduct, may be guilty in a crime against humanity."[100]

Command Responsibility

On command responsibility, the tribunal ruled that what determines liability is the actual possession, or non possession, of a position of command over subordinates. The decisive criterion in determining who is a superior is the ability, as demonstrated by duties and competence, to effectively control subordinates, and it does not matter whether the accused was a civilian or military superior.[101] The tribunal also adopted the definition of genocide given in the *Akayesu* case and ruled that the specific intent to commit the crime of genocide is found in the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".[102] Since intent is a mental factor that is difficult, even impossible, to determine, the tribunal held that in the absence of a confession from the accused, intent can be inferred from a certain number of presumptions of fact including the general context of the perpetration of other culpable

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[99] *Bagilishema,* para 34
[100] *Furundzija (*TC) para. 207

[101] *Ibid.*, para 39
[102] *Ibid.,* para 60

acts systematically directed against that same group, whether these acts were committed by the same offender or by others.[103]

The accused was also charged with complicity in genocide.[104] However since the prosecution relied on the same acts as those of genocide, the chamber argued that genocide and complicity in genocide are two different forms of participation in the same offence. The tribunal agreed with the opinion expressed in *Akayesu* that "an act with which an accused is being charged cannot be characterized both as an act of genocide and an act of complicity in genocide as pertains to the same accused. Consequently, since the two are mutually exclusive, the same individual cannot be convicted of both crimes for the same acts."[105]

Ignace Bagilishema was acquitted of all the charges which included genocide, serious violations of article 3 common to the Geneva Conventions and of Additional Protocol II, complicity in genocide, crimes against humanity (murder, extermination, and other inhumane acts) due to the absence of sufficient proof. In most instances, the accused was found to have assisted the Tutsi population sometimes to escape death.

In *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, the accused was charged with genocide, crimes against humanity and violations of article 3 common to the Geneva Conventions of 1949 and Additional Protocol II. He was a member of the National and Prefectoral Committees of the *Mouvement Républicain National pour le Développement et la Démocratie* (MRND) and a shareholder of *Radio Télévision Libre des Mille Collines (RTLM)*. On April 6, 1994, he was serving as the second vice president

[103] Ibid., para 62
[104] Ibid.,para 66
[105] Akayesu (TC) para. 532.

of the National Committee of the *Interahamwe*, the youth militia of the MRND. Rutaganda was further accused of distributing guns and other weapons to Interehamwe members in Nyarugenge commune, Kigali, on or about April 6, 1994, which were later used to kill persons of Tutsi identity.[106]

For purposes of applying the Genocide Convention, the trial chamber held that the membership of a group is an objective rather than a subjective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances the victim may perceive himself or herself as belonging to that group. The tribunal however held that in assessing whether a particular group may be considered as protected from the crime of genocide, it will proceed on a case by case basis, taking into account both the relevant evidence proffered and the political, social and cultural context.[107] It declined to define national, ethnical, racial and religious groups arguing that each should be assessed in the light of a particular political, social and cultural context.[108]

Most importantly a civilian population was defined to comprise all persons who are civilians, and hence the civilian population is made up of persons who are not combatants or persons placed *hors de combat.* If civilians take a direct part in the hostilities, then they lose their right to protection as civilians and could fall within the class of combatants. This broad definition enables a court to determine on a case by case basis whether a victim has status of a civilian.[109]

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[106] *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Trial Chamber, Judgment of 6th December 1999, Para 10 and 11
[107] *Rutaganda Case*, para 373
[108] Ibid., para 56
[109] Ibid., para 100-101

Chapter Five

Analysis of the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda

Introduction

There have been key developments of international humanitarian law by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. The last two chapters have highlighted the major legal issues emerging from the jurisprudence of the two tribunals. However trials are still ongoing in the two tribunals. This chapter will analyze the jurisprudence of the ICTY and ICTR with a view to highlighting their contribution to the enforcement and development of international humanitarian law, especially considering the fact that the two tribunals were the first international tribunals to try violations of international humanitarian law since the adoption of the four Geneva Conventions of 1949 and their two Additional Protocols of 1977 and also the Genocide Convention of 1948. According to the trial chamber in the *Celibici*[1] case,

> "The kinds of grave violations of international humanitarian law which were the motivating factors for the establishment of the ICTY continue to occur in many other parts of the world, and continue to exhibit new forms and permutations. The international community can only come to grips with the hydra-headed elusiveness of human conduct through reasonable as well as purposive interpretation of existing provisions of international customary law."

[1] *Prosecutor v Delalic et al.* (the *Celibici* Case), Case No. IT-96-21-T, Trial Chamber, Judgment of 16th November 1998, para 170

Until the creation of the ICTY and ICTR tribunals, the mechanisms for prosecuting individuals for "grave breaches" of the 1949 Geneva Conventions remained remarkably untested. By incorporating the terminology of the Conventions into the statutes of the ICTY and ICTR, the debate surrounding the exact scope of the "grave breaches" regime has been reopened. Many voices have been raised in support of an extension of these provisions to incorporate internal armed conflicts as well as international armed conflicts, the former category being of far greater incidence than the latter. The current developments in international law are rendering any strict division along these lines wholly artificial. A purely internal conflict becomes internationalized when two warring factions are supported by other states or when there are direct hostilities between two foreign states that militarily intervene in an internal conflict in support of opposing sides and when there is war involving a foreign intervention in support of an insurgent group fighting against an established government.[2] Although motivations for intervention in civil wars may have changed since the end of the Cold War, the increased interdependence of states as a result of globalization, the development of nuclear weapons among previously incapable states, the greater incidence of terrorism in Western countries and the increasing scarcity of natural resources all provide incentives for foreign intervention in domestic conflicts.[3] As a reflection of this, internal conflicts have increased in recent times and have become more brutal and damaging than their international counterparts.

This chapter would analyze the jurisprudence of the two tribunals with regard to major violations of international humanitarian law including genocide and crimes against

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[2] D. Schindler, "International Humanitarian Law and Internationalized Armed Conflicts," *International Review of the Red Cross,* No.230, 1982, p 255
[3] I. Detter, *The Law of War*, Cambridge University Press, London, 2002, p 38

humanity, and the contribution of the two tribunals to the enforcement and development of international humanitarian law. Attention would be paid to interpretations given by the tribunals to key provisions of the 1949 Geneva Conventions and the two Additional Protocols of 1997. The jurisprudence of the *Tadic's* appeals chamber case for instance, demonstrates how the ICTY's adoption of a functional approach to nationality has expanded the traditional grave breaches regime, thus broadening the concept of protected persons under the fourth Geneva Convention.[4] The ICTY held that a legal approach hinging on substantial relations than on formal bonds is more important in present-day international armed conflicts. The tribunals considered that in modern inter-ethnic armed conflicts such as that in former Yugoslavia, new states are often created during the conflict, hence, ethnicity rather than nationality becomes determinative of national allegiance.[5] Moreover, the ICTY and the ICTR have re-conceptualized the law of individual criminal responsibility to incorporate the doctrine of common purpose under which a defendant can be held responsible for killings committed by other members of his group, even if the killings are not necessarily a part of the common plan.[6]

Crimes against Humanity

Crimes against humanity have been perpetrated against civilian populations and non combatants since the dawn of time. Empires were built on enslavement, massacres and general ill-treatment of conquered peoples.[7] These horrific and inhumane acts meted

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[4] Natalie Wagner, "The Development of the Grave Breaches Regime and of Individual Criminal Responsibility by the International Criminal Tribunal for the Former Yugoslavia," *International Committee of the Red Cross*, June 2003, Vol. 85, No. 850, p 360. See also *Prosecutor v Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment of 15th July 1999, para 227

[5] *Prosecutor v Tadic,* Case No. IT-94-1-A, Appeals Chamber Judgment of 15th July 1999, para 166

[6] *Ibid.*, p 361

[7] Claire De Than & Edwin Shorts, *International Criminal Law and Human Rights*, 1st Ed, London: Sweet & Maxwell, 2003, p 87

out against innocent civilians were only legally recognised as crimes less than sixty years ago with the codification of the 1949 Geneva Conventions although they were morally unacceptable before then. In article 6 (c) of the Nuremberg Charter, crimes against humanity were recognised as separate offences, whether committed before or during the war. However, despite universal condemnation of crimes against humanity, there is no specific convention to deal with this offence. Under both the ICTR and the ICTY statutes, crimes against humanity are defined to include; murder, extermination, deportation, imprisonment, enslavement, torture, rape, persecutions on political, racial and religious grounds, and other inhumane acts.[8] Article 7(1) of the statute of the International Criminal Court extends the list of crimes against humanity to include enforced disappearance of persons and the crime of apartheid.

In the ICTY statute, it is necessary that crimes against humanity be committed in an armed conflict, whether international or non-international for the tribunal to have jurisdiction. The attacks must also be directed against a civilian population.[9] In *Tadic*[10], the ICTY ruled that an armed conflict exists whenever there is resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state. Although under customary international law, the requirement of an armed conflict is not a necessary ingredient for crimes against humanity; the same is a jurisprudential prerequisite under the ICTY.[11]

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[8] See Articles 3 and 5 of the Statutes of the ICTR and ICTY respectively.
[9] See Article 5 of the ICTY Statute
[10] *Prosecutor v Tadic*, Case No. IT-96-21-T, Appeals Chamber Judgment of 15th July 1999, para 249
[11] Claire De Than & Edwin Shorts, *International Criminal Law and Human Rights*, 1st Ed, London: Sweet & Maxwell, 2003, p 90

In addition to the requirement in the ICTY statute that there must be an armed conflict, the tribunal in *Kunarac*[12] listed the following elements as necessary; that there must be an attack; the acts of the perpetrator must be part of the attack; the attack must be directed against any civilian population; the attack must be widespread or systematic and the perpetrator must know of the wider context in which his acts occur and know that his acts are part of the attack. In *Gacumbitsi,*[13] the ICTR clarified that the presence of certain individuals within the civilian population who do not fall under the definition of "civilians" does not deprive the population of its civilian character. In *Akayesu*,[14] the trial chamber added the fact that an attack must be inhumane in nature and character, causing great suffering or serious injury to body or to mental or physical health and must be launched on discriminatory grounds, that is on national, political, ethnical, racial or religious grounds for it to constitute a crime against humanity.

In international law, rape is recognised as a war crime and this recognition began with the Tokyo trials after the Second World War. It was incorporated as a crime against humanity under Control Council Law No. 10.[15] The prosecution of rape and sexual enslavement as crimes against humanity by the International Criminal Tribunal for the former Yugoslavia (ICTY) fits within a larger, emerging picture of international legal jurisprudence. First, the ICTY built upon both its own prior decisions and the decisions of the International Criminal Tribunal for Rwanda (ICTR), especially *Prosecutor v. Akayesu*, in order to close gaps in the international legal conceptualizations of rape and

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[12] *Prosecutor v Kunarac, Kovac and Vukovic*, Case No IT-96-23/11, Trial Chamber Judgment of 22nd February 2001, para 410

[13] *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-T, (Trial Chamber), para 300

[14] *Prosecutor v Akayesu,* Case No. ICTR-96-4-T, Trial Chamber, Judgment of 2nd September 1998, paras 578 & 595

[15] See Article II (c) , Control Council Law, No 1 Claire De Than & Edwin Shorts, *International Criminal Law and Human Rights*, 1st Ed, London: Sweet & Maxwell, 2003, p 66

enslavement, torture, war crimes, genocide and crimes against humanity. Second, building upon the example set by the ICTR, the ICTY broadened international protections of civilians of either gender, especially civilians of different ethnicities, from even unsystematic acts of depravity. The ICTY gives the word "civilian" a much broader meaning than its normal common sense meaning. Even if there are a few members of an armed group intermingled with the targeted civilian population, once they remain predominantly civilian, then that whole group will be considered civilian for the purposes of the offence of crimes against humanity.[16] The two tribunals have established a historic foundation for the prosecution of crimes against humanity by other courts such as the International Criminal Court and national courts.

The ICTY and the ICTR's jurisdiction extend to acts of sexual violence perpetrated against civilians. The ICTY's jurisdiction particularly extends to violations of international humanitarian law committed in Kosovo since 1991 to date. It does not have a limited time spun like the ICTR that has jurisdiction over genocide and other serious violations of international humanitarian law committed in the territory of Rwanda, and Rwanda citizens responsible for such violations committed in the territory of neighbouring states between 1st January 1994 and 31st December 1994. Both statutes specify rape as one of the acts which may constitute crimes against humanity. The statute of the Rwanda tribunal enumerates "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" as war crimes, following the formulation of common article 3 of the Geneva Conventions and article 4(2)(e) of Additional Protocol II of 1977.

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[16] See *Prosecutor v Kayishema & Ruzindana*, Case No ICTR-95-1-T, Trial Chamber Judgment of 21st may 1999, para 127-129 and *Prosecutor v Kordic & Cerkez,* Case No IT-95-14/2, Trial Chamber, Judgment of 26th February 2001, para 180

In the *Akayesu* decision, the ICTR found the defendant guilty of crimes against humanity based on evidence that he had witnessed and encouraged rapes of Tutsi women within the premises of *bureau communal* while he was the *bourgmestre* of the Taba Commune. It was alleged that Akayesu had publicly incited the perpetrators by telling them "never to ask him again what a Tutsi woman tastes like."[17] He was charged with rape as a war crime during Rwanda's civil war and this signified the prosecution of rape as a war crime in an internal armed conflict. In the dicta in the *Akayesu* decision, the ICTR described a situation in which a rapist might deliberately impregnate his victim with the intent to force her to give birth to a child who would, because of patrilineal social conventions, not belong to its mother's group. The tribunal noted that such an act might be a constitutive element of genocide, thus recognizing forced pregnancy as a potential crime. After *Akayesu* and *Kunarac*, any act of rape during war may become tantamount to a crime against humanity, a war crime, or an act of genocide, and may not be tolerated or ignored by the international legal community.

The jurisprudence of the ICTY and the ICTR also recognize rape as torture. In the *Celebici* case, the ICTY characterized the rape of Bosnian Serb women prisoners at the Celebici prison camp as acts of torture. The tribunal found Hazim Delic, a Bosnian Muslim deputy camp commander, guilty of torture as a grave breach of the Geneva Conventions of 1949 and torture as a war crime in relation to the rapes he committed. In the same Case Zdravko Mucic, a Bosnian Croat camp commander, was found to have command responsibility for crimes committed at Celebici, including crimes of sexual assault. This decision underscored the fact that rape inflicts the severe physical and

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[17] *Prosecutor v Akayesu*, Case No. ICTR -96-4-T, Trial Chamber, Judgment of 2nd September 1998, para 422

psychological pain and suffering that characterizes torture. Sexual violence strikes at the very core of human dignity and physical integrity. The actions in former Yugoslavia involved a targeted campaign of gruesome dehumanization, actualized as the rape and sexual enslavement of approximately twenty thousand women.[18] In *Tadic*, the ICTY heard extensive testimony on the rapes and sexual assaults committed against Bosnian Croat and Bosnian Muslim women. In the *Celibici* case, the trial chamber emphasized that when such violence is committed against a woman because she is a woman, in addition to rape because of a woman's ethnicity, the perpetrator's intent triggers the prohibited purpose of gender discrimination as an element of the crime of torture. In *Kunarac*[19] the trial chamber concluded that rape is a serious offence that unquestionably satisfies the requirement of article 3 common to the four Geneva Conventions of 1949. The tribunal reiterated the conclusion that rape and sexual enslavement could also be considered as war crimes.[20] These decisions establish clear boundaries for intolerable behaviour although they may not prevent campaigns for mass rape against civilians in future wars.

In *Celebic*i, the ICTY found Zdravko Mucic guilty on the basis of command responsibility for the violations of international humanitarian law committed by guards at the camp including rapes and sexual assaults, and this introduced the issue of command responsibility for rape. Indictments against Bosnian Serb leaders Radovan Karadzic and Ratko Mladic charged them with command responsibility for rape and sexual assaults

[18] William Drozdiak, Serbs Forces Raped 20,000, EC Team Says, Washington Post, Jan. 9, 1993, at A12
[19] *Prosecutor v Kunarac*, Case No IT-96-23-T
[20] *Ibid.*, para 883-890

rising to the level of crimes against humanity. In *Kunarac,*[21] the definition of crimes against humanity was expanded to include the application of war crimes' standards to acts of rape and sexual enslavement. By building on the *Akayesu* decision, the expansion closed holes in the international legal conceptualizations of rape and enslavement, torture, war crimes, genocide, and crimes against humanity, and it brought prosecution of sexual crimes against women to the forefront of international law. It broadened the enforcement of international protections of civilians, especially those of different ethnicities, from even unsystematic acts of depravity during an armed conflict.[22]

The Statute of the International Criminal Court recognizes sexual violence and rape as international crimes. In addition to charging torture or inhuman treatment as grave breaches of the Geneva Conventions, the statute lists other crimes such as committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence as punishable crimes. Such crimes may be prosecuted as grave breaches of the Geneva Conventions (in the context of international armed conflict) or as violations of common article 3 of the Geneva Conventions (in the context of internal armed conflict).

In its jurisprudence, the ICTR and the ICTY have defined the crime of extermination which is considered a crime against humanity. Although extermination was not specifically defined in the tribunals' statutes and in the Nuremberg Charter, the two tribunals have developed jurisprudence that relate to the essential elements of the crime. In the *Akayesu* judgement, the trial chamber considered that extermination is a crime that by its very nature is directed against a group of individuals and differs from murder in

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[21] *Prosecutor v Kunarac*, Case No. IT-96-23-IV (Judgment of 22nd February 2001),
[22] See *Kunarac*, Judgment,Case Nos. IT-96-23-T & IT-96-23/1-T

that it requires an element of mass destruction that is not required for murder. The tribunal was of the view that there is no need for a defined number of people to die for the killing to rise to an act of extermination; the crime is determined on a case-by-case basis.[23] In *Gacumbitsi*,[24] responsibility for a single or a number of killings was considered insufficient for a finding of extermination. In *Krstic*,[25] the trial chamber held that the definition of the number of individuals involved should be read as meaning the destruction of a numerically significant part of the population concerned. In *Prosecutor v Kayishema and Ruzindana,* the tribunal ruled that there is no specific numerical requirement since it is usually an indiscriminate elimination.[26]

Genocide

The term "genocide" was first attributed to a Polish attorney Raphael Lemkin[27] in 1944. Lemkin, a scholar of international law, promoted the concept that within international law there existed "unarticulated laws of humanity which protected the integrity and existence of groups." In describing the crimes perpetrated on the Jews of Europe by the Nazis, Lemkin devised the term "genocide" from the Greek word *genos* meaning race or tribe and the Latin word *cide* meaning to kill.[28] The term "genocide" was first used to describe the massacre of the Jewish people. Genocide is a denial of the

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[23] *Akayesu Judgment*, para 91
[24] *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-T, (Trial Chamber), para 309
[25] *Prosecutor v Krstic*, Case No. IT-98-33, Trial Chamber Judgment of 2nd August 2001, para 502
[26] *Prosecutor v Kayishema & Ruzindana,* Case No ICTR-95-1-T, Trial Chamber, Judgment of 21st May 1999, para 142
[27] Raphael Lemkin, "*Axis Rule in Occupied Europe*," Cited in Scott D. Owens, "Sentencing Procedure of Clement Kayishema and Obed Ruzindana under the Statute of the International Criminal Tribunal for Rwanda for Genocide and Crimes Against Humanity: Memorandum for the Office of the Prosecutor," *New England School of Law International ,War Crimes Project ,Rwanda Genocide Prosecution,* UCWR, November 1999. See also Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 Az. J. Int. Comp. L. 415, 419, Spring 1998.
[28] *Ibid.*

right of existence of an entire human group just as homicide is the denial of the right to life of individual human beings. Such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contribution represented by these human groups, and is also contrary to moral law.[29] However, during the trial of the Nazis at Nuremberg, genocide was not a crime punishable under the jurisdiction of the Nuremberg tribunal. This was due to the fact that prior to trials at Nuremberg, genocide had not been codified by international law. The Nazi officials were charged with crimes against humanity, specifically the mass extermination of a civilian population.[30]

In the hierarchy of international humanitarian crimes, genocide is widely perceived as being the most barbaric, heinous and abominable of all inhuman acts committed against mankind. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide of defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its destruction in whole or in part; imposing measures intended to prevent births within the group; or forcibly transferring children of the group to another group.[31] The ICTR case of *Akayesu* is a landmark decision on the crime of genocide.[32] The tribunal defined the crime of genocide elaborately and distinguished it from other crimes due to its

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[29] See United Nations General Assembly Resolution 96(1) dated 11th December 1946 declaring Genocide a Crime under International law.

[30] Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 Az. J. Int. Comp. L. 415, 419, Spring 1998.

[31] See Article 2 (2) of the Convention on the Prevention and Punishment of the Crime of Genocide

[32] Claire De than & Edwin Shorts, *International Criminal Law and Human Rights*, 1st Ed, London: Sweet & Maxwell, 2003, p 65

requirement of special intent, which lies in the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[33] This implies that a person can only be convicted of genocide if he committed one of the enumerated acts with the specific intent to destroy in whole or in part a particular group.[34] In *Kayishema and Ruzindana*[35] the trial chamber stated that the specific intent can be inferred from words and deeds and may be demonstrated by a pattern of purposeful action. From the jurisprudence of the two tribunals it is clear that the mere attacking and killing members of a particular group is not sufficient to constitute genocide; it must be further proved that the perpetrator intended to destroy that group in whole or in part.

The ICTY and the ICTR also prosecuted rape as genocide. In *Akayesu*, the ICTR found Jean-Paul Akayesu guilty of genocide, which decision was based in part on evidence that he had witnessed and encouraged rapes and sexual mutilation of women in the course of a genocidal campaign against the Tutsi population while he was a communal leader. In the ICTY case of the *Prosecutor v Anto Furundzija,* rape was recognized as a violation of the laws or customs of war. The tribunal found Anto Furundzija, a local Bosnian Croat military commander, guilty of aiding and abetting a war crime, that is, the rape of a Bosnian Muslim woman. The ICTY defined rape under international law to cover both male and female victims, thus expanding the definitions of rape that had been given by the ICTR in *Akayesu.* [36]

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[33] *Prosecutor v Akayesu, Case* No. ICTR-96-4-T, (Trial Chamber), Judgment of 2nd September 1998, para 517-522

[34] *Prosecutor v Rutaganda*, Case No ICTR-96-3, (Trial Chamber), Judgment of 6th December 1999, para 59

[35] *Prosecutor v Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber, Judgment of 21st May 1999, para 527

[36] *Prosecutor v. Anto Furundjiza*,(Trial Chamber) para 174

Application of Article 3 common to the four Geneva Conventions of 1949

Article 3 common to the four Geneva Conventions of 1949 contains provisions that regulate armed conflicts not of an international character. It extends principles of humanitarian protection to those persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause. It prohibits taking of hostages, outrages upon personal dignity, and violence to life and person in particular, murder, mutilation, cruel treatment and torture among others. Additional Protocol II of 1977 which applies to non international conflicts developed and supplemented Article 3 common to the Geneva Conventions of 1949. International humanitarian law has however had a historical bias towards regulation of inter-state warfare which is evidenced by the fact that the 1949 Geneva Conventions and the Additional Protocols of 1977 contain close to 600 articles, out of which only Article 3 common to the 1949 Geneva Conventions and the 28 articles of Additional Protocol II apply to internal conflicts. Common article 3 only covers non-participants and persons who have laid down their arms, it does little to regulate combat or protect civilians against the effects of hostilities. Additional Protocol II addresses protection of civilian populations more explicitly although its coverage does not compare to the prohibitions on indiscriminate attack and on methods and means warfare causing unnecessary suffering that are applicable under Additional Protocol I.[37] However inspite of this, customary international law has developed to a point where the gap between the regimes governing internal and

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[37] See Articles 13-15 of Additional Protocol II and Article 35 & 51 of Additional I

international conflicts is less marked. This is reflected in the *Tadic*[38] case where the ICTY appeals chamber explicitly held that customary rules governing internal conflicts include:

> "protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban on certain methods of conducting hostilities."

The ICTY and the ICTR have broken down the barriers between international and non-international conflicts. International and internal aspects were closely intermingled in the conflicts in the former Yugoslavia and in Rwanda. It would therefore be arbitrary to attempt to separate the two types of conflict, although international humanitarian law has established different rules pertaining to each category of situation. The problem has been approached from the point of view of competence, particularly in the *Tadic*[39] case. The ICTY has also narrowed the gap between international and internal conflicts. In *Tadic* the tribunal set out conditions under which a *prima facie* internal conflict becomes international in character. The appeals chamber stipulated that:

> "It is indisputable that an armed conflict is international if it takes place between two or more states. In addition, in case of an internal conflict breaking out on the territory of a state, it may become international if another state intervenes in the conflict through its troops, or alternatively if some of the participants in the internal armed conflict act on behalf of another state."[40]

The blurring of the distinction between the features characteristic of international and non-international conflicts has led to the emergence of customary rules in

[38] *Prosecutor v Tadic*,Case No. IT-94-1, Appeals Chamber, Judgment of 2nd October 1995, para 127
[39] *Prosecutor v Tadic*, Case No. IT-94-1, Appeals Chamber, Judgment of 10th October 1995
[40] *Prosecutor v. Dusko Tadic*, Case No. IT-94-1, (Appeals Chamber), Judgment of 15th July 1999, para. 84

humanitarian law, the existence and content of which the ICTY has rightly recognized and formally acknowledged. The ICTY thus largely bases its decisions on custom and on the evolution of international humanitarian law, while at the same time contributing to its development. The Rome Statute of the International Criminal Court expressly includes both serious violations of article 3 common to the four Geneva Conventions of 1949 and other serious violations of the laws and customs applicable in armed conflicts not of an international character in the article concerning its jurisdiction over war crimes.[41] War crimes are also defined to include grave breaches of the Geneva Conventions of 12th August 1949 and other serious violations of the laws and customs of war applicable in international armed conflicts.[42]

The conviction of Akayesu by the ICTR was historic because it was the first time that a defendant was tried and convicted by an international tribunal for genocide arising out of an internal conflict, since the adoption of the Genocide Convention in 1948 and the Geneva conventions of 1949. Moreover, Akayesu's conviction for genocide constituted a judicial precedent for other trials conducted by the ICTY and the ICTR. The judgment in *Akayesu* is truly remarkable in its breadth and vision, as well as in the detailed legal analysis on many issues that will be critical to the future of both ICTR and ICTY, in particular with respect to the offence of genocide. Although the judgment in *Akayesu* was hailed as historic, it has been criticized for being "abundant in facts but short on law and reasoning to support its determinations, consequently, its conclusions about rape in

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[41] See Article 8 of the Statute of the International Criminal Court
[42] Article 8, Rome Statute of the International Criminal Court.

international law were only tentative."[43] The two tribunals have had to deal with the darkest and most brutal tales of man's inhumanity to man and woman.

Sentencing a defendant for crimes arising out of same facts

The ICTY trial of *Tadic* and *Furundzija* exemplify the notion that it is at the discretion of an international criminal tribunal to sentence a defendant, if found guilty, for crimes arising out of the same set of facts. The correct procedure to be followed in such matters is to sentence the defendant for all possible punishable crimes with the sentences running concurrently.[44] In the ICTR case of *Prosecutor v Kayishema* and *Ruzindana,* the defendant, Obed Ruzindana was only convicted for a single act of genocide. If Ruzindana, on appeal, were to submit evidence disputing the presence of one of the elements of genocide such as "intent to destroy", then there would be nothing in place to justify his further incarceration since Ruzindana could not be tried again as this would violate the ICTR's double jeopardy provision. Thus, by failing to sentence the defendants Ruzindana and Kayishema on all charges, the trial chamber placed justice in jeopardy. International criminal tribunals may sentence defendants for multiple convictions arising out of the same set of facts as long as such sentences run concurrently.[45] By imposing more than one sentence upon a defendant, there is significant increase that, should a defendant successfully overturn a conviction, some measure of justice would be carried out. A secondary conviction could impose a

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[43] The Holocaust Encyclopedia (Walter Laquer & Judith Tydor Baumel eds., Yale Univ. Press 2001).
[44] *Prosecutor v Dusko Tadic*, Case No. IT-94-1, Judgment of 7th May 1997
[45] *Prosecutor v Kayishema & Ruzindana*, Case No. ICTR – 95-1-T, Judgment of 21st May 1999, para

substantially similar sentence upon the defendant as the sentence which might be overturned on appeal.[46]

However this anomaly was rectified in the ICTR case of the *Prosecutor v Akayesu* where the tribunals held that genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions of 1949 and of Additional Protocol II have different constituent elements and are intended to protect different interests. The crime of genocide exists to protect certain groups from extermination while the concept of crimes against humanity protects civilian populations from persecution. The idea of violations of article 3 common to the Geneva Conventions and of Additional Protocol II is to protect non-combatants and persons *hors de combat* in internal conflicts. Since these crimes have different purposes and are never co-extensive, the tribunal ruled that it is legitimate to charge these crimes separately although they may be based on the same facts. Accordingly multiple convictions are also permissible as long as the sentences run concurrently.[47] In *Prosecutor v Rutaganda*, the tribunal affirmed the decision in Akayesu that allowed multiple convictions for offences based on the same set of facts.[48]

The many decisions taken so far, especially by the International Criminal Tribunal for the former Yugoslavia, have enabled both courts to develop progressive and constructive case law in the spheres of general international law and international humanitarian law, covering different questions of procedure and competence and also some substantive issues of considerable importance. These points include the question of

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[46] *Ibid.*
[47] *Prosecutor v. Akayesu*, Case No ICTR-96-4-T, Trial Chamber, Judgment of September 2, 1998, paras 468-470
[48] *Prosecutor v Rutaganda*, Case No ICTR-96-3, (Trial Chamber), Judgment of 6th December 1999, paras 110-119

fair trial, the distinction between international and non-international conflicts and the role of custom in international humanitarian law. The decisions of the two tribunals have largely been based on customary international law. The jurisprudence of the ICTY and the ICTR has contributed immensely to the development and enforcement of international humanitarian law.

Chapter Six

Conclusion

The study set out to examine the enforcement of international humanitarian law with particular emphasis on the jurisprudence emerging from the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Early attempts to enforce international humanitarian law dating back to the Nuremberg and Tokyo trials of 1945 to 1947 and their implications on the ICTR and ICTY trials were also examined. One of the key assumptions of the study was that the ICTR and ICTY have contributed immensely to the development of international humanitarian law through clarifying and interpreting applicable rules of law just like any other judicial body.

An examination of the many decisions handed down by the ICTR and the ICTY since their inception, reveals that the two tribunals have contributed to the development and enforcement of international humanitarian law in three ways, which interact with each other: first, by affirming the customary nature of a certain number of principles governing armed conflicts which have since risen to the level of *jus cogens*; secondly, by reducing the substantive gap separating the rules applicable to international versus non-international armed conflicts; and finally, by adapting international humanitarian law to modern realities through a liberal interpretation of certain relatively old provisions of humanitarian treaties.[1] The two tribunals affirmed that crimes such as genocide, crimes against humanity, war crimes and torture have attained the level of *jus cogens* and are

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[1] Paul Tavernier, "The experience of the International Criminal Tribunals for the former Yugoslavia and for Rwanda," *International Review of the Red Cross,* 31st December 1997, pp 606-609

now considered as peremptory norms of international law.[2] They have attained this status because they threaten peace and security, which are the essential values of any society. These offences stand to be redressed by the international community as a whole. The United Nations Security Council indeed described events in the former Yugoslavia and Rwanda as a threat to international peace and security and this gave rise to the Security Council's creation of the ICTY and the ICTR on 25th May 1993 and 8th November 1994, respectively.[3]

After more than ten years of existence, it appears that the role of the two tribunals, (the ICTY and ICTR), cannot be limited to the mere enforcement of international humanitarian law, since, while exercising its functions, the tribunals have been interpreting this complex area of law and in so doing have greatly contributed to a more progressive vision of international humanitarian law. The tribunals have extended and modified rules of law contained in the 1949 Geneva Conventions to suit the challenges of contemporary conflicts and also to suit the particular facts of the cases before them. In the *Tadic* Case for instance, the ICTY expanded the nationality doctrine to cover civilians caught up in inter-ethnic conflicts and recognized the fact that a *prima-facie* internal conflict can become international in character.[4]

The idea of applying legal rules and standards to the complex and chaotic backdrop of contemporary armed conflicts and episodes of mass atrocity is a bold effort by the two tribunals to ensure individual responsibility of the perpetrators of such heinous crimes. Modern conventional international humanitarian law has its origins in the nineteenth

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[2] See *Prosecutor v Kayishema & Ruzindana*, Case No. ICTR-95-1-T(Tril Chamber),May 21, 1998, para. 88
[3] See United Nations Security Council Resolution 827 of 25th May 1993 and United Nations Security Council Resolution 955 of 8th November 1994
[4] *Prosecutor v Tadic*, Case No. IT-95-1(Trial Chamber), Judgment of 7th May 1997, para 560

century, a time governed by state-centric notions of international law. Rights and duties were defined largely for states rather than for individuals. At the time the 1949 Geneva Conventions were formulated the drafters may not have envisaged the present-day type of inter-ethnic conflicts. Indeed, the nature of the armed conflict in Bosnia and Herzegovina reflects the complexity of many modern conflicts and not, perhaps, the paradigm envisaged in 1949.[5] The two tribunals have had to interpret the law in a manner that corresponds to the contemporary context in which serious violations of international humanitarian law took place in the former Yugoslavia and Rwanda, thus affording protection to civilians to the maximum extent possible.

Most importantly the two tribunals brought to life the crime of genocide as codified in the Genocide Convention of 1948 and violations of common article 3 of the Geneva Conventions. It was the first time an international tribunal was established for purposes of bringing to justice perpetrators of international crimes in purely internal conflicts such as the Rwanda genocide. This is basically a recognition by the international community that internal conflicts constitute a threat to international peace and security. This also signifies an affront against impunity that has characterized commission of international crimes. The Rwanda Tribunal became the first court after the adoption of the Genocide Convention of 1948 and the Geneva conventions of 1949 to try senior government officials for violation of international humanitarian law. The former Rwanda Prime Minister Jean Kambanda was the second person to be convicted of genocide and other related crimes by the ICTR sitting in Arusha, Tanzania. In February 2002, the ICTY began the trial of Slobodan Milosevic, the former Serbian leader, who many argue is

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[5] *Prosecutor v Delalic et al.*(*Celebici Case*), Case No. IT-96-21-T, Judgment of 16th November 1998, para 170

responsible for most atrocities that were committed in the territory of the former Yugoslavia.[6] The trial sent a signal that violations of international humanitarian law would no longer be tolerated by the international community and it also signals the end of impunity that has characterized commission of international crimes. The ICTY and the ICTR trials of senior government leaders including heads of state has shown that international judicial bodies are capable of performing important adjudication duties which national courts may not perform.

The conviction of a former mayor, Jean Paul Akayesu by the Rwandan tribunal on 2 September 1998 was the first conviction on genocide by any international court, and the first time an international court found the crime of rape to be an act of genocide. Generally, the ICTR and the ICTY have been responsible for the most significant developments in criminalization of sexual violence in international law. Sexual violence has been charged as violations of the laws or customs of war, genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, and violations of common article 3 of the 1949 Geneva Conventions and their two Additional Protocols of 1977.

The ICTR and ICTY, through their creation and functioning have contributed significantly to development of international humanitarian law. The jurisprudence of the two tribunals will definitely offer useful guidelines on interpretation, application and enforcement of international humanitarian law. Except for the International Criminal Court, the ICTY and the ICTR are so far, the only examples of criminal tribunals that have been established by the international community as a whole and have not been imposed by the victors on the vanquished as was the case with the Nuremberg and Tokyo

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[6] *Prosecutor v Slobodan Milosevic*, Case No IT-02-54-T, Judgment of 16th June 2004

Tribunals. The principles embodied in the Nuremberg Charter however influenced considerably the development of rules of international law concerning the extradition of war criminals, the non-applicability of statutory limitations to war crimes and the increase in the number of crimes that can be termed "crimes against humanity" as exemplified in the statutes of the ICTY and ICTR.

The establishment of the tribunals ignited the process that led to the negotiation and subsequent adoption of the Rome statute of the International Criminal Court on 17th July 1998 that created a permanent international criminal court. The International Criminal Court (ICC) was set up in July 2002. It is the first international court to be established by and with the cooperation of the world community unlike the Nuremberg and Tokyo War Crimes Tribunals that were created by the victors of the Second World War and the ICTR and the ICTY that were set up under different resolutions of the United Nations Security Council.

The ICC is a permanent international criminal court, unlike the ICTR and the ICTY that are *ad hoc* in nature since they were set up for specific purposes and are to be disbanded in the future. The ICC was established to try grave humanitarian and human rights crimes globally and is not geographically defined like the ICTR and ICTY. The ICC however only possesses jurisdiction over crimes committed after its establishment unlike the ICTR and the ICTY which have jurisdiction to prosecute individuals for crimes committed prior to the setting up of the tribunals. The ICC has jurisdiction to try crimes of genocide, crimes against humanity and war crimes. It will also try crimes of aggression once a provision is adopted defining the crime.[7] The creation of the ICC is

[7] See Article 5 (1) and (2) of the Rome Statute of the International criminal Court

aimed at putting an end to impunity as it sends out a powerful message that individuals responsible for human rights atrocities would be tried and punished for their crimes should national courts fail to take appropriate judicial action against them. It is expected that the ICC will benefit from the immense jurisprudence developed by the ICTR and the ICTY. Key and often revolutionary decisions of both tribunals as relates to sexual violence provided blueprints for the ICC rules on helping victims of crime[8] and contributed greatly towards the definitions of crimes encompassing or constituting sexual violence which is a positive development in international humanitarian law.

The ICTY and ICTR have legitimated the prosecution of international crimes, thus creating a substantial and tangible body of jurisprudence, which has been lacking in the past. The adoption of the ICC Statute and the establishment of the court constitute significant progress in international criminal law, especially considering that the ICC is a multilateral, treaty based, permanent court with the status of an independent international organization. The relationship between the UN Security Council and the ICC is also characterized by its complementary nature as opposed to subordination and this is a great development in international law. It is hoped that international humanitarian law would be enhanced by the ICC when it begins its trials especially borrowing from the success of the ICTR and the ICTY.

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[8] See the *Prosecutor v. Furundzija*, Case No IT-95-17/1 and the *Celibici Case,* Case No. IT-96-21-T

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