"THE PENAL RESPONSIBILITY AND SANCTIONS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW"

BY

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DEDICATION

This thesis is dedicated to God Almighty for his abiding mercies, my father, Hon. Patrick Amaije Igalawuye and my mother, Mrs. Mary Igalawuye who gave me life and instilled in me the virtue of hardwork and perseverance. I also dedicate it to Mr. Paul Igalawuye for his encouragement and belief in me.

DECLARATION

I hereby declare that this dissertation has been written by me and it is a record of my research work. It had not been presented in any previous application for higher degree. All quotations are indicated and the sources are fully acknowledged.

CHARLES ONYEKA IGALAWUYE

CERTIFICATION

This thesis entitled: **"The Penal Responsibility and Sanctions for Violations of International Humanitarian Law"** meets the regulations governing the award of the degree of Master of Law (LL.M) of Ahmadu Bello University Zaria and is approved for its contribution to knowledge and literary presentation.

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ABSTRACT

During this century, millions of children, women and men have been victims of unimaginable atrocities in the threatre of wars that deeply shook the conscience of humanity. It is against this background that an analysis of the penal responsibility and sanctions for violations of International Humanitarian Law becomes necessary.

The first chapter is a general introduction which highlighted all the core issues to be discussed and analysed in the course of this research work.

The second chapter will examine the definition of crimes under international law, war crimes and the prosecution of war criminals which has become so vitally important to stem the impunity with which violations international humanitarian law go unpunished.

The general scheme of repression codified in the four Geneva Conventions of August 12, 1949 and its Additional Protocols of 1977, International Criminal Tribunals for the former Yugoslavia and Rwanda and the Rome Statute of International Criminal Court will equally be examined.

Chapter three espouses the theory of state and individual responsibility under international law. It takes into cognizance that international humanitarian law establishes not only basic rights of the individual, but also contains important machinery for guaranteeing observance of these rules, imposes obligation necessary to repress any act constituting a serious infringement on personal dignity or a grave threat to the security of the civilian population.

Though the prosecution of war criminals after World War I was largely ineffectual, coupled with the different interpretations given to the November trial with regard to the position of individual under international law. Chapter four establishes that whatever the case may be regarding the position of the individual under international law after the Nuremberg trials through the creation of the two ***ad hoc*** international criminal tribunals for the former Yugoslavia and Rwanda, the United Nations Security Council took a great leap forward and established, beyond doubt, that individuals may now, with respect to international humanitarian law, appear as subject bound by certain legal obligations directly under international law, and can be held individually responsible.

The main thrust of chapter four is the examination of the elaborate penal regime and the concomitant sanctions in the Geneva Conventions and the Additional Protocols, the International Criminal Tribunals for Yugoslavia and Rwanda and finally the Statute of International Criminal Court.

Chapter five will examine the fundamental issue of which court has jurisdiction to prosecute the breaches of international humanitarian law against the backdrop that despite all the indignation aroused by the crimes, the international criminal tribunals are called upon to prosecute, the accused must be accorded the right to a fair hearing or trial. It takes cognisance of the fact that the effective humanitarian law and respect for human rights are complementary and indispensable to each other. They both contribute in upholding the rule of law.

It is our conviction that research on the penal responsibility and sanctions for breaches of international humanitarian law cannot be complete without according a pride place to international committee of the Red Cross that informed the elaborate discussion on the same in Chapter six before concluding the research work and proffering the way forward.

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ABBREVIATIONS

1.	A.J.I.L	American Journal of International Law
2.	C.C.L	Control Council Law
3.	H.R.L News	Human Right Litigation News
4.	ICRC	International Committee of the Red Cross
5.	I.C.J	International Court of Justice
6.	I.C.T.R	International Criminal Tribunal for Rwanda
7.	I.C.T.Y	International Criminal Tribunal for Former Yugoslavia
8.	I.L.C.	International Law Commission
9.	I.L.M	International Law Manual
10.	I.R.R.C.	International Review of the Red Cross
11.	U.N	United Nations
12.	UNESCO	United Nations Educational, Scientific & Cultural Organisation
13.	U.S.C.M.A	United State Court Martial, Appeal

CHAPTER ONE

1.0 INTRODUCTION

1.1 HISTORICAL DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

"Humanitarian law is a branch of public international law which owes its inspiration to a feeling for humanity and which is centred on the protection of the individual"

This quotation from a work by Mr. Jean Pictet defines the scope of this law, the purpose of which is to "alleviate the sufferings, of all the victims of armed conflicts who are in the power of their enemy whether wounded, sick or shipwrecked prisoners of war or civilian"[1]

Prior to the middle of the 19th Century, agreements to protect victims of wars were of mere transient character, binding only upon the contracting parties thereto, and based upon strict reciprocity.

In reality, they constituted purely military agreements usually effective only for the duration of a particular period of hostility. This state of affairs was changed by the birth of modern humanitarian law which is associated with the emergence of the Red cross movement. This development makes states bound by universal treaty applicable at all times and in all circumstances.

The history of mankind is the story of power struggles, confrontations and armed conflicts between nations, people and individuals[2].

From earliest times, men have been preoccupied with the problem of how to control the effect of violence and its attendant human sufferings with varying degrees of success.

It would therefore be misleading to claim that the founding of the Red Cross in 1863, or the adoption of the first Geneva Convention in 1864, marked the beginning of international humanitarian law as we know it today. Just as there is no society of any sort that does not have its own set of rules, there has never been a war that did not have some vague or precise rules covering the outbreak, end of hostilities, and how they are conducted. As Quincy Wright rightly observed that "Taken as a whole, the war practices of primitive people illustrate various types of international rules of war known at the present time; rules determining the circumstance formalities and authority for beginning and ending war; rules describing limitation of persons, time, place and methods of it conducts, and even rules outlawing war altogether[3].

The first laws of wars were proclaimed by major civilization several millennia before our era: "I establish these law to prevent the strong from oppressing the weak"[4].

Many ancient texts such as Mahabharata, the Bible and the Koran contain rules advocating respect for the adversary. For instance, the viqayet, a text written toward the end of the 13th century at the height of the period in which the Arabs ruled Spain, contains a veritable code for warfare. The 1864 convention, in the form of a multilateral treaty, therefore codified and strengthened ancient, fragmentary and scattered law and customs of war protecting the

wounded and those caring for them. In the 17th century, the Dutch legal scholar and diplomat, Grotius wrote his De ***Jure Belli, Ac pacis***, in which he listed rules that are among the firmest foundation of the law of war.

In the 18th century, Jean – Jacques Rousseau made a major contribution in formulating the following principle about the development of war between States: "War is in no way a relationship of man with man but a relationship between state, in which individuals are enemies only by accident; not as men, nor even as citizens, but as soldiers . . . since the object of war is to destroy the enemy state, it is legitimate to kill the latter's defenders as long as they are carrying arms; but as soon as they lay them down and surrender, they cease to be enemies or agents of the enemy, and again become mere men and it is no longer legitimate to take their lives".

From the beginning of warfare to the advent of contemporary humanitarian law, over 500 cartels, codes of conduct, covenants and other texts designed to regulate hostilities have been recorded. They include the Lieber Code, which came into force in April 1863 and it is important in that it marked the first attempt to codify the existing laws and customs of war.

Unlike the first Geneva Convention adopted a year later the lieber code however did not have the status of a treaty as it was intended solely for union soldiers fighting in the American civil war[5].

Modern international humanitarian law can be associated with sophistication of weapons of mass destruction employed in modern warfare by large national armies and the resultant suffering of the wounded soldiers lying helpless in the battle field, the wanton destruction of properties and the ecological effect on the environment. These coupled with the increasing interest of state in the common principles of respect for the human being informed the development of the modern law of armed conflicts which is based on multilateral conventions.

On 24 June 1859, the Austrian and French armies clashed at Solferino, a town in modern Italy. After 16 hours of fighting the battle field was strewn with 40,000 dead and wounded men. The same evening Henry Dunant, a Swiss citizen, arrived at the area on business. He was horrified by what he saw: for want of adequate medical services in both armies, thousands of wounded soldiers were left to suffer unattended and abandoned to their fate. Dunant immediately set about organizing care for them without discrimination, helped by civilians from neighbouring villages. On return to Switzerland, Dunant was unable to forget the terrible scene he had witnessed.

He decided to write "A memory of Solferino" which he published at his own expense in November 1862, and circulated to friends, philanthropist, military officers, politicians and certain reigning families. The book was an immediate success and its appeal to human conscience was eloquent, as he stated. "On certain special

occasions, as, for example, when princes of the military art belonging to different nationalities meet. . . would it not be desirable that they should take advantage of this sort of congress to formulate some international principle sanctioned by a convention and inviolate in character, which once agreed upon, and ratified, might constitute the basis for societies for the relief of the wounded in the different European countries[6].

On 9th February 1863, the Geneva society for public welfare, a charitable association based in the Swiss city of Geneva, decided to set up a five-member commission to consider how Dunant's ideas might be implemented.

This commission made up of Gustave Moynier, Guillaume-Henry Dufour, Louis Appia, Theodore Mounior and Dunant himself met on 17 February and founded the International Committee for Relief to the wounded in time of war, which later became the International Committee of the Red Cross (ICRC)[7]. By Dint of enthusiasm and perseverance, they succeeded in 1864 in persuading the Swiss government to convene an international conference in which the representative of twelve states participated and the tangible result of which was the signing in 1864 the Geneva Convention for the Amelioration of the conditions of the wounded in the Armies in the field[8]. This expressed with clarity, the idea of a generally applicable humanitarian principle, by requiring the High contracting parties to treat their own wounded and those of the enemy with equal care[9]. Medical personnel, equipment and installation were to be protected.

They were to be identified by a distinctive emblem, a red cross on a white background. This first Geneva Convention signed in 1864, marked, the beginning of modern international humanitarian law. In 1899, the Hague Convention respecting the laws and customs of war on land and the adaptation to maritime warfare of the principles of the 1864 Geneva Convention. In 1906, the provisions of the 1864 Geneva Convention was improved and supplemented. In 1907, the Hague Convention of 1899 was reviewed and a new Convention which defined the categories of combatants entitled to prisoner of war when captured and to a specified treatment during the whole period of their captivity. In 1925, the Geneva Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases and of bacteriological methods of warfare was adopted. These Conventions which are at present in force were adopted.

The Diplomatic conference of 1949 not only adopted the 'Geneva Convention relative to the protection of Civilian Persons in time of war", but also carried out a revision of the three earlier conventions, the text of which were brought into harmony. The four Geneva conventions, containing some 400 articles, constitute a legal achievement of historic importance which for more than fifty years has afforded protection for the countless victims of armed conflict[10].

The international committee of the Red Cross, the initiator of international humanitarian law, in its quest to develop the law so that it may keep pace with the changing pattern of conflicts, undertakes revision of existing instruments as and when it appears to it to be necessary and feasible

Although the 1949 Geneva conventions marked a major advance in the development of humanitarian law. In 1965, the ICRC felt the time was ripe for such an undertaking. After de-colonization, however, the new states found it difficult to be bound by a set of rules which they themselves had not helped to prepare. What is more, the treaty rules on the conduct of hostilities had not evolved since the Hague Treaties of 1907. Since revising the Geneva Conventions might have jeopardized some of the advances made in 1949, it was decided to strengthen protection for the victims of armed conflict by adopting new texts in the form of protocols additional to the Geneva Conventions[11].

On the basis of the draft rules prepared in 1956, then on resolutions adopted in the 1960's by two International Conference of the Red Cross and by the International Human Rights conference held in Tehran in 1968, the ICRC studied the possibility of supplementing the conventions adopted in 1949. In 1969, the ICRC submitted the idea to the 21st International Conference of the Red Cross, in Istanbul; the participants including the states party to the Geneva Conventions mandated it accordingly and the ICRC's own lawyers embarked on the preparatory work. Between 1971 and 1974, the ICRC organized several consultations with government and the movement, the United Nations being kept constantly informed of the progress of the work.

In 1973, the 22nd International Conference of the Red Cross, in Tehran, considered the draft texts and fully supported the work done. In February 1974 the Swiss Government, as depository of the 1949 Geneva Conventions, Convened the Diplomatic Conference on

the re-affirmation and development of international humanitarian law applicable in armed conflicts, in Geneva, it comprises four sessions and ended in June 1977.

The law of Geneva, or humanitarian law proper, is designed to safeguard military personnel who are not or no longer taking part in the fighting and persons, particularly civilians not actively involved in hostilities, while the law of the Hague, or the law of war, which establishes the rights and obligations of belligerents in the conduct of military operations and limits the means of harming the enemy.

These two branches of IHL are not completely separate. However, the effect of some rules of law of the Hague is to protect victims of conflicts, while the effect of some rules of the law of Geneva is to limit the action that the belligerent can take during hostilities. With the adoption of the Additional Protocols of 1977, which combined both branches, of IHL, that distinction is now merely of historical and didactic value.

At the end of the fourth and last session of the Diplomatic Conferences, the plenipotentiaries of the 102 states present adopted the 102 articles of Protocol 1 relating to the victims of international armed conflicts and the 28 articles of Protocol 11 relating to the protection of victims of Non- international conflicts[12].

By adopting on June 8, 1977 the two Protocols Addition brought to a successful conclusion four years of arduous negotiation. It is indeed a landmark in the development of international humanitarian law[13].

To make state party bound by the protocols additional to the Geneva conventions, they have to sign and ratify or accede to them hence the solemn ceremony of signature of June 10, 1977. These texts became effective as from that date as common property and have been invoked in appropriate circumstances. Protocol I, relating to international armed conflict introduced innovatory features.

Special protection was extended to cover civilian medical personnel, transport and units, which represents a considerable improvement in medical assistance to victims[13]. This is a good illustration of the significant break through made by the protocol, since it broadens the generic category of objects and persons protected by the 1864 Geneva Convention. In addition the means of identification of medical transports (radio signal, radar, acoustic, etc) were adopted to modern technology[14]. These rules therein set forth should spare civilian populations such sufferings and tragedy of the kind experienced during the second World War.

Prior to 1977, there existed only fragmentary provisions for the protection of civilians against the consequences of armed conflicts: The Hague convention regulating the conduct of hostilities was signed in 1907, at a time when military aircraft were unknown and artillery fire had a comparatively limited range while the fourth Geneva convention of 1949, aside from setting forth a few general rules contains only provisions for the protection of civilians against abuses of power by enemy or an Occupying Power.

A major breakthrough of protocol, it must be emphasized was the substantial progress achieved in the rules relating to the conduct of hostilities, the authorized methods and means of warfare and the protection of civilian population[15]. New types of conflicts have emerged in the interlude, wars of liberation and guerrilla tactics. The use of sophisticated and indiscriminate weapons, such as incendiary weapons and fragmentation projectiles have also emerged. The Civilian population often compelled to accept combatants in their midst, have thus become more vulnerable. It was therefore important to frame legal rules of protection in that field.

The three basic rules governing the conduct of hostilities were clearly expressed and incorporated in the text of law:

1. The right of the parties to the conflict to choose methods or means of warfare is not unlimited[16].
2. "It is prohibited to employ weapons (. . .) and methods of warfare of a nature to cause superfluous injury"[17]
3. Civilians and civilian objects must not be the target of attack,[18]

These articles set out the principles of the distinction between civilians and combatants and between civilian objects and military objectives.

These articles protect both the civilian objects, which it defines by contradistinction with military objective. It specifies that attack against the civilian population or against civilian objects are

prohibited. As well as attacks made against civilians by way of reprisals, and that attacks may be directed only against military objectives. Indiscriminate attacks i.e. those which are of a nature to strike military objective and civilian or civilian objects without distinction are prohibited.

Similarly, it is forbidden to attack non- defended localities or demilitarized zones[18a]. Precautionary measures must be taken by the armed forces in order to spare to the fullest possible extent the civilian population and civilian objectives.

Four articles deal with relief in favour of the civilian population. These articles specify that the parties to the conflict must provide the necessary relief to the civilian population or, if they are unable to supply the needs of that population, must allow unimpeded passage to all relief supplies essential for its survival. This rule applies in all circumstances even for the benefit of an enemy population of an occupied territory. Action in this respect must include facilities for relief organization and protection of specialized relief personnel.

These articles supplement other protocol provisions on civilian objects, which prohibit the starvation of civilians as a method of warfare. In addition objects indispensable to the survival of the population such as agricultural areas, livestock, drinking water installation and supplies, crops, irrigation works etc; are hence forth protected as are works and installations containing dangerous forces

like nuclear electric generating stations, dams, dykes etc; cultural objects and places of worship. It is provided that military operations must be so conducted as to protect the natural environment against widespread, long term and severe damage [19a].

The protocol also changed the conditions conferring combatant status and consequently prisoner of war status in the event of capture. Fundamental guarantees of respect of the person have been introduced which include an enumeration of prohibited acts, such as murder, torture, corporate punishment, outrage upon human dignity, the taking of hostages, collective punishments and threat to commit any of the foregoing acts. Legal safeguards are provided, should a person be arrested for an offence related to the conflict; the accused has the right to be informed, in the language which he understands, of the acts of which he is arrested. If a sentence in passed, it must be pronounced by an impartial court applying a regular judicial procedure. Persons accused of war crimes must be handed over to the judicial authorities in accordance with the applicable rules of international law and they must benefit from the more favourable treatment under the Conventions or the Protocol. Special protection is specified for women and children and it is provided that parties to the conflict must avoid the pronouncement of the death penalty on them. If the sentence has already been pronounced, it must not be carried out upon a pregnant woman, upon a mother having dependent infants, or upon a person who has not attained the age of 18 years.

The protection afforded by the fourth Geneva Convention to civilians in the power of a party to the conflict has been extended by protocol 1, to contain categories which were not covered until then. Thus persons who were considered before the beginning of hostilities to be stateless or refugees shall be protected without any adverse distinction and in all circumstance. More so, the protocol, provides for the facilitation of the reuniting of dispersed families, and inquiring into the where about of missing persons[19].

With the assistance of specialized humanitarian organizations
Protection is also accorded journalists engaged in dangerous missions, especially those who are not accredited as war correspondents. They can now obtain from their own authorities or from those of the territory on which they work a special identity card attesting that the bearer has the right to be treated as a civilian within the meaning of the Geneva conventions.

The Geneva convention of 1949, provides for the immunity of the military medical personnel and installations, and civilian hospitals which are recognized as such and are marked with the red cross or red crescent emblem. The military medical personal and the personnel of civilian hospitals must be protected and respected. Protocol I extends to civilian personnel and medical units, during the hostilities, protection similar to that which is already accorded to military medical personnel and units. In order to avoid abuses, it has however specified that this protection will be accorded to units recognized by the authorities of a party to the conflict, civilian

religious personnel are protected by the protocol in the same manner as medical personnel.

In full grasp of the knowledge of the present day weaponry and means of warfare the Protocol juxtaposes the provisions on the protection of civilian population with regulations indicating the principles to be observed during combat. Thus protocol I prohibits the resort to perfidy i.e. feigning of surrender in order to attack the opponent, where as ruses of war like misinformation, camouflage are permitted. It is prohibited to order that there shall be no survivors in an attack. The improper use of recognized emblems like emblem of the red cross or red crescents, emblems of nationality United Nations flag etc is also prohibited.

The protocol reiterates the rule that parties to a conflict are prohibited from using weapons capable of causing superfluous sufferings to the victims [20] or which strike without discrimination. But the draft Protocol I submitted by the ICRC did not include any specific rules on the use of conventional weapons. The ICRC consequently organized two conferences of medical and military experts. These were held in 1974 at Luzern and in 1976 at Lugano, and they drew up a list of the weapons to be considered. Rules concerning specific weapons were, however, introduced into the Protocols and the Diplomatic Conference merely adopted a resolution referring the matter to the United Nations. Which in 1970 organized, the first session and a second session in 1980. A conference which concluded its proceedings, with the adoptions of a convention on protection or restriction on the use of the following

weapons. (a) those the primary effect of which is to injure by fragments which escape detection in the human body, thus preventing treatment of the wounds caused, (b) mines, booby traps and other devices which have caused in the past numerous victims among civilian population, often long after the end of hostilities, (c) incendiary weapons which have caused great sufferings to human beings as well as enormous damage to the environment.

Protocol I gave prisoners of war a broader definition than that embodied in the third Geneva Convention of 1949 in that, prior to the protocol, the members of the regular armed forces and partisans belonging to a party to the conflicts and certain persons who accompany the armed forces without actually being members thereof viz; war correspondents, civilian members of military aircraft crews were considered as prisoners of war. Under the provisions of protocol 1, the definition of prisoners of war now includes all members of the armed forces of a party to the conflict and also all members of armed groups and units which are under command responsible to that party. Guerrilla without uniform which are not recognized by the adverse party, also benefit from these provisions.[21] Nevertheless members of the armed forces are obliged to distinguish themselves from the civilian population at least by bearing arms openly during combat. The breach of this rule may entail deprivation of the status of prisoner of war.

The protocol provides for sanctions in the event of breaches. The repression of the breaches of the Geneva conventions and the

protocol is the subject of a number of provisions[22], which include a list of grave breaches which are regarded as war crimes, and of a few articles on the concept of responsibility Grave breaches of the protocol includes attacking the civilian population or gravely affecting it when attacking a military objective; launching a military operation against protected plants or non-defended localities the perfidious use of the emblems of the Red Cross; the transfer by an Occupying Power part of its own population into the territory it occupies, the deportation of an occupied population; and the sentencing of protected person without trial. Persons in command are held responsible for all breaches committed by their subordinates if they have not taken all necessary measures in order to prevent the commission of these acts, or in order to suppress them. The acts thus designated by the protocols, together with the serious breaches listed in the conventions, constitute an appropriate penal response to the most reprehensible acts committed in wartime.

Article 90 of protocol I brings a new control mechanism to international humanitarians law. The International Fact – Finding Commission. The 1949 conventions did include the idea of an inquiry but it was never put into effect. The Fact-finding commission constitutes an effort to remedy the short –comings of the convention system, making it mandatory in particular to accept an enquiry concerning any allegation of a serious violation of international humanitarian law. This is a new and powerful means of imposing respect for international humanitarian law. It still has two

weaknesses, however first a state is not bound by simply acceding to the protocol, it has to make a declaration specifically accepting the commissions competence. By 31 October 1997 out of 148-state party to protocol 1, only 50 had made such a declaration. The other weakness concerns its material competence for the commission is empowered to enquire only into situation falling within the scope of protocol 1, that is international armed conflicts. Yet most of the tragedies of recent times have taken place in the course of civil wars or hybrid situation of violence.[23] It therefore becomes imperative that the commission's field of competence be extended.

By and large protocol 1, is an important milestone in the development of international humanitarian law and in the words of George H. Aldrich ". . . I remain unshaken in my belief that protocol I represents a significant and responsible progressive development of international humanitarian law. There are presently 148 state party to protocol 1, and I believe that it largely represents customary international law today"[24].

Protocol 11, relating to non-international armed conflicts equally has a far reaching impact on the development of international humanitarian law. Protocol 11, a brief document consisting of 28 articles was adopted by consensus at the end of the diplomatic conference. It substantially supplement, and develops articles 3 common to the four Geneva conventions of 1949, the only provision applicable to armed conflicts of a non-international character.

Protocol 11, is applicable in armed conflicts which takes place in the territory of a high contracting party between its armed forces and dissident armed forces or other organized armed groups which under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. [25]

In spite of the restricted filed of application, since the situations covered are characterized by a comparatively high level of intensity of confrontation; the rules contained in Protocol 11, are very important for the protection of the victims.

The fundamental guarantees of respect for the human person have been strengthened and supplemented. The provisions relating to human treatment reiterate, on the whole those of protocol 1: respect of non-combatants; no adverse distinction between persons, prohibition to order that there shall be no survivors. Prohibition of acts of violence against the life, health, and physical or mental well being of persons; prohibition of torture, mutilation, taking of hostages, etc special protection for children, protection of persons whose freedom has been restricted and judicial safeguards for the wounded, sick, shipwrecked and dead[26]. Protocol II "does not include provisions on special categories of protected persons, such as prisoners of war, all persons, who do not or have ceased to take part in hostilities are entitled to the same guarantees.

Like in situation covered by protocol 1, medical and religious personnel, medical units and transports, and medical duties and such must be respected and protected.

Protocol II also set forth the general principle that the civilian population must be protected. Thus the protection of civilian objects is provided for in three specific cases: objects indispensable to the survival of the civilian population like prohibition of starvation of civilians as a method of combat, works or installations containing dangerous forces, cultural objects and places of worship[27] and the prohibition of forced movement of civilian[28].

Although, protocol 11, only covers situations of non-international armed conflict of a certain magnitude and duration, however, its provisions confirm the determination of the international community to limit the human sufferings caused by the most cruel of struggles i.e. the civil war. Concern to safeguard the states sovereignty, the fear of being hampered in fighting insurgent or dissident elements, meant that it was not possible to give protocol 11 a field of application comparable to that of Article 3 common to the four Geneva Conventions, although, from a humanitarian point of view, this would have been highly desirable. However, it set forth, for non-international armed conflicts standard recognized by the international community. In this regard, it is a step forward and its effect should be felt not only in situation where its applicability is formally acknowledged, but in all non-international armed conflicts.[29]

There are other recent efforts in the development of international humanitarian law. The 1993 Convention prohibits the development, production, stock pilling and use of chemical weapons and their destruction.

The Protocol relating to blinding laser weapons, adopted at the Vienna Diplomatic conference in October 1995, prohibit both the use and transfer of laser weapons, one of whose combat functions is to causes permanent blindness. The protocol also requires states to take all appropriate precautions including the training of armed forces, to avoid causing permanents blindness by the lawful use of other laser system.

In the case of mines, the field of application of protocol II to the 1980 convention was extended by the adoption, in Geneva on 3 May 1996, of an amended version of the Protocol on the prohibitions and restrictions of the use of mines bobby-traps, and other devices. Further more, the convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction, signed by 121 countries in Ottawa on 3-4 December 1997, entirely prohibits anti-personnel mines. This convention also provides for mine – clearance and assistance to victims of mines.

International humanitarian law treaties containing rules applicable to environmental protection include Article 55 of additional protocol 1 and the convention on the prohibition of military or any hostile use of environmental modification technique of 10 December 1976. However, the Gulf war of 1991, revealed that those rules were little

known and sometimes imprecise. Therefore in 1994, encouraged by the UN General Assembly and with the help of experts in the matter, the ICRC drafted guidelines for military manuals and instructions on the protection of the environment in times of armed conflicts

Another recent development is the San Remo Manual on international law applicable to armed conflicts at sea. The importance of that undertaking, carried out by the international institute of Humanitarian law with the support of the ICRC, was recognized by governments in the resolution adopted at the 26th International Conference of the Red cross and Red crescent, held in Geneva in 1995.

Although the Geneva Convention and the protocols additional thereto do not expressly prohibit the use of nuclear weapons, the general principles of IHL do apply in such cases. Among other things, they require belligerents to distinguish at all times between combatants and non- combatants and prohibit the use of weapons likely to cause unnecessary suffering. The International Court of Justice in The Hague reaffirmed the application of those principles to nuclear weapons in 1996[30].

1.2 OBJECTIVES AND SCOPE OF THE RESEARCH

Taking into cognizance the fact that international humanitarian law does not claim that it can put an end to the scourge of war, but aims at attenuating the unnecessary harshness of armed conflicts, and that the reciprocal interest of the belligerents should compel them to observe certain "rules of the game" in the conduct of hostilities. It is therefore

necessary to determine from the onset the objective of the research. The main thrust of the research is to undertake a discourse of the origin, nature and the scope of international humanitarian law albeit in brief with a view to determining whether the High Contracting Parties to the four Geneva Conventions and the two additional Protocols are keeping faith with their obligation, to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, or to have ordered to have committed, such grave breaches, and shall bring such persons, regardless of their nationality before its own courts.

Another important aim of the research, is to identify crimes breaches under international humanitarian law. The emotional and psychological trauma of displaced persons and refugees, the torture, cruel and inhuman treatment meted out to prisoners of war and other grave breaches of international humanitarian law necessitate that effective penal sanctions should be meted to those persons committing or ordering to be committed such grave breaches of international humanitarian law.

It is absolutely imperative to consider the enforcement machinery put in place both nationally and internationally under IHL to arraign, prosecute and punish those who violate the provisions of the Geneva Conventions and the Protocols.

Finally to determine the efficacy or otherwise of the sanctions and the enforcement machinery in bringing compliance with the rules of the game during armed conflicts.

1.3 RESEARCH METHODOLOGY

The principal source of materials for this research are textbooks, journals, law reports, pamphlets, conference proceedings (both national and international) humanitarian groups periodic publications most especially International Review of the Red Cross (IRRC). The central anchor of the entire discussion will be the four Geneva Conventions and the two additional Protocols. The analysis of the research will be based upon authoritative expositions, propositions of respected and universally acclaimed authors and jurists of contemporary humanitarian and legal philosophy especially in the area of humanitarian law and jurisprudence, judicial pronouncements of the international criminal tribunals and where necessary international institutions where they safeguard or enforce humanitarian principles.

1.4 ORGANIZATIONAL STRUCTURE

This research is essentially divided into six chapters with humanitarian principles as the common thread not only binding them but equally establishing the parameter of coordinating the entire discourse. The first chapter is a general introduction to the research work. It considers a general background information on the origin, nature and development of international humanitarian law. The chapter set the ball rolling by defining the objectives of the research sought to be achieved. It equally defines in precise and crystal terms the scope of the research. The chapter further considers the methodology the research will adopt and the materials to be employed. It finally considers the structure and order of presentation and of the research.

Chapter two deals with the issue of crimes/breaches under international humanitarian law, grave breaches of IHL applicable in international armed conflicts and other violations applicable in international armed conflict. Serious violations applicable in non-international armed conflicts will be analysed. The national and legal framework will form the epilogue of the chapter.

Chapter three will espouse the penal responsibility for grave breaches of international humanitarian law. International law and the theory of state responsibility, international text on penal responsibility will be discussed. Further, domestic legislation on penal responsibility is accorded a pride of place while individual penal responsibility in internal armed conflict will be treated towards the end of the chapter.

Chapter four undertakes an exposition of the penal sanctions for breaches of international humanitarian law. Nature and scope of the sanctions imposed will be analysed. Further, imposition of penalties for grave breaches by state is examined/trials of violators, extradition where necessary and reparation for states will conclude this chapter.

Chapter five generally treated the enforcement machinery of the sanctions of international humanitarian law. The establishments of national and international criminal jurisdictions to punish grave breaches, the competence and competent courts, procedural guarantees under IHL will be

analysed. Further, competence/jurisdiction of International Criminal Tribunals, International Criminal Tribunal for former Yugoslavia and International Criminal Tribunal for Rwanda will be examined. While the Permanent International Criminal Court will conclude this chapter.

Chapter six, the final part of this research work will bring the discourse to its conclusion by making recommendations and finally the International Committee of the Red Cross role in developing, monitoring and implementation of international humanitarian law will conclude this research work.

CHAPTER ONE NOTES AND REFERENCES

1. **Quoted in: Bory, F. Origin and Development of International Humanitarian Law, ICRC, Geneva, 1982, P. 7**
2. **Ladan, M. T. Introduction to International Human Rights and Humanitarian Law, Ahamdu Bello University Press, Zaria, Nigeria, 1999 P. 108**
3. **Quincy, Wright; quoted in International Committee of the Red Cross, ICRC "Answers to your Questions" Published by ICRC, P. 9**
4. **See Code of Hamurabi, King of Babylon**
5. **See Lieber, Francis (Professor at Columbia College, New York); at the request of Abraham Lincoln, draw up a series of instructions for union soldiers during the American Civil war.**

6. **Dunant, Henry; "A memory of Solferino" published in November 1862, P. 7**

7. **See ICRC, "International Humanitarian Law: Answers to your questions" published by the ICRC, P. 4**

8. **Geneva Convention of 1864**

9. **See Ladan M. T, Op. Cit. (note 2) p. 109**

10. **Bory, F; (note 1) P. 11**

11. **ICRC, "Answers to your questions "published by ICRC, P. 13**

12. **Bory, F; Op. Cit. P. 16**

13. **Refer to Rene K; "The 1977 Protocols :a landmark in the development of IHL" in International Review of the Red Cross, Geneva, Sept./Oct. 1997, No 320, PP 483 – 505.**

13a **See Article 8, 15 and 23 of protocol 1**

14. **Rene, K; ibid; at 487**

15. **See protocol 1, part iii, section 1 "methods and means of warfare (Articles 35-42); part iv "Civilian population" section 1, "Geneva protection against effect of hostilities" (Articles 48 – 60).**

16. **Article 35, Para 1 of protocol I**

17. **Article 35, para 2 of protocol I**

18. **Articles 48,50,62 of protocol I**

18a **Article 59 and 60 of protocol I**

19. **See articles 33 and 74 of protocol I**

19a **See articles 54, 55 and 56 of protocol I**

20 See article 35 para 2 of protocol I

21 Ibid. Articles 43 and 44

22 ibid. Articles 11 and 85

23 Rene, K; (note 13) p. 492

24 Aldrich, G. H. "Comments on the Geneva protocols" in international review of the Red Cross, Sept,/Oct. 1997. No 320; P. 507

25 See Article 1 of protocol II

26 Ibid. Articles 4, 5 and 6

27 Ibid. Article 13, and 14

28 Ibid. Article 17

29 Preux, Jean de; "The protocols additional to the Geneva Conventions" ICRC No. 258, May – June, 1997, P. 258.

30 See ICRC "Answers to your questions" published by ICRC, P. 23.

CHAPTER TWO

CRIMES/BREACHES UNDER INTERNATIONAL HUMANITARIANS LAW

2.0 INTRODUCTION

A historical excursion into the origins or the law of warfare[1], will reveal that one of the fundamental questions which agitated the minds of the early lawmakers in this field of study was: "why, in fact, should there be legal limitations to belligerent actions aimed at destroying a foreign foe?" [2] Primarily, one might be tempted to question the rationale of constraints, as it appears to defeat the very purpose of warfare and therefore devoid of any value to the combatants who are to resist an armed attack or who wish to wage war against a foe.

There are mutual benefits to be derived by both parties from observing the rules of constraints in the art of warfare. These rules seek to limit the suffering and damage inflicted not only upon the victims of the other party but also on one's own soldiers, civilians, environment and properties of historical and cultural value. Thus this hitherto classic question no longer agitate the minds of political and military leaders to whom the body of international humanitarian law has become a widely accepted, though not always respected framework for the conduct of hostilities.

The question, now, is not whether or not there should be legal restraints to warfare, but rather how effectively can these restrictions be enforced and applied against the perpetrators.

It is against this background that the defining crime under international law, war crimes and the prosecution of war criminals has become so important or vital. It therefore becomes pertinent that the general scheme of repression codified in the four Geneva conventions of August 12, 1949, and in Additional protocol 1, of 1977, which are generally the same, (their point of departure being only in the nature of breaches to be punished) be examined. The text made a distinction between grave breaches and other" breaches" the only provision in the international regulations concerning the enforcement of other breaches" is that states should take measures necessary for their prevention and repression[3].

An examination of the classification of crimes and breaches under international humanitarian law contained in the Statute of International Criminal Tribunal for former Yugoslavia [4], and the International Criminal Tribunal for Rwanda [5]. And the definition of crimes such as genocide, crimes against humanity, war crimes with a view to determining the parameter of the constituents of the offence is countenanced, and finally the landmark development in international criminal justice and administration which the adoption of the Rome statute of the International Criminal Court (ICC) has occasioned. The statute was adopted in Rome on July, 17 1998. A revolutionary institution which has punctured the myth of state sovereignty and subjects state nationals to an international criminal jurisdiction. The Rome Status came into force on 1st July 2002 with sixty states ratification amidst mixed feelings especially by the United state[6]. The substantive features of the Rome statute includes

a definition of crimes falling within its jurisdiction which is more specific than existing international law.

2.1 THE CONCEPT OF CRIME UNDER INTERNATIONAL LAW

If "a crime is a human conduct which the state decides to prevent by threat of punishment liability of which is determined by a legal proceedings of a special kind"[7] then a crime under international law or rather international crime is a human conduct, which the community of nations decides to prevent by threat of penal responsibility and sanctions for its breaches; which is determined by special legal proceedings.

The Osborn's concise law Dictionary defines a crime as an act, default or conduct prejudicial to the community, the commission of which by law renders the person responsible liable to punishment by fine or imprisonment in special proceedings . . . "[8] The philosophy of the law of Geneva being the protection of individuals, ensures that those who have been placed *hors de combat* or who do not take part in hostilities are treated humanely, while the law of Hague restricts the freedom of belligerents to choose weapons and methods of warfare by proscribing method of warfare that causes superfluous damage to man and his environment. These laws prescribes punishment for individuals violates them.

Bringing those individuals who contravene the norms of international law to justice, has a long, albeit inconsistent history. The fact that individuals were not responsible under international law compounded issues. But development in this field ensured that

individuals are now answerable under international law and can be prosecuted for war crimes.

Arguably the first international war crimes trial was the prosecution of Peter Von Hagenbach in 1474 for the atrocities committed during an attempt to compel Breisach to submit to Burgandian rule by a tribunal comprising judges drawn from different states and principalities[9]. Article 227 of the 1919 Treaty of Versailles provided that German Emperor William II should be tried by an international court to answer charges for "flagrant offence against international morality and the sacred authority of treaties". But since the Netherlands refused to give up the accused, the trial never took place, and Wilhelm II died in exile in Holland in 1941. Articles 228 and 229 of the Treaty providing for the prosecution of the war criminals were applied in a disappointing way in the Leipzig trail. The Nuremberg and Tokyo trial after the second world war undeniably represented progress towards the creation of a body with truly international criminal jurisdiction but they were greatly influenced by their origins and in effect applied the law and justice of the victor rather than those of universal community of states.[10] The International Military Tribunal in Nuremberg[11] and the International Military Tribunal for the far East in Tokyo[12], were set up in 1945 to persecute and punish major Axis war criminals in Europe and Japan. The Military Tribunal at Nuremberg asserted that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced [13]" Thus by recognizing

individual responsibility under international law, it is an important milestone in the development of international criminal justice.

Today the rules governing the prosecution of offenders are principally to be found in the 1949 Geneva conventions, which oblige states to try to extradite individuals responsible for committing or having committed "grave breaches" of the conventions[14], and in Article 85 of Additional protocol I.
It should be emphasized that international humanitarian law cannot impose criminal sanctions in the case of an internal armed conflict as "grave breaches" defined in the Geneva conventions and protocol 1 can only occur in international armed conflict.

Developments in international humanitarian law in recent years have radically changed the situation. Atrocities committed in internal armed conflicts are today punishable as a result of a new approach taken to such acts and the broader definition given to international crimes[15].

The Statute of the International Criminal Tribunal for the former Yugoslavia[16], and the International Criminal Tribunal for Rwanda[17]. The statute of International Criminal Tribunal for the former Yugoslavia expressly gives the tribunal jurisdiction over crimes against humanity "when committed in armed conflict, whether international or internal in character, and directed against any civilian population[18.] Thus the Appeal chamber of the Tribunal in the case of ***Prosecutor V: Tadic:*** observed that "it is by now a settled rule of customary international law that crimes against humanity do

not require a connection to international armed conflict. Indeed . . . customary international law may not require a connection between crimes against humanity and any conflict at all"[19]. Thus the appeal chamber held on the basis of state practice, that the provision on the statute of the Tribunal dealing with the violations of the laws and customs of war applied to both internal and international armed conflict. [20]

Under International Law after the Nuremberg trials, by creating two criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), the Security Council took a leap and established beyond any doubt that individuals may now, in respect of international humanitarian law, appear as subject bound by certain legal obligation directly under international law. They can be held individually responsible before an international forum for the violations of these obligations. This is a remarkable development in international law with far reaching implications for *inter alia,* the concept of state sovereignty.

Subsequently, the International Law Commissions 1996 Draft code of crimes against the peace and security of mankind accepts that certain acts committed in the violation of the laws and customs of war, acts prohibited under common Article 3 of the four Geneva conventions and Protocol II; and severe damage to the natural environment unjustified by military necessity constitute war crimes when committed in internal armed conflict.

The above development has dispensed with the distinction between international and internal armed conflicts for the purpose of what constitutes war crimes and the punishment of offenders. The statute of the permanent International Criminal Court, provisions in Article 8, may be considered retrogressive in the light of the existing law as it make a clear distinction between international and internal armed conflicts.

Nevertheless, the adoption of the Statutes for an International Criminal Court has been widely welcomed as an important milestone in entrenching international accountability. Now that the statute has received the necessary 60 states ratification and has entered into force,[21] it is the first time the world has a permanent mechanism for prosecuting genocide, crimes against humanity and war crimes

The preamble to the Statutes of International Criminal Court eloquently captures what may be referred to as the concept of international crime in these words.

> "The state parties to this statute, conscious that all people are united by common bonds, their cultures pierced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time and mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity; recognizing that such grave crimes threaten the area, security and well being of the world, affirming that the most serious crimes of concern to the international community

as a whole must not go unpunished, and that their effective prosecution must be ensured by taking measure at the national level and by enhancing international cooperation, determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes, recalling that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes, re-affirming the purposes and principles of the charter of the United Nations, and in particular that all states shall refrain from the threat of use of force against the territorial integrity of political independence of any state, or in any other manner inconsistent with the purpose of the United Nations, emphasizing in this connection that nothing in the statutes shall be taken as authorizing any state party to intervene in an armed conflict or in the internal affairs of any state, Determined to these ends and for the sake of present and future generations, to establish an independent permanent international criminal court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole . . . "[22]

Article 5, of the statute limits the jurisdiction of the court to the most serious crimes of concern to the international community as a whole. Which are the crimes of genocide, crimes against humanity, war crimes and the crime of aggression when the exact parameter has been agreed upon

in accordance with the provision of Articles 121 and 123 of the statute.

2.2.1 INTERNATIONAL CRIMES

Considering that jurisdiction of the International Criminal Tribunal for former Yugoslavia[23] (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) [24] were established on 11 February 1993 and 8 November 1994 respectively by the Security Council to prosecute persons responsible for flagrant violations of international humanitarian law, the aim of the Security Council is to put an end to such violations and to contribute to the restoration and maintenance of peace and the establishment of ad hoc tribunals as a signal to the perpetrators and to the victims that such conduct will not be tolerated.

The conferment of jurisdiction on ICTY over the following crimes: (a) grave breaches of the Geneva conventions of 1949; (b) violations of the laws or customs of war; (c) genocide, and (d) crimes against humanity. While the ICTR has jurisdiction over: (a) genocide (b) crimes against humanity; and (c) violations of Article 3 common to the 1949 Geneva conventions and of Additional protocols 1. Coupled with the fact that the Rome Statute of the International Criminal Court (ICC) [25] with jurisdiction over all serious violations of the law of war, in civil conflicts and international engagement as well as crimes of genocide.[26] even when they occur outside a state of war. In essence, the ICC will be a permanent institution, with automatic

jurisdiction over the crimes of genocide, crimes against humanity, war crimes and aggression (once it is defined)[27]

It is proposed to attempt a definition of the crimes against humanity, war crimes, the exact parameter of the crime of genocide and the crime of aggression.

2.2.2 CRIMES AGAINST HUMANITY

When establishing the Yugoslavia Tribunal, one view expressed by the secretary General was that 'the application of the principles *nullem Crimen Sine lege* required that the international tribunal apply rules of international humanitarian law which are beyond any doubt part of customary law". [29] Therefore, although the ICTY has jurisdiction to prosecute crimes against humanity, which are generally recognized as being covered by customary international law, the question is whether the definition adopted in the statute of ICTY and in that of the Rwanda Tribunal (ICTR) reflects customary international law.

Unlike grave breaches of the 1949 Geneva conventions on genocide, crimes against humanity have not been defined in a treaty, and throughout the relatively short history of the use of the term "crimes against humanity" the definition has developed inconsistently. It is therefore difficult to substantiate any claim that the definition reflects customary international law. This will be illustrated by looking at the development of the concept with particular emphasis on the Nuremberg Trials, Control Council law No. 10 (CCL), the International Law Commission's attempt at codification, national decisions and the statute of the ICTR and ICTY.

Concept of crimes against humanity before world war 11

The term "crimes against humanity" and cognate expression received little attention prior to World War II. The 1868 St. Peters burg Declaration limited the use in times of war, certain explosives or incendiary projectiles, since they were declared to be contrary to the laws of humanity. In 1907, the well known *martens clause,* provided as follows: Until a more complete code of the laws of war has been issued,…the inhabitant and the belligerents remain under the protection and the rule of the principles of the law of nations as they result from usage among civilized peoples, from the laws of humanity and the dictates of public conscience.[30]

The expression " crimes against humanity" was used in the 1915 Declaration by the governments of France, Great Britain and Russia denouncing the massacre of Armenians taking place in Turkey.

" Crime against humanity and civilization for which the members of the Turkish Government will be held responsible together with the agents implicated in the massacres".[31] But in the 1919 report of the Commission on the Responsibilities of the Authors of war and on Enforcement of penalties for violations of laws and customs of war.[32] The majority of the members concluded that the German empire and its allies carried out the war "by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity" and "all persons belonging to enemy countries… who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable for criminal prosecution".[33]

Concept of Crimes against Humanity Following World War II

The most important developments regarding the concept of crimes against humanity have taken place since World War II. A number of declarations were made during the war, by several allied governments expressing the desire to investigate, try and punish not only war criminals in the narrow sense, i.e. perpetrators of the violations of the laws and customs of war on allied territory or against allied citizens, but also those responsible for the atrocities committed on Axis territory against nationals of non-allied countries.[34]

On 8 August 1945, the four allied powers (France, Great Britain, the USSR and the United States) concluded the London Agreement. Annexed to it was the Charter of the International Military Tribunal for the prosecution and punishment of the major criminals of the European Axis, article 6 of which provides that the tribunal had the power

> **"… to try and punish who, acting in the interest of the European Axis Countries, whether as individuals or as members of organisation, committed any of the following crimes:**
>
> **b. War crimes: namely, violations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation or slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or of persons of the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;**
>
> **c. Crimes against humanity; namely murder, extermination, enslavement, deportation or other inhuman acts committed against any civilian population before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated".**

As a result, the Nuremberg Tribunal on charges of crimes against humanity pronounced convictions. Nonetheless the concept of crimes against humanity remained vague, often overlapping with that of war crimes. The former was used as an accessory crime and almost exclusively to protect inhabitants of a foreign country from the authorities of the occupying power. The tribunal interpreted article 6(c) in such a way that these crimes fall under the definition of crimes against humanity only when they are committed in execution of, or in connection, with a crime against peace or a war crime. [35] This does not mean that any crime committed before 1939 could not come under the category of crimes against humanity but rather that link (casual nexus) had to be found between one of the acts enumerated in article 6(c) and the war. Thus, the

tribunal considered not only the nationality of the victims and the country where the crimes were perpetrated, but also the connection with crimes against peace or traditional war crimes, to be essential element.

Control Council Law No. 10

Control Council Law No. 10 (CCL) was enacted on 10 December 1945 by the acting legislative body for all Germany (the Allied Control Council for Germany) consisting of the commanders of the four zones.[36] The law was created for the punishment of persons guilty of war crimes, crimes against humanity, crimes against peace. Each zone commander was responsible for its implementation. Although the London charter was made an integral part of the CCL, the definition of crimes against humanity are defined in the following terms:

> **"Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial or religious groups, whether or not in violation of the domestic laws of the country were perpetrated".**

The differences from article 6(c) of the London charter are noticeable:

1. **The expression "atrocities and offences, including but not limited to", under the CCL the list of atrocities and offences is inclusive rather than exclusive as it was under article 6(c);**

2. **The addition to the list of offences and atrocities of "imprisonment", "torture" and "rape";[37] the removal of the necessary connection between the specific crimes listed in Article II (c) and crimes against peace and war crimes; and (3) the CCL does not include the words "before or during the war".**

Accordingly, in interpreting the CCL, the tribunal were nor restricted to the narrow interpretation which evolved from he jurisprudence of the Nuremberg proceedings. For example, in the *Einsatzgruppen case* the tribunal specifically declared that it was no longer limited by the nexus requirement with, or link between, crimes against peace and war crimes, neither was it restricted by the nationality of the victim or of the accused, nor for the location where the crimes were committed. [38]

In the British zone of control in Germany, the German regular courts were given jurisdiction over crimes against humanity committed by persons of German nationality against persons of German nationality or stateless persons. In the French zone of control, crimes against humanity were defined as "Crimes committed against any civilian population of whatever nationality, including persecutions on political, racial or religious grounds".

More comprehensive than article 6, the CCL is of a different character than the charter. The CCL is primarily a national instrument, with an internal scope. Thus, the binding nature of the definition and interpretation of crimes against humanity of the CCL is more limited.[39] Nevertheless, it certainly contributed to the subsequent expansion of the concept of crimes against humanity.

Important National Decisions

a. ***Eichmann Case*.[40] This case was the first attempt by a non-World War II belligerent state to exercise its universal jurisdiction to punish perpetrators of war crimes and crimes against humanity. Eichmann was charged under Israel's 1951 Nazi and Nazi collaborators for the following offences:**

   i. **Crimes against the Jewish people;**

   ii. **Crimes against humanity;**

   iii. **War crimes and**

   iv. **Membership of a hostile organisation.**

   Crimes against humanity were punishable if "done during the period of the Nazi regime, in an enemy territory" and were defined as "any of the following acts: murder, ill-treatment, or the deportation to forced labour or for any other purpose, of civilian population of or in the occupied territory, murder, or ill-treatment of prisoners of war, of persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of property, cities, towns or villages; and devastation not justified by military necessity".

   Thus, the definition under Israeli law was also different from that of the Nuremberg charter: no nexus was required between the commission of crime against humanity and any of the other crimes (war crimes or crimes against peace). The definition only required the former to have been committed during the NAZI regime.

b. French trial of Claus Barbie

In the case of Claus Barbie, the German head of the Gestapo in Lyon, the French Court of Cassation ruled that crimes against humanity were imprescriptible and could be prosecuted in France "whatever the date and place of their commission".

Whereas what constitute crimes imprescriptible against humanity, within the sense of Article 6(c) of the charter of the International Military Tribunal of Nuremberg annexed to the London Agreement Accord of August 8, 1945, even though they could also be characterized as war crimes according to Article 6(b) of the same text, are the inhumane acts and persecutions which, in the name of a state practicing a hegemonic political ideology, have been committed in a systematic fashion, not only against persons because they belong to a racial or religious group, but also against the adversaries of this (state) policy, whatever the form of their opposition". [41]

The Court of Cassation adds here a new requirement for crimes against humanity, the perpetrator must carry out his crime on behalf of the "state practicing a hegemonic political ideology" and "in execution of a common plan". Any group or state not practicing this hegemonic policy would therefore not be included in the definition.

c. Demjanjuk Vs. Petrovski

The case of Demjanjuk Vs Petrovski[42] is interesting not so much for its contribution to the definition of crimes against humanity[43], but rather for the recognition that crimes against humanity are offences for which there is universal jurisdiction. The US Circuit Court of Appeal ruled that, based on the right to exercise universal jurisdiction over offences against the law of nations and against humanity, the United States could extradite an alleged Nazi concentration camp guard to Israel or any other nation. The court recognized that acts committed by Nazis and Nazi collaborators are "crimes universally recognized and Condemned by the Community of Nations" and that these "crimes are offences against the law of nations and against humanity the prosecuting nations is acting for all nations". The court thereby recognized the principle of universality for crimes against humanity.

The work of the International Law Commission.

In 1947, the International Law Commission (ILC) was given two tasks by the United nations General Assembly:

a. **To formulate the principles of international law recognised by the charter of the Nuremberg Tribunal and Judgement of the Tribunal; and**

b. **To prepare a code of offences against peace and security of mankind. The ILC worked on the draft code up to 1986, although it had to suspend its work for many years owing to the problem of defining aggression. Accordingly, at its forty-eight season (1996) it adopted the text of and commentaries to, draft articles 1 to 20. As stated in its report, the draft code was adopted with a view to reaching a consensus. Thus the commission has considerably reduced the scope of the last version of the draft code, in an effort to obtain the support of states. The definition here is noticeably different from the above definitions. Crimes against humanity are defined in the following terms"**

> **"A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organisation or group:**
>
> **Murder;**
>
> **Extermination;**
>
> **Torture;**
>
> **Institutionalised discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedom and resulting in seriously disadvantaging a part of the population;**
>
> **Persecutions on political, racial, religious or ethnic grounds;**
>
> **Arbitrary deportation or forcible transfer of population;**
>
> **Arbitrary imprisonment;**
>
> **Forced disappearance of persons;**
>
> **Rape, enforced prostitution and other forms of sexual abuse;**

Other inhuman acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm".

The list of prohibited acts is more exhaustive than in other definitions we have looked at so far. In addition, we find the requirement that the acts be instigated or directed by a government or by any organisation or group.

<u>ICTY and ICTR's Statutes on Crimes Against Humanity.</u> Discrepancies in the definition of crimes against humanity can also be found between the statutes of the Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR). Article 5 of the ICTY statute provides as follows:

> **"The International Tribunal shall have power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:**
>
> **a. Murder;**
>
> **b. Extermination;**
>
> **c. Enslavement's;**
>
> **d. Deportation;**
>
> **e. Imprisonment;**
>
> **f. Torture;**
>
> **g. Rape;**
>
> **h. Prosecutions on political, racial and religious grounds;**
>
> **i. Other inhuman acts"**

The ICTR statute, on the other hand, provides the same list of crimes although the threshold is different. Whereas the ICTR statute does not require crimes to be committed in an armed conflict, each of the crimes listed in the ICTR statute must be committed "as part of a widespread or systematic attack against any civilian population on national, political, racial or religious grounds".

The interpretation of the ICTY statute by the ICTY Appeals Chamber is however, revealing. In the decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Tadic case), the Appeals Chamber confirmed the findings of the Trial Chamber, and considered that by requiring proof of an armed conflict, the statute had narrowed the customary concept of crimes against humanity.[44] Hence it stated that since the judgement at Nuremberg, the

concept of crimes against humanity need no longer establish a link with crimes against peace or war crimes.

In the light of the above definitions of crimes against humanity as developed in the Nuremberg charter and judgement, the CCL, subsequent attempts at codification by the ILC, key national decisions on crimes against humanity and the statutes of the Tribunals for former Yugoslavia and Rwanda, it is obvious that there is yet to be a clear, substantive and uniform definition of crimes against humanity. There is undoubtedly a consensus that crimes against humanity are crimes under international law, recognised under the general principles of law, giving rise to universal jurisdiction. Yet the exact parameters of such crimes remain unclear.

The Rome Statute of International Criminal Court

Article 7 of the statute gives a precise definition of crime against humanity enumerated in the ICC statute as "any of the foregoing acts when committed as part of widespread or systematic attack against any civilian population with knowledge of the act", followed by the enumeration of the various sub-classes of acts amounting to such a crime. It is worthy of note, that unlike the charter provisions of the Nuremberg Tribunal and the ICTY relating to crimes against humanity, the relevant article of the ICTR statute, Article 7 of the ICC statute does not require that crimes against humanity be committed in connection with an armed conflict. This seems to reflect current international law.

Regarding the class of crimes against humanity enumerated in the ICC statute, offences such as enforced prostitution, forced pregnancy and enforced disappearance of persons are now included. These practices, often associated with "ethnic cleansing" as in the case of disappearances, the pursuit of power by terror and elimination of political opposition properly belong in any modern description of crimes against humanity by virtue of the role they play in policies of repression against civilian populations.

The definition of crimes against humanity in ICC status is more specific. This principle of specificity is evident in the sub-class of crimes against humanity termed "other inhuman acts". This broad class is narrowed down in the statute because it is specified that they must be "of a similar character (to that of the other subclasses and) intentionally causing great suffering, or serious injury to body or to mental or physical health".

2.2.3 GENOCIDE

Unlike crimes against humanity, genocide has been codified and its definition is not generally subject to debate. The statutes of the ad hoc tribunals for the former Yugoslavia and for Rwanda adopted verbatim the definition of genocide found in Article 2 of the 1948 convention on the prevention and punishment of the crime of genocide:

> **"Genocide means any of the following acts committed with the intent to destroy, in whole or part, a national, ethical, racial or religious group, as such:**
>
> **a. Killing members of the group;**
>
> **b. Causing serious body or mental harm to member of the group;**
>
> **c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;**
>
> **d. Imposing measures intended to prevent births within the group;**
>
> **e. Forcibly transferring children of the group to another group;**

The following acts shall be punished:

> **a. Genocide;**
>
> **b. Conspiracy to commit genocide;**
>
> **c. Direct and public incitement to commit genocide;**
>
> **d. Attempt to commit genocide;**
>
> **e. Complicity in genocide".**

Historical Background

The Genocide Convention was among the first conventions of the United Nations to address humanitarian issues. It was adopted in 1948 in response to Nazi atrocities committed during World War II and following General Assembly Resolution 180 (II) of 21 December 1947 in which the UN recognized that "Genocide is an international crime, which entails the national and international responsibility of individual persons and states." Under Article 1 "the contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish".

The International Court of Justice (ICJ) noted in the reservation to the convention on Genocide as follows

"The origins of the convention show that it was the intention of the United Nations to condemn and punish Genocide as a crime under international law … involving a denial of the right of existence of entire human group, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96) of the General Assembly, December 11, 1946). The first consequence arising from this conception is that the principles underlying the convention are principles, which were recognized by civilized nations as binding on states, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the cooperation required in order to liberate mankind from such an obvious scourge (preamble to the convention)." [45]

<u>In the Barcelona case (second phase),</u> the ICJ recognized the outlawing of acts of genocide as obligations *erga omnes* **for which, due to the importance of the rights involved, all the states can be held to have legal interest in their protection.** [46]

When breaking down the definition, three essential elements are required:

An identifiable national, ethical, racial or religious group;

The intent to destroy such a group in whole or in part *(mens rea);* **and**

The commission of any of the listed acts in conjunction with the identifiable group *(actus reus)*

The first requirement implies that acts of genocide can only be committed against the listed types of groups, i.e. an identifiable national, ethical, racial or religious groups. The intent to destroy, for example, a political or social group would therefore not fall under the definition of genocide. Political and cultural groups were excluded from the original General Assembly draft of the convention because of strong opposition to their inclusion.

The second element of the definition of genocide certainly, represents a challenge for the prosecutor, who will be obliged to establish the requisite state of mind *(mens rea)* **of the accused, i.e. the specific criminal intent to destroy one of the enumerated groups. The ILC, in commenting on its draft code of crimes against the peace and security of mankind, stated in this regard:**

"… a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a specific

intent with respect to the overall consequences of the prohibited acts". [47]

Therefore the killing of one individual with such intent is genocide, but the killing of a thousand without the intent would only be homicide. [48] **The former type was however, distinguished from the latter by the General Assembly in 1948 when it drafted the convention genocide is the "denial of the right of existence of entire human group" homicide is the "denial of the right to life of individual human beings". The ultimate target is the group itself. Hence the actus reus (prohibited act) may be restricted to one human being, but the mens rea or mental element must be directed against the life of the group".** [49] **In other words, "genocide occurs when the intent is to eradicate the individuals for no other reason than that they are a member of the specified group."** [50]

Some light as to specific intent required may also be found in the Karadsic and Mladic case, in which the ICTY suggested that the specific intent may also be inferred from the circumstances:

> **"Genocide requires that the acts be perpetrated against a group with an aggravated criminal intent, namely that of destroying the group in whole or in part. The degree to which the group was destroyed in whole or in part is not necessary to conclude that genocide has occurred. That one of the acts enumerated in the definition was perpetrated with a specific intent suffices (…).**

The intent, peculiar to the crime of genocide, need not be clearly expressed. (…) The intent may be inferred from a certain number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article 4 (of the statue), or the repetition of destructive and discriminatory acts. The intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundation of the group acts which are not in themselves covered in the list in Article 4 (2) which are committed as part of the same pattern of conduct". [51]

The third element of the definition of genocide requires that the crime be among the listed acts. The exact scope remains, however, vague i.e. "causing serious bodily or mental harm to members of the group" or "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" for the former, it is not clear what is covered by "mental harm". It has been described by commentators as a psychological damage which would lead to the destruction of the group, [52] **or bodily harm "which involves some type of impairment of mental faculties".** [53] **Nor is it clear what is considered to be 'calculated' to bring about the physical destruction in whole or in part of the group.**

2.2.4 WAR CRIMES

The jurisdiction of the Rome statute of the international criminal court embraces four categories of crimes genocide, crimes against humanity, war crimes and aggression. It is intended to define what constitute war crimes albeit summarily within the context of the ICC statute.

The statute sets out, in Article 8, the various instances of war crimes and defines each war crime in a specific and detailed manner. Furthermore the most striking feature of Article 8 is that it lays emphasis on war crimes which are " committed as a part of a plan or policy or a part of a large scale commission of such crimes". At both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda, this would have been a useful qualification to avoid prosecutions of isolated atrocities which do not pose a threat to international order as much as atrocities which are committed as part of a plan or, policy or on a large scale. [54]

It should however be noted that the requirement that war crimes be committed as part of a plan or policy or a large scale practice only relate, to the court's jurisdiction and must not affect the existing notion of war crimes. [55] In other words the fact that the court shall only pronounce upon war crimes that form part of a plan or policy does not mean that the definition of war crimes under international law is hereby narrowed so as to cover only large scale war crimes. It should be added that another commendable feature of the Rome statute lies in its extending the class of war crimes to serious violations of international humanitarian law perpetrated in internal armed conflicts. This is in line with the pronouncement of the ICTY, judgements, in the Tadic (Interlocutory Appeal on Jurisdiction) Decision, [55] and subsequent ICTY judgements, notably in the *Delalic et al.* [56] However, an even better approach, would have been simply to establish one body of law applicable to all armed conflicts – internal or international without distinctions.[57]

2.2.5 CRIME OF AGGRESSION

Article 5 (I) (d) of the statute of International Criminal Court (ICC) states that the crime of aggression is within the jurisdiction of the court, although Article 5 (2) provides that such jurisdiction will not exist until a definition and conditions for exercising jurisdiction are adopted in accordance with Articles, 121 and 123, which means 'amending' the statute.

Aggression is to a large extent the worst of all crimes bothering menaces international society. Once war is unleashed, all the horrors and miseries of war are let loose. At Nuremberg it was regarded as the supreme international crime

differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[58]

Aggression is a crime for which a definition (in its form as a state's wrongful act) has not yet been achieved, despite United Nations discussions lasting many decades and culminating in the disappointing General Assembly Resolution 3314 (xxix) adopted by consensus on 14 December 1974. As it is well known, the definition laid down in that resolution is not exhaustive as stated in Article 4 of the resolution, which states further that "the security council may determine that other acts (than those listed in Articles 2 and 3 as amounting to aggression) constitute aggression under the provisions of the Charter". That the definition was deliberately left incomplete is quite understandable; To define aggression also means, among other things, to decide whether so-called pre-emptive self defence is lawful under the charter or must instead be regarded as a form of aggression. There may be other reasons. Understandably, an exhaustive list of instances of aggression might leave gaps which could encourage manipulation by potential aggressors. Any definition of aggression probably should leave a margin for discretion and therefore makes an exhaustive definition impossible.[58]

It seems most probable that the definition of this crime, to be adopted under Article 5 (2) of the statute in accordance with Articles 121 and 123, will not be agreed upon, at least, not in the near future.

Nevertheless the fact that Article 5 (1) (d) provides that the crime of aggression is within the jurisdiction of the court does create, at least, the expectation that the states parties will strive to find an acceptable definition, creating an impetus which would be altogether absent if Article 5 (2) did not exist. It is also important that if a definition of aggression is ever agreed upon, the "conditions under which the court shall exercise jurisdiction with respect to this crime" remain to be agreed, and the statute does not exclude the possibility that, in addition to the security council, the prosecutor, or state, might one day be allowed to initiate investigations into whether aggression has been committed. This eventually would be a welcome development in as much as it would break the security council's stronghold on the notion of aggression.[54] Judicial review of aggression might prove a useful counter-balance to the monopolizing power of the security council.

It is submitted that the above survey of the Nuremberg judgement, the trials under the CCL, the work of the ILC, and the statute of the ad hoc tribunals for the former Yugoslavia and Rwanda confirm that the exact parameters of the crimes against humanity which are crucial in criminal proceedings, despite the element of specificity introduced by the ICC are not clear. Inconsistency seems to be the rule. As for the crime of genocide, the ambiguity does not rest so much

in the exact parameters of the definition, since the 1948 Genocide Convention provides for it; but rather in the difficulty in criminal proceedings to prove the required element of the crime. The recognition and codification of war crimes applicable to both internal and international armed conflicts by Article 8 (2) (b) and (e) of the Rome statute is a welcome development in the prosecution of war crimes. Equally commendable is the recognition and the conferment of jurisdiction on ICC by Article 5 of the Rome statute over the crime of aggression though such jurisdiction will not exist until a definition is agreed upon by the states parties.

2.3 GRAVE BREACHES UNDER IHL

The legal framework and definition of breaches, which are punishable under international humanitarian law is contained in the Geneva conventions of 1949[55] and the provisions of additional protocol 1 of 1977.

The Geneva conventions of 1949 provides that

> "The High contracting parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed, any of the grave breaches of the present convention defined in the following Article"

The provisions of Articles 50 and 51 of the 1st and 2nd conventions which provisions are paramateria provide that;

> "Grave breaches to which the proceeding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the convention. Willful killing, torture or in-human treatment, including biological experiments willful causing great suffering or injury to body or health, and extensive destruction and appropriation

of property not justified by military necessity and carried out unlawfully and wantonly"

Article 130 of the third Geneva Convention Defines grave breaches in these word:

"Grave breaches to which the proceeding Article relates shall be those involving any of the following acts if committed against persons or property protected by the convention: Wilful killing, torture or inhuman treatments including biological experiments wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the force of the hostile power, or wilfully depriving a prisoner of war of the right of fair and regular trail prescribed is this convention.

The concluding part of the article is worthy of note as it refers to the rights of a prisoner of war, which is the theme of the third Geneva Convention. And punishes any act which compels a prisoner of war to serve in the forces of a hostile power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed on this convention.

Article 147 of the fourth Geneva Convention defines grave breaches to mean

"Grave breaches to which the preceding Article relates to shall be those involving any of the following act, if committed against persons or property protected by the present Convention willful killing torture or inhuman treatment,

including biological experiments, willful causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile power or willfully denying a protected person of the right of fair and regular trail prescribed in the present convention, taking of hostages and extensive destruction and appropriation of property not justified by military necessity, and carried out unlawfully and wantonly"

It is only acts, which are contrary to the provision of these conventions which are regarded as grave breaches that are specifically mentioned.

An exhaustive list of acts which are equally regarded as grave breaches are provided in Article 85 of protocol 1 additional to the Geneva convention.

1. The provision of the conventions relating to the repression of breaches and grave beaches, supplement by this section, shall apply to the repression of breaches and grave breaches of this protocol
2. Acts described as grave breaches in the conventions are grave breaches of this protocol if committed against persons in the power of an adverse party protected by Articles 44, 45 and 73 of this protocol or against the wounded, sick and shipwrecked of the adverse party who are protected by this protocol, or against those medical or religious personnel, medical units or

medical transports which are under the control of the adverse party and are protected by this protocol

3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this protocol, when committed willfully, in violation of the relevant provision of this protocol, and causing death or serious injury to body or health.

   (a) Launching an indiscriminate attack affecting objects in the knowledge that such attack will cause excessive loss of life, injuring to civilians or damage to civilian objective as defined in Article 57, Paragraph 2 (a) (iii);

   (b) Launching an attack against works or installation containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilian or damage to civilian objective as defined in Article 57, Paragraph 2 (a) (iii);

   (c) Launching an attack against work or installation containing dangerous forces in the knowledge that such will cause excessive loss of life, injury to civilian or damage to civilian objects as defined in Articles 57 paragraph (2 (a) (iii);

   (d) Making non-defined localities and demilitarized zones the object of attack

   (e) Making a person the object of attack in the knowledge that *he is hors* de combat

   (f) Perfidious use in violation of Article 37, of the destructive emblem of the red cross, red crescent, red

lion and sun or of other protective signs recognized by the conventions or this protocol

4. In addition to the grave breaches defined in the proceeding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed willfully and in violation of the Conventions or the Protocol.

(a) The transfer on the Occupying Power of part of its own civilians population into the territory it occupies, or the deportation or transfer of all or part of the population of the occupied territory in violation of Article 49 of the fourth convention

(b) Unjustifiable delay in the repatriation of prisoners of war or civilians;

(c) Practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination

(d) Making the clearly recognized historic monuments, works of art, places of worship which constitute the cultural or spiritual heritage of people and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization. The object of attack causing extensive destruction thereof where these is no evidence of violation by the adverse party of Article 53, sub-paragraph, and when such historic monuments works of art and places of worship are not

located on the immediate proximity of military objectives

(e) Depriving a person protected by the Conventions or referred to in paragraphs 2 of this Article of the right of fair and regular trial

5. Without prejudice to the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.

The above breaches are regarded as grave breaches and termed war crimes a term which is not defined in the text but which can be understood to mean those unimaginable atrocities that shock the conscience of humanity and threaten the peace, security, and well being of the world and of concern to the international community as a whole which must not go unpunished Grave breaches because of non clarity of definition is difficult to place (pigeon hole), hence the Conventions and the Protocol 1 enumerate them but not exclusively. The class of acts or omissions, which constitute grave breaches is not closed but left open subject to universal jurisdiction as are those expressly enumerated under customary international law or other treaties.

The repression, of grave breaches is so important to the international community that the Conventions and the Protocol 1 expressly makes it incumbent on the states parties to enact legislation necessary to provide penal sanctions for

persons committing, or ordering to be committed, any of the grave breaches of the present conventions"[56]

> "Each High contracting party shall be under the obligation to search for persons alleged to have committed, or to have ordered to have committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own court. It may also if it prefers and in accordance with the provisions of its own legislation hand such persons over for trial to another High Contracting party concerned, provided such High contracting party has made out a prima facie case"[57]

The Conventions and the Additional Protocol did not establish any machinery for the enforcement of the penal sanctions for violations of its norms but mandates the High contracting parties the responsibility of establishing such machinery for enforcement. This accounts for treason why enforcement of the provision has breached many more times than it has been obeyed.

2.3.1 MINOR BREACHES

Minor breaches are not specifically enumerated in the Conventions and the additional Protocol 1 but are merely referred to as all acts contrary to the provisions of the present Convention thus:

> "Each High contracting party shall take measure necessary for the suppression of all acts contrary to the

provision of the present convention other than the grave breaches defined in the following Article"

Thus minor breaches may be referred to as those violations of international humanitarian law but not of such fundamental character as deserving of international jurisdiction. The High contracting parties are only expected to take measure necessary for their suppression.

2.4 TYPES OF BREACHES OF IHL

The most recent typification of breaches of international humanitarian law is contained in the statutes of the International Criminal Court[58,] which provided as follow:

2.4.1 SEROUIS VIOLATIONS OF THE LAW AND CUSTOMS APPLICABLE IN INTERNATIONAL ARMED CONFLICT

Article 6; Genocide

"For the purpose of this statute genocide means any of the following acts committed with intent to destroy. In whole or in part, a national ethical, racial or religious groups, such as:

a. Killing of the group
b. Causing serious bodily or mental harm to members of the group
c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
d. Imposing measures intended to prevent births within the group;
e. Forcibly transferring children of the group to another group

Article 7: Crimes against humanity

1. For the purpose of this statute, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack:
   a. Murder;
   b. Extermination;
   c. Enslavement
   d. Deportation or forcible transfer of population;
   e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
   f. Torture;
   g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity
   h. Persecution against any identifiable group or collectivity on political, racial national ethical cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court
   i. Enforced disappearance of persons;
   j. The crime of apartheid;

k. Other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health

Article 8: War crime

2. For the purpose of this statutes "war crimes" means

a. Grave breaches of the Geneva conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Conventions:

i. Torture or inhuman treatment, including biological experiments

ii. Willfully causing great suffering, or serous injury to body or health,

iii. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly

iv. Compelling a prisoner of war or other protected person to serve in the forces of a hostile power,

v. Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial,

vi. Unlawful deportation or transfer or unlawful confinement

vii. Taking of hostages

viii.

2.4.2 OTHER SERIOUS VIOLATIONS OF THE LAWS AND CUSTOMS APPLICABLE IN INTERNATIONAL ARMED CONFLICT

"Other serious violations of the law and customs applicable in international armed conflict within the established framework of international law, namely any of the following act:

i. Intentionally directing attacks against individual civilians not taking direct part in hostilities;
ii. Intentionally directing attacks against civilian objective, that is, objects which are not military objectives'
iii. Intentionally directing attack against personnel installations, materials, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
iv. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects, or widespread, long term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated
v. Attacking or bombarding, by whatever means, towns, village dwellings or buildings which are undefended and which are not military objectives.
vi. Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

vii. Making improper use of a flag of truce or of the flag or of the military insignia and uniform of the enemy or of the united Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

viii. The transfer directly or indirectly of the Occupying Power of part of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

ix. Intentionally directing attacks against building dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and the wounded are collected, provided they are not military objective;

x. Subjecting persons who are in the power of adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest and which cause death to or seriously endanger the health of such person or persons;

xi. Killing or wounding treacherously individuals belonging to hostile nation or army;

xii. Declaring that no quarter will be given;

xiii. Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

xiv. Declaring abolished, suspended or inadmissible in any court of law the right and actions of the nationals of the hostile party

xv. Compelling the nationals of the hostile party to take part in the operation of war directed against their own country even if they were in the belligerents service before the commencement of the war;

xvi. Pillaging a town or place, even when taken by assault,

xvii. Employing poison or poisoned weapons,

xviii. Employing asphyxiating, poisonous or other gases, and all analogous liquid, materials, or devices;

xix. Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelop which does not entirely cover the core or is pierced with incisions;

xx. Employing weapons, projectiles and materials and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and materials and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this statute, by an amendment in accordance with the relevant provision set forth in Article 121 and 123;

xxi. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

xxii. Committing rape sexual slavery, enforced, prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f) enforced

sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva conventions;

xxiii. Utilizing the presence of a civilian or other protected person to render certain points areas or military forces immune from military operations

xxiv. Intentionally directing attacks against buildings, materials, medical units and transport, and personnel using the distinctive emblems of the Geneva conventions in conformity with international law;

xxv. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival including willfully impeding relief supplies as provided for under the Geneva conventions;

xxvi. Conscripting or enlisting children under the age of fifteen into the national armed forces or using them to participate actively in hostilities

2.4.5 SEROUS VIOLATIONS IN CASE OF ARMED CONFLICT NOT OF AN INTERNATIONAL CHARACTER

(c) In the case of an armed conflict not of an international character, serious violations of articles 3 common to the four Geneva conventions of 12 August 1949, namely any of the following acts committed against 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:

i. Violence to life and person, in particular murder of all kinds, mutilation cruel treatment and torture

ii. Committing outrage upon personal dignity, in particular humiliating and degrading treatment

iii. Taking of hostages

iv. The passing of sentence and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable

2.4.6 OTHER SERIOUS VIOLATIOUS OF THE LAWS AND CUSTOMS APPLICABLE IN INTERNAL ARMED CONFLICT

(d) other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

i. Intentionally directing attack against the civilian population as such or against individual civilians not taking direct part in hostilities.

ii. Intentionally directly attacks against buildings materials, medical units and transport, and personnel using the distinctive emblem of the Geneva Conventions in conformity with international law;

iii. Intentionally directing attacks against personnel installation, materials units, or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the charter of the United Nations as long as they are entitled to the protection given to civilians or civilian objective under the international law of armed conflict

iv. Intentionally directly attacks against buildings dedicated to religion, education, art, science charitable purpose, historic movement, hospitals and places where the sick and wounded are collected provided they are not military objective

v. Plaguing a town or place, even when taken by assault;

vi. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in articles 7, paragraph 2 (f) enforced sterilization and any other form of sexual violence also

constituting a serious violation of article 3 common to the four Geneva conventions;

vii. **Conscripting or enlisting children under the age of fifteen into armed forces or groups or using them to participate actively in hostilities**

viii. **Ordering the displacement of the civilian population for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demands;**

ix. **Killing or wounding treacherously a combatant adversary;**

x. **Declaring that no quarter be given;**

xi. **Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental, or hospital treatment of the person concerned nor carried out in his or her interest and which cause death to or seriously endanger the health of such person or persons;**

xii. **Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;**

NOTES AND REFERENCE TO CHAPTER TWO

1. **Form Sun Tzu, The art of war (5th Century B.C) through Hugo Grotius, *De Jure Bellis at Pacis Libre Tres*. (1825) to Clausewitz, on war (1832) quoted in Harhoff Frederik "The Rwanda Tribunal A Presentation of some legal Aspect" published in international Review of the Red Cross (ICRC) 1997 P1**
2. **Ibid. P. I**
3. **Article 53, 50, 129 and 146 of the 1st , 2nd, 3rd and 4th Geneva Conventions of August 12, 1949.**
4. **Resolution 827 (1993), 3217 meeting May 25 1993**
5. **Resolution 955 (1994) 3453 Meeting, November 8, 1994.**
6. **Cable New Network (CNN) News July 1,2002.**
7. **Gledhill, Allen, The Penal Codes of Northern Nigeria and the Sudan" 1963 (London) quoted in Chukkol, Kharisu Sufiyan, Law of Crime in Nigeria" Ahmadu Bello University Press Zaria, 1988 P. 2**
8. **Osborn's conscise law Dictionary, Seventh Edition by Roger Bird, Sweet & maxwell, 1983 P. 102**
9. **See Mc Cormack, T. L H; and Simpson, G. J, (eds) The Law of War Crimes: National and International, the Hague/London/Boston, 1997 P. 37 referred to by Dugard, John, in "Bridging the Gap between human right and humanitarian Law. The Punishment of Offenders Published in International Review of the Red Cross, September 1998, No 324 PP. 445-446**
10. **Tavernier Paul; "The experience of the International Criminal Tribunal for the former Yugoslavia and for Rwanda" Published by (I.C.R.C) P.I**
11. **See Hans-Henrich Jesclieck "Nuremberg Trail" in Rudof Bernhadt (ed) Encyclopedia of Public International Law, Vol. 4 North Holland Publishing Company Amsterdam/New York /Oxford 1982, P. 50**
12. **See Bert V.A Roling, "Tokyo Trial" op. cit. (Note 10a), P. 242**
13. **See the Proceeding of the International Military Tribunal at Nuremberg, Germany, Part 22, London, 1950 P. 447**
14. **Articles 49 – 50, 50 –51, 129-130 and 146-147 of the first, second, third and fourth Geneva Convention**

15 See Dugard, John, op. cit. (Note 9) P. 447 Article 5.

16. U.N Resolutions 808 and 827 of 22nd February and 25 May 1993

17. UN. Security Council Resolution 955 of 8 November 1994

18. Decision of 2 October 1995, Case No IT-94-1-AR 72, Para. 141. See International Legal Materials, Vol. 35, 1996 P. 35

19. Supra (note 14) P. 71 Para. 137

20. Report of the International Law Commission 48th Session, UN Doc. A/CN. 4/L. 522, 31 May 1996, Article 20 (e) – (g).

21. The statute entered into force on 1st July 2002 after the reification of the both slate

22. See the preamble of the statute of international criminal court

23. Established by the UN security council resolution 827 (1993), 3217th meeting, 25, May 1993.

24. United Nations Security Council Resolution 955 (1994), 3453rd meeting, 8, November 1994.

25. UN Doc. A/Conf. 183/9 (17 July 1998).

26. Articles 5, 6, and 8.

27. Ibid, Article 7.

28. See generally Roberge, Marie – Claude, "Jurisdiction of the ad hoc tribunals for the former Yugoslavia and Rwanda over Crimes against humanity and genocide--" international Review of the Red Cross (IRRC) 1997 p. I- 11

29. See report of the Secretary General Pursuant to paragraph 5 of Security Council Resolution 955 (1994), 5/1995/134).

30. Preamble, Hague Convention No. IV respecting the laws and customs of war on land 1907.

31. Cited in Schwelb, E. "Crimes against humanity", British Year Book of International Law. Vol. 23, No. 8 1949, p. 181.

32. The commission was established to inquire into the responsibilities of the German empire and its Allies under international law for acts committed during World War 1.

33. However, as a result of certain objections no mention was made of

the laws of humanity in Peace Treaties of Versailles, *St- German-en-Laye, Trianon and Neally-sur-scine;* only acts committed in violation of the laws and customs of war were referred to.

34. Schwelb, E. Op. Cit. (note 24) p. 183.

35. Soon after the signature of the London Charter an agreement was

Concluded by the four Governments in Berlin to clarify the text of Article 6(c) and resolve the discrepancies found between the equally authentic Russian, English and French texts. Accordingly, alterations were made to the two former texts, to change the intentions of these Governments to the effect that the meaning of crimes against humanity in the charter was limited to such crimes committed in connection with any crimes within the jurisdiction of the tribunal.

36. No further trials were to be conducted by the international military

tribunal and the task of prosecuting and punishing the remaining suspected war criminals was left to each occupying power. Howards, Levie; "Terrorism in war: the law of war crimes, Oceania Publications, New York 1993, p. 71.

37. However, these differences could arguably have been absorbed by

the expression "or other inhumane acts" in the charter.

38. United States Vs Ohlendoof et al, case No 9, IV CCL Trials (1947), p.

49, same decision in Unites States Vs. Affoselter et al (Justice case) case No. 3, III CCL Trails (1947), p. 974. However, such an interpretation was not unanimously applied; see founding in United States Vs. Vonweizsaecker et al. (Ministries case), case No. II, XIII CCL trials (1948), p.112.

39. The legal status of the CCL, whether considered international,

national, or even hybrid law, has been on discussed by a number of authors as well as in the justice case. Bassiouni clearly expresses this ambiguity in the following terms: " The inconsistancy is obvious, since it (the CCL) was purported to be a national law, and it formulation and enactment was by the victorious Allies acting pursuant to their supreme authority over Germany by virtue of that country's unconditional surrender" C. Bassiouni, crimes against humanity in international criminal law, Martinus Nijhoff publishers, Dordrecht, 1992, P. 36 see also Schwelb E, Loc. cit. (At note 27), P. 218.

40. District Court of Jerusalem, Attorney-General of the Government of Israel Vs Eichmann, in Israel law Review, vol. 36 no 5, 1961 for a more complete discussion of the Eichmann case see Baade "The Eichmann trial. Some legal aspects" Duke law Journal, 1961. P. 400.

41. Judgement of 20 December 1985, published in journal *de driot international,* 1986 PP 129-142, cited in L. X. Wexlar, " The interpretation of the Nuremberg principles by the French Court of Cassation: From Touvier to Barbie and back again" Columbia journal of international law, vol. 32, 1994, P. 3 42.

42. **Danjanjuk Vs Petrovsky, 776 F. 2nd 571 (6th Crc. 1985 cert. Denied, 475 US. 1016 (1986).**

43. **The Court of Appeal addressed the definition of crimes crime against humanity only as defined in 1950 Israel statute, the Nazis or Nazi collaborators (punishment) Act. This was done in order to satisfy the requirement of double criminality. The court concluded that although the crime was not described in the same way in both countries – since in US the act of unlawfully killing one or more persons with the requisite malice is punishable as murder, not as a crime against humanity or mass murder – it was enough that the particular act for which extradition was sought be criminal in both.**

44. **Decision on the Defence Motion for Interlocutory Appeal on jurisdiction, *prosecutor Vs. Dusko Tadic,* case No. IT-94-1-AR72, 2 October 1995, Para. 141.**

45. **Reservation to the convention on Genocide case (Advisory Opinion), ICJ Report, Vol. 15, 1951, p.23.**

46. **Barcelona Traction Case (Belgium Vs. Spain) ICJ Report, Vol.3, 1970, paras. 33 and 34.**

47. **1996 ILC Report, UN doc A/51/10, p. 88.**

48. **"… thus, one has to ask whether it is logical to have a legal scheme whereby international killing of a single person can be genocide and the killing of a million persons without intent to destroy the protected group on whole or part is not an international crime? Yet that is the present situation". C. Bassiouni, loc. Cit (note 32) p. 473.**

49. **Bassiouni, C; International Criminal Law: A draft International Criminal Code, Sijthoff and Noordhoff, Alphen aan den Rijn, 1980, p. 73.**

50. **Webb, J., "Genocide Treaty – Ethnic cleansing; substantive and procedural hurdles in the application of the Genocide Convention to alleged crimes in the former Yugoslavia" Georgia Journal of International and Comparative Law No. 377, 1993, p. 391.**

51. *Prosecutor Vs Mladic and Karasdic,* **review of the indictments pursuant to rule 61 of the rules of procedure and evidence, case No. IT-95-5-R61, 11 July 1996, paras. 92 and 94.**

52. **Webb J., Loc Cit (note 43), p. 393.**

53. **1996 ILC report, p.91.**

54. **It is mainly the leaders and organizers of such plans or policies who threaten international public order and who should therefore be prosecuted by an international court. See the ICTY Martic Rule 61 of 6 March 1996, para. 21; "The Tribunal has particularly valid grounds for exercising its jurisdiction over persons who, through their position of political or military authority, are able to order the commission of crimes falling within its competence ration material or**

who knowingly refrain from preventing or punishing the perpetrators of such crimes.

55. Cassese, Antonio, "The Statute of the International Criminal Court; Some Preliminary Reflections" published on European Journal of International \law, Vol. 10 (1999) No.1 P. 149.

56. See Decision of 2 October 1995 at 68-71 paras 128-137.

57. Judgement, 16 November 1998, paras 202 and 314.

58. See Article 8 (2) (b) and (e) which deals respectively with war crimes in international armed conflicts and war crimes in non international war crimes.

59. See trial of major war criminals before the international criminal tribunal; Nuremberg 1947 vol. 1 at 186.

60. Cassese, Antonio; op cit. (note 48) p. 147.

61. Ibid at p. 147.

62. See Articles 49,50,129 and 146 of 1st, 2nd, 3rd and 4th Geneva Conventions of 1949

63. ibid.

64. ibid.

65. Rome Statute of International Criminal Court UN Doc. A/CONF. 183/9 (17 July 1988). Published at http/www.un.org/icc (hereinafter ICC statute).

CHAPTER THREE

3.0 THE THEORY OF RESPONSIBILITY UNDER INTERNATIONAL LAW

3.1 INTRODUCTION

The fundamental instruments of international humanitarian law are well known. They are principally the four Geneva Conventions of 1949 and their Additional Protocols of 1977, as well as the extensive framework of customary law. These instruments deals with issues of importance in times of armed conflicts including the protection of the wounded, sick and shipwrecked, prisoners of war and civilian internees, as well as the protection of the civilian population as a whole.[1]

International humanitarian law establishes not only the basic rights of the individual but also contains important mechanism for guaranteeing observance of these rules. It imposes the obligation necessary to express any act constituting a serious infringement of personal dignity or a grave threat to the security of the civilian population.

The current spate of armed conflicts and flagrant violations of humanitarian law has revived interest in the sanctions system to ensure greater respect for the law. This system is designed to halt violations and, in particular, to repress grave breaches classified as war crimes.
Though the punishment of breaches of international humanitarian law has been the subject of several studies,[2] the penal responsibility for such breaches did not come about until after the first World War. Before then it was impossible to apply sanctions under international penal law and punish breaches as it was not recognized that states had any penal responsibility for war crimes or other violations of international law coupled with the fact that individuals were not recognized as answerable to international law. The international observance of the law and customs of war was only predicated upon good faith.[3]

The recognition of individuals as subject to penal prosecution under international law was a completely new vista that has enhanced the development of international criminal responsibility for war crimes,

The starting point of this development can be traced to an Inter-Allied Commission formed to establish the responsibility of "war criminals" as soon as the First World War ended on 11th November 1918. The Treaty of Versailles proposed to try Kaiser Wilhelm II and other Germans accused of war crimes,[4] and to set up an International Court of Justice, and national courts to try all kinds of war criminals. These proposals were not carried out; Kaiser then was a refugee in Holland, which refused to extradite him, and the few alleged war criminals put on trial were either acquitted or given nominal sentences.[5]

An effective international system of repression was introduced at the end of the Second World War. It was the result of various documents[6] leading to the London Agreement and its charter of 8 August 1945. Its most important provision was to establish a tribunal in Nuremberg and try the "major war criminals" of the Axis countries, whose offences had no particular geographical location. Many other tribunals were also established, some by the Allies in their own occupied zone of Germany[7],and others in, and by the governments of, the countries formerly occupied by the Germans.[8]

Mention should also be made of the instrument for international repression of wartime offences against international law, the Far Eastern military tribunal set up on 19th January 1946, sitting in Tokyo, which tried Japanese war criminals applying the European system with few variations.[9]

The substantive law of these Tribunals defined offences, assigned responsibilities, and imposed sentences in a number of cases. This system continued to operate without any radical change until 1949 when the four Geneva Conventions were adopted.

The Nuremberg charter also set up a general procedure for prosecuting, bringing to trial and sentencing, without prejudice to the tribunals powers to issue regulations for its own procedure.[10]

The international texts now in force for the repression of breaches of international humanitarian law are the Geneva Conventions of 1949 and Additional Protocol 1 of 1977, the statues of international criminal tribunal for the former Yugoslavia and Rwanda; and the most recent statue, the Rome Statue of International Criminal Court adopted on 17 July 1998. These plethora of statutes constitutes an appropriate penal response to the most reprehensible acts committed in wartime. And yet few criminals are ever prosecuted and convicted.

This segment of this research will examine the concepts of state and individual responsibility within the paradigm of international law; the extent to which states respect their obligation under the conventions and protocol to search for all persons guilty of war crimes and to bring them before the competent national courts.[11] For both grave and minor breaches; the universal penal jurisdiction put in place by the international community for the prosecution of war crimes in former Yugoslavia and Rwanda and finally the establishment of the permanent International Criminal Court by the Rome statute. And finally, it will conclude whether the impunity with which violation of international humanitarian law go unpunished is predicated upon dearth of appropriate penal machinery or lack of political and moral will on the part of the states parties to put in place national and international machinery for the prosecution and punishment of war

criminals.

3.2 Theory of Responsibility

In any legal system there must be liability for failure to observe obligations imposed by its rules. Such liability is known in international law as responsibility[12]. Responsibility arises from the breach of any obligation under international law. A state is responsible, for example, if it fails to honour a treaty, if it violates the territorial sovereignty of another state, if it damages the territory or property of another state, if it employs armed forces against another state, if it injures the Diplomatic representatives of another state, or if it mistreats the nationals of another state[13].

(a) State responsibility

Every internationally wrongful act of a state entails the international responsibility of that state[14]. Every state is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility[15]. A state is equally responsible for internationally wrongful act when: (a) conduct consisting of an action or omission is attributable to the state under international law and (b) that conduct constitutes a breach of international obligation of the state[16].

The principle of civil and criminal responsibility of a state under international law is enacted in Article 19 of International Law Commission Draft Articles on state responsibility, thus:

1. **An act of a state which constitutes a breach of an international obligation is an international wrongful act, regardless of the subject matter of the obligation breached**
2. **An internationally wrongful act which result from the breach by a state of an international obligation so essential for the protection of fundamental interest of the international community that its breach is recognized as a crime by that community as a whole, constitute an international crime.**
3. **Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from**
   - **(a) a serious breach of an international obligation of essential importance for maintenance of international peace and security, such as that prohibiting aggression.**

(b) a serious breach of an international obligation of importance for safeguarding the right of self determination of people, such as that prohibiting the establishment or maintenance by force of colonial domination

(c) a serious breach on a widespread scale of an international obligation of importance for safeguarding the human being, such as those prohibiting slavery, genocide, apartheid,

(d) a serious breach of an international obligation of importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2, constitutes an international delict

The Draft Article distinguish between civil and criminal liability on the part of state in international law

A Civil (or delictual) liability arises where there is a breach of a treaty obligation under international law.

The question whether state may be criminally liable has long been the subject of debate.[17] In reaching the conclusion that they can International law Commission commented on state practice as follows:

"It seems undeniable that today's unanimous and prompt condemnation of any direct attack on international peace and security is paralleled by almost universal disapproval on the part of states towards certain other activities. Contemporary international law has reached the point of condemning outright, the practice of certain states in forcibly keeping other people under colonial domination, forcibly imposing international regimes based on discrimination, and the most absolute racial segregation in imperiling human life and dignity in other ways, or in so acting or gravely to endanger the preservation and conservation of the human environment. The international community as a whole, and not merely one or other of its members, now considers that such acts violates principles formally embodied in the charter and, even outside the scope of the charter, principles which are now so deeply rooted in the conscience of mankind that they have become particularly essential rules of general international law. There are enough manifestations of the views of the state to warrant that conclusion that in the general opinion, some of these genuinely constitute "international crimes", that is to say, international wrong which are

more serious than other and which as such, should entail more severe legal consequence . . ."[18]

Responsibility under international law can result from the commission of the prohibited act alone which is called the 'objective theory' of responsibility and also where the prohibited act is accompanied by some degree of intention or negligence on the part of the actor, which is referred to as the subjective or fault' theory of responsibility.

States are equally liable under international law on the principle of imputability where the conduct of a status organ can be considered as the act of the state, Thus, Article 518 provides

"For the propose of the present articles, conduct of any state organ having the status under the internal law of that state shall be considered an act of the state concerned under international law, provided that organ was acting in that capacity in the case in question

"The conduct of an organ of a state shall be considered as an act of that state under international law, whether that organ belong to the constituent, legislative, executive, judicial or other power, whether it functions are of an international or an internal character and whether it holds a superior or a subordinate position in the organization of the state[19]".

A state in not absolved of liability even when the acts of its organ or agent is *ultra vires***. As the conduct of an organ or a state of a territorial government entity empowered to exercise elements of a governmental authority, such organ having acted in that capacity, shall be considered as an act of the state under international law even if the organ exceeded its competence according to internal law or contravened instruction concerning it activity[20].**

The underlying philosophy behind this principle of attributability is based on the need for clarity and security in international relations. That is the state must recognize it acts whenever persons or groups of persons whom it has instructed to act in its name in a given area of activity appears to be acting effectively in its name. Even when in so doing those persons or groups exceed the formal limits of their competence according to municipal law of administrative ordinances or internal instruction issued by their superiors, they are nevertheless acting, even though improperly within the scope of the discharge of their functions. Once such acts occur, the state is therefore obliged to assume responsibility for them and bear the consequences in international law.

(b) Individual Responsibility

International law was conceived to deal with actions of sovereign states, it provides no punishment for individuals and where the act in question is

an act of state, those who committed it out are not personally responsible, but are protected by the doctrine of the sovereignty of the state.

It is against this background that the prosecution of war criminals after world war I was largely ineffectual but it still gave the Allied powers the incentive towards the end of world war 11 to take steps to punish the leaders of the Third Reich for crimes committed during the war; and the Nuremberg trials were the culmination of these measures.

On August 8, 1945, the governments of France, the United Kingdom, the United States and the USSR, "acting in the interests of all the United Nations and by their representatives duly authorized thereto" signed in London an Agreement for the establishment of an International Military Tribunal[21]. The tribunal was for the trial of war criminal whose offences have no particular geographical location[22]. It was to operate in accordance with a charter annexed to the agreement. The tribunal was composed of four members one appointed by each of the signatory governments. The members were Lawrence L.J, President, Biddle, Nikitchenko and de vabres. The alternate members were Birkett J; Parker, Volchor and Palco.

The jurisdiction of the tribunal is defined in the agreement and charter. The crimes within the jurisdiction of the tribunal for which there shall be individual responsibility, are set out in article 6.

At the trial it was argued on behalf of the indicted persons that individuals are not subject of international law and that where the act in question is an act of a state, those who carry it out are not personally responsible but are protected by the doctrine of the sovereignty of the state. In the opinion of the tribunal, these submissions must both be rejected[23]. On the basis that international law imposes duties and liabilities upon individuals as well as upon states. *In the case of Ex parte Quirin*[24]**, before the Supreme Court of United States, persons were changed during war with landing in the United State, for purpose of spying and sabotage. The Late Chief Justice Stone, speaking for the court said.**

"Form the very beginning of its history this court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war,

the status, rights and duties of enemy nations as well as enemy individuals".

The Nuremberg tribunal thus held that individual can be punished for the violations of international law. For "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced …"

Of the twenty-two individuals indicted by the tribunal, three were acquitted; the remainder were found guilty of one or more of the counts in the tribunals charter. Of those found guilty; twelve (including Goering, Von Ribbentrop, Keitel Streicher and Bormann) were sentenced to death; three (including Hess) were sentenced to life imprisonment; and four were sentenced to periods of ten to twenty years imprisonment.

However, the theoretical impact of the Nuremberg trials with regard to the position of individuals under international law has been interpreted differently. For some, these trials were taken to imply that individuals were unquestionably subjects of international law and could thus face certain international legal obligations. Others, however, asserted more cautiously that the trials were but an expression of the victorious powers right to assume jurisdiction over the defeated enemy territory, and that the London Charter as well as the Nuremberg trials therefore represented a singular case of a supranational legal system, by which the victorious powers had pooled their respective jurisdiction and done together what each of them could have done separately[25].

It is submitted that, the position of the individual under international law after the Nuremberg trials, is that, by creating the two criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), the Security Council took a leap forward and established beyond doubt that individual may now, in respect of international law, appear as subjects bound by certain legal obligations directly under international law, and that they can be held individually responsible before an international forum for their violations of international obligations. This is a remarkable development in international law with far-reaching implications for, inter alia, the concept of state sovereignty.

(c) THE DEFENCE OF SUPERIOR ORDERS

The plea of obedience to superior orders is certainly one of the most widely debated and controversial defences in international criminal law. Under national legal systems, soldiers are duty bound to obey the orders of their superiors and cannot dispute their legality. This situation, however becomes problematic when a soldier is ordered to perform an act which constitute a war crime or; more generally, an international crime. In this the duty of military obedience clashes with the need to preserve the supremacy of the rule of law, which proscribe the commission of criminal offences. The soldier is then caught in a dilemma. Should he obey the order, at the risk of being held responsible for the commission of a crime or should he ignore it and risk being punished for

military disobedience? This dilemma takes on an even more dramatic tones in situations where the order requires the performance of an action that is not branded as criminal by national law, but which constitute a war crime under international law.

It is worthy of note that the difficulty of distilling the content of the international customary rule on superior orders is made difficult by the fact that two seemingly conflicting approaches have been advocated and followed in international practice: the first which could be termed the conditional liability approach, is generally adopted by national legal systems; and the second, the so called absolute responsibility approach, was consistently taken in international legislations. The view that subordinates are never accountable for actions taken in execution of orders has been set aside. For many years this view based on the principle of respondent superior, prevailed in international community. It gradually proved to be inadequate, for two reasons; first, the increasing tendency in modern war for combatants at all levels to breach the international legal standards on the conduct of warfare and the protection of victims of armed conflicts. It thus became necessary to put a stop to those breaches by calling to account not only higher authorities but also the actual perpetrators, even if they act upon superior orders. Secondly, in recent times it has been successfully argued that acceptance of superior orders as an absolute defence would lead to a *reductio ad absurdum:* to bring to book the persons responsible for gross breaches one would have to climb right up the military chain of command and even the political hierarchy, with the preposterous result that only the supreme commander or even the Head of State could be held criminally liable for those breaches. The rationale behind the demise of the principle of respondent superior and the emergence of the contrary principle of subordinates' responsibility for the execution of illegal orders has been forcefully expressed by United States military tribunals at Nuremberg in the High Command case[27]; and has been more recently echoed by a *United States Court Martial in Calley.*[28]

Within the conditional liability approach the plea of superior order is, as a general rule a complete defence. The subordinate may, however, be held responsible together with his superior, under certain circumstances; namely when he know or should have known that the order was illegal, or when the illegality of the order was manifest. In national case law on war crimes, this principle was first proclaimed in a 1915 decision of the Austro-Hungarian Military Court and was subsequently reaffirmed in two renowned and much cited cases; *Dover Castle and Llandovery Castle***, brought before the Leipzig Court. The Austro-Hungarian Military Court took this approach by referring to the principle of manifest illegality. It stated that the subordinate is only responsible if the action ordered is "manifestly in conflict not only with criminal law but also with the custom of war of civilized peoples"[29]. The Leipzig Court instead made reference to the other standard, namely, more specifically whether the subordinates know that the order was illegal. In both cases the court upheld the principle that subordinates cannot avoid criminal liability in cases where**

they were unaware of having obeyed illegal orders[30]. Since that time many states have made recourse to the conditional liability approach[31] and it has also been upheld in some military manuals adopted after 1945, such as the 1990 Dutch law on Military Discipline[32], the 1992 German military manual[33], the Israeli military manual[34] the Italian Regulations for military Discipline[35], the Swiss[36] and the United States[37] military manuals. In addition, the notion of conditional liability finds support in the case law on war crimes of many national courts and tribunals.

Admittedly, the circumstances under which obedience to orders cannot be taken as a complete defence have been formulated in varying terms, it often depends on the wording of the relevant national provision on superior order that judges were bound to apply. Nonetheless, they can be grouped under the two fundamental criteria indicated by the Austro-Hungarian Military Court and the Leipzig Court in the cases already cited. The standard of manifest illegality has been upheld in the *Hoelzer, Weigel and Ossebach case,*[38] **brought before a Canadian Military Court, the judge advocate, in summing up the applicable law, stated that the order must not be "obviously unlawful" for it to constitute a defence. A more recent case where reference has been made to the manifest illegality standard, is the decision of the Rome Military Court of Appeal of 7 March 1998 in the** *Priebke case*[39]**.**

to determine whether the subordinate knew or should have known that the order was illegal, the decision handed down by the Dutch Special Court of Cassation on 21 November 1949 in the Zimmermann case **in apposite, the court upheld the view of the Appeals Court that the appellants reliance on superior orders was to be dismissed as "it must have been clear to the appellant… that his actions were contrary to any conception of law, and that the criminal nature of the deportation by the German occupying forces of citizens of conquered and occupied Dutch territory to Germany as forced labour … must have been all too clear to the appellant"[40]. In Walter Griffen case the law officer who instructed the court martial stated among other things that: "A soldier or air man is not an automaton but a reasoning agent who is under a duty to exercise judgment in obeying the orders of a superior officer to the extent that where such orders are manifestly beyond the scope of the issuing officer's authority and are so palpably illegal on their face that a man of ordinary sense and understanding would know them to be illegal, then the fact of obedience to the order of a superior officer will not protect a soldier for acts committed pursuant to such illegal orders. This is the law in regard to superior orders"[41].**

A different approach has been taken at the international level. Article 8 of the London Agreement establishing the Nuremberg tribunal laid down the so-called principle of absolute liability, whereby obedience to orders is never a defence and can only be urged in mitigation of penalty[42]. The rationale behind this principle is that a soldier is a reasoning agent, and therefore is capable of appraising the orders he receives. If an order is illegal he is not duty bound to

obey. If he elects to obey he takes the risk of being punished, along with his superior, for committing a criminal act. Articles 8 of the London Agreement inspired all the other international instruments dealing with the issue of obedience to superior orders. Thus the principle of absolute liability was incorporated into the charter of the Tokyo Tribunal[43] as well as the statutes of the two ad hoc tribunals recently instituted by the security council under chapter VII of the United Nations charter[44]. In addition the four occupying powers in Germany affirmed it when, with a view to establishing a uniform legal basis in Germany for the prosecution of Germans alleged war criminals, they adopted control council Law No. 10.45

As pointed out by Gaeta,[46] the correct position under customary international law would seem to be that superior orders are never a defence to serious violations of international humanitarian law, be they crimes of genocide, crimes against humanity or war crimes, but may only be urged in mitigation. The Rome statute provides in Article 33 for a different regulation. Under this provision superior orders shall not relieve a person of criminal responsibility unless the person (a) was legally bound to obey the order, and (b) did not know that the order was unlawful, and (c) the order was not manifestly unlawful. The Article adds, however, that orders to commit genocide or crimes against humanity are always manifestly unlawful. It follows that under Article 33 a superior order may always be urged as a defence for war crimes when the order was not manifestly illegal. The order would itself remain illegal, and the superior issuing the order liable to punishment, but the subordinate who executed the order in good faith relying on its legality and in the circumstances in which it was not manifestly unlawful, would have a complete defence entitling him to an acquittal. Cassese[47] argued that this conclusion is first of all at odd with lex-lata, under which any order to commit an international crime – regardless of its classification is illegal and therefore may not be urged in defence by the subordinate who obeys the order. Secondly, it is all the more surprising because Article 8 of the Rome statute is intended to specify and enumerate through an exhaustive list the war crimes falling under the ICC jurisdiction. Given this specificity of Article 8, one fails to see under what circumstances the order to commit one of the crimes listed therein may be regarded as being not manifestly unlawful i.e. if nothing else it would be 'manifest' in the text of the Rome Statute itself. Therefore if the subordinate knew the Rome's provisions, the illegality of any order to commit a war crime as defined in the statute would ipso facto be manifest to him. Of course, the issue may be clouded by a mistake of fact, but the statute already provides for defences based on this principle.

On this score therefore, Article 33 may be faulted as making retrogression with respect to existing customary law.

3.3 STATE PARTY AND THE REPRESSION OF GRAVE BREACHES OF INTERNATIONAL HUMANITARIAN LAW

International humanitarian law deals extensively with the repression of grave breaches committed during international armed conflicts, with the underlying idea that penal sanctions are an integral part of any coherent judicial system and that the threat of punishment or sanction in an element of dissuasion[48].

Recognition of individual penal responsibility of persons who commit or order the commission of grave breaches of international humanitarian treaties constitutes a major advance in humanitarian law[49].

The Geneva Conventions of 1949 and Additional Protocol 1 thereto address two categories of violations: those classified as grave breaches; which states have the obligation to prosecute, and those which states have the sole obligation to halt; no specific procedure have been prescribed for this.

Each convention contains a list of grave breaches[50]. This list is supplemented in Additional Protocol 1[51] which classifies these breaches as war crimes[52].

In the repression of grave breaches of international humanitarian law, the principal role and hence the responsibility rests with the parties to the conflict and the other contracting parties. In other words, the maxim aut judicare aut dedere must be applied. If grave breaches are committed, a contracting party has the choice of bringing the perpetrators before its courts or to "hand such person over for trial to another High Contracting Party concerned, provided such, High Contracting Party has made out a prima facie case"[53]. The obligation to repress grave breaches is independent of the nationality of the person committing them and of the place where they are committed, pursuant to the principle of universal penal jurisdiction. This principle places all states party to the humanitarian treaties under an absolute obligation to repress such breaches effectively; only their universal repression can ensure real respect for humanitarian law. This principle may not be circumvented, even by agreement among the parties concerned[54].

To that end, the Geneva Conventions specifically lay down the obligation to prescribe effective penal sanctions under national legislation [55]. Thus while international humanitarian law qualifies those acts, constituting war crimes, it is up to the national jurisdictions to determine the sanctions to be imposed.

3.4 STATE PARTY AND REPRESSION OF BREACHES NOT QUALIFIED AS WAR CRIMES: MINOR BREACHES

Persons committing violations of the rules applicable in international armed conflicts other than those qualified as grave breaches are deemed to have international penal responsibility. These other violations may be defined as

conduct contrary to the instruments of international humanitarian law which is of a serious nature but which is not included as such in the list of grave breaches.

It is not necessary to have in mind exactly what could fall under this definition to be able to distinguish three categories that qualify:

a. Isolated instances of conduct, not included amongst the grave breaches, but nevertheless of a serious nature;

b. Conduct which is not included amongst the grace breaches, but which takes on a serious nature because of the frequency of the individual acts committed or because of the systematic repetition thereof or because of circumstances;

c. Global violations, for example, acts whereby a particular situation, a territory or a whole category of persons or objects is withdrawn from the application of the conventions or the protocol[56].

The various duties which stem from the principle *pacta sunt servanda* **reaffirmed in Article 1 common to the four Geneva Conventions and recalling the obligations of states "to respect and to ensure respect for the present conventions in all circumstances" can help to establish an international penal responsibility for other violations of international humanitarian law[57]. In the absence of such international norm, it would be advisable that, in order to stop other violations not considered under international humanitarian law as war crimes, for domestic regulation or legislation to prescribe suitable means to restore a situation in conformity with the law, as violations of rules applicable to internal conflicts are the same as those considered as war crimes when they occur in international conflicts[58]. Presently, given the development in international law, only such internal mechanisms could make it possible to ensure effective respect for humanitarian law in all circumstances.**

It would be desirable for a national mechanism that would complement the provisions of international humanitarian law be put in place to accord victims full compensation for damages caused them. Indeed it is not enough to punish those responsible for such acts; victims should also be effectively compensated for the injury suffered. This crucial issue is not completely settled under international humanitarian law;[59] and calls for complementary measures which at present can be adopted only internally.

In contrast, the provisions of international humanitarian law concerning the observance of judicial guarantees are highly developed[60]. In this connection, no derogation from the fundamental guarantees enshrined in domestic legislation should be tolerated merely because the acts are committed in a time of armed conflict.

These guarantees should be supplemented, where necessary, so as to conform to the provisions of humanitarian law.

3.5 INTERNATIONAL TRIBUNALS FOR THE PROSECUTION OF WAR CRIMES

It is regretted that in spite of the detailed regulations on the repression of war crimes contained in the international humanitarian treaties, the system of universal penal jurisdiction have not been implemented by states and, consequently, it has not been possible to repress these crimes effectively.

This state of affairs has been informed by the fact that international humanitarian law makes no provision for an international tribunal to prosecute war crimes as do other instruments of international law; 61 but does not rule it our either. Such power could be conferred by an agreement among states in the form of an international treaty or by a decision of the security council. This has been the case for the "international tribunal … for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991"[62].

3.5.1 INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

The dream of international criminal jurisdiction, albeit ad hoc was realised with the establishment of the International Criminal Tribunal for the former Yugoslavia. Article 227 of the 1919 Treaty of Versailles provided that German Emperor Wilhelm II should be tired by an international court to answer charges of "flagrant offences against international morality and sacred authorities of treaties". Since the Netherlands refused to give up the accused, the trial never took place; and Wilhelm II died in exile in Holland in 1941. Articles 228 and 229 of the treaty providing for the prosecution of war criminals were applied in a disappointing way in the Leipzig trial. The Nuremberg and Tokyo trials after the Second World War immediately represented progress towards the creation of a body with truly international criminal jurisdiction, but they were greatly influenced by their origin and in effect applied the law and justice of the victors rather than those of the universal community of states[63].

For over 45 years, the international community, represented by United Nations, endeavoured to use the lessons drawn from Nuremberg to establish a permanent international criminal court, operating on the basis of international criminal code, but its efforts proved abortive. The debates of the international law commission which was entrusted with the tasks of drawing up a code of offences against the peace and security of mankind and a statute for international court, became mired and seemed fated never to succeed[64], much to the disappointment of legal experts and certain idealists.

It was only after the shock of the tragic events that followed the disintegration of the former Yugoslavia that the international community, at least made aware of the atrocities committed and alerted by the courageous report of Tadeuz Mazowiecki, agreed to the establishment of an international criminal tribunal for the former Yugoslavia, which was instituted by resolution 808 and 827 of the United Nations Security Council, adopted on 22 February and 25 May 1993.

The International Criminal Tribunal for former Yugoslavia (ICTY) has jurisdiction over the following crimes:
Grave breaches of the Geneva Conventions of 1949;
Violations of the laws and customs of war;
Genocide; and
Crimes against humanity.

When establishing the Yugoslavia Tribunal, the view expressed by the Secretary General was that " the application of the principle nullem crimen sine lege required that the international tribunal apply rules of international humanitarian law which are beyond any doubt part of customary law.

Article 2 of the ICTY statue gives the tribunal the power to prosecute persons committing or ordering to be committed grave breaches of the 1949 Geneva conventions. Article 2 common to these conventions indicates that the conventions apply in their entirety to all armed conflicts involving one or more High Contracting Parties on each side; to all cases of total or partial occupation of the territory of a High Contracting Party by the forces of another High Contracting party; and to armed conflicts involving powers which are not parties to the conventions if those powers accepts and apply the provisions thereof. A reasonable argument can be made that grave breaches provisions are part of customary law and apply to all international armed conflicts. In any event the Geneva Conventions applied throughout the territory of the former Yugoslavia during the period of the conflict as a matter of treaty obligation. It should also be noted that the Article 3 of the Conventions which applies to non-international armed conflicts, encourages parties to such conflicts to enter into agreements to bring into force all or part of the Conventions' other provisions. All the parties to the Yugoslavia conflict entered into special agreements under the auspices of the international committee of the Red Cross pursuant to Article 3 common to the 1949 Geneva Conventions or to other general principles of international humanitarian law.

Unfortunately, simply stating that the sovereign entities in the territory of former Yugoslavia were bound by the Geneva conventions as a matter of treaty or custom does not resolve whether or not the grave breaches provisions were relevant in determining the issue of conflict classification and the related issue of determining the applicable law to punish those who breached the provisions of the laws and customs of war.

The decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (hereinafter called the Tadic jurisdiction decision) rendered on 2 October 1995 gave the Appeal Chamber a first opportunity to address the issue of conflict classification65. The offences with which Tadic was charged with occurred in Bosnia and Herzegovina in 1992; they involved a Bosnia Serb perpetrator and Bosnia Croat or Muslim victims.

At the trail level, the defence argued that the conflict in question was not international and to that extent the conflict had internal aspects, therefore the grave breach provisions applied as a result of relevant Article 3 agreements. The United State in an amicus brief, argued that violations of Article 3 common to the Geneva conventions could be prosecuted under the grave Breach provisions of those conventions. On Appeal the prosecution also argued that the Security Council had determined that the conflict in the former Yugoslavia was international and that this determination should be given full effect.

The Appeal Chamber declined to decide on the nature of the conflict, leaving the issue to be resolved as a matter of mixed law and fact by the Trial Chamber. It however indicated in its decision that classification was a complex issue and that the Security Council was also aware of this complexity. "We conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the security council clearly have both aspects of the conflicts in mind when they adopted the statute of the international tribunal, and that they intended to empower the international tribunal to adjudicate violations of humanitarian law that occurred in either context" [66].

The Appeal Chamber went on to adopt a relatively conservative approach to Article 2 of the ICTY statute, deciding that "in the present state of development of the law Article 2 of the statute only applies to offences committed within the context of international armed conflicts"[67].

The relatively cautious approach to interpretation of Article 2 of the ICTY statute taken by the majority can be contrasted with a much more progressive approach adopted in a separate opinion of Judge Abi-Saab. He was of the view that the tribunal should assume jurisdiction under Article 2 of the statute for acts committed in internal conflicts on the basis of either a new interpretation of the Geneva Conventions or the establishment of a new customary rule ancillary to those conventions[68].

In the Rajic rule 61 proceeding, a trial chamber consisting of judges McDonald, Sidhwa, and Vohrah reviewed and reconfirmed an indictment against Ivica Rajic alleging that Bosnia Croat forces under his command had attacked the Bosnia Muslim village of Stupric Do on 23 October 1993 and committed several offences for which Rajic was responsible including wilful killing, a grave breach under Article 2(a) of the ICTY statute. Bearing in mind the Tadic Jurisdiction

Decision, the trial chamber was of the view that it was necessary to establish an undefined quantum of third-state (Croatian) involvement in the clashes between Bosnian Government and Bosnian Croat (HVO) forces to convert an internal conflict into an international armed conflict. The prosecution advanced two theories. First the conflict was international because of the direct military involvement of Croatian forces engaged in combat with Bosnian forces in Bosnia and, second, because, in the hostilities between Bosnia and Herzegovina and the Bosnia Croats, the Bosnian Croats were closely related to and controlled by Croatia and its armed forces.

The Chamber found that there was an international conflict between Bosnia and Herzegovina and Croatia during the appropriate period but this was not enough by itself, to establish that grave breaches had been committed by Bosnian Croats. It was also essential to establish that Croatia exerted such political and military control over the Bosnian Croats that the latter might be regarded as an agent or extension of Croatia. After reaching this conclusion the chamber went on to decide that the Bosnian civilian victims were protected persons that they were effectively 'in the hands of' Croatia, a country of which they were not nationals.

The Trial Chamber in the Tadic case consisted of judges McDonald, Vohrah and Stephen. As mentioned earlier, Tadic is a Bosnian Serb who committed offences against Bosnian Muslims or Croats in Bosnia and Herzegovina in the summer of 1992. In brief, the majority consisting of judge Vohrah and Stephen, held implicitly that the Geneva Conventions did apply in Bosnia throughout the period covered by the indictment because of an ongoing international armed conflict between Bosnia and the Socialist Federal Republic of Yugoslavia (SFRY)/Federal Republic of Yugoslavia (FRY)[69]. The majority then made two unsubstantiated assertions in a single paragraph: first, that the armed forces of the Republika Srpska (Bosnian Serb army) and the Republika Srpska as such were, at least from 19 May 1992 onwards legal entities distinct from the armed forces of the FRY and from the FRY itself, and secondly that members of the Bosnian Serb forces were nationals of Bosnia[70].
The date 19 May 1992 was significant as that of the dissolution of the old SFRY national army into two new components, the Bosnian Serb army and the FRY army and the formal withdrawal of the latter from Bosnia.

Relying on these assertions the majority went on to review the *Nicaragua case*[71] **in order to determine the proper rule for applying general principles of international law relating to state responsibility for** *defacto* **organs or agents to the specific circumstances of rebel forces fighting seemingly national conflict against the recognized government of a state, but dependent on the support of a foreign power in the continuation of that conflict. The majority noted that the International Court of Justice (ICJ) had set a particularly high standard for determining whether or not the United States was responsible for the activities of the contras.**

On the basis of its assessment of the law as contained in the Nicaragua decision (the effective control test) and its assessment of the facts, the majority found that the Bosnia Serb army and the Republika Srpska could not be regarded as de facto organs or agents of the FRY. Consequently, the civilian victims in the Tadic case could not be regarded as protected persons within the meaning of the Fourth Geneva Convention because they were not in the hands of a party of which they are not nationals, to an armed conflict. The Bosnia victims were in the hands of their fellow Bosnian (Serb) nationals. As a consequence, the grave breach provisions of the Geneva Conventions recognized in Article 2 of the ICTY statute did not apply[72].

Judge McDonald, continuing to adopt the approach she had formulated in the Rajic Rule 61 proceeding, filed a robust dissent in which she argued that the majority had misinterpreted the Nicaragua decision and in any event had misapplied its mistaken interpretation to the facts. In her view, Nicaragua established two distinct test for attributability: effective control and agency.

If "effective control" is the proper test, judge McDonald, interpreting the same evidence and accepting the same facts, concluded that FRY did effectively control Bosnian Serb army, that the creation of that army was a legal fiction, and that the attack which provided the opportunity for Tadic to commit offences had to have been planned before the Bosnian Serb army was created on 19 may 199273.

In the Celebici Trial Decision addressing incidents that occurred in 1992 and involved Bosnian Serb victims and perpetrators linked to the Bosnian government, the Trial Chamber adopted a different approach to the issue of conflict classification. It explicitly adopted the premise that "should the conflict in Bosnia and Herzegovina be international, the relevant norms of international humanitarian law apply throughout its territory until the general cessation of hostilities, unless it can be shown that the conflicts in some areas were separate internal conflicts, unrelated to the larger international armed conflict" [74].

The Chamber appears to have neatly side-stepped the Nicaragua decision and its various tests as irrelevant to the situation in Bosnia Herzegovina and as of limited relevance to the determination of individual criminal responsibility. In lieu thereof, the chamber considered the first relevant question to be: "was there an international armed conflict in Bosnia and Herzegovina in May 1992 and did that conflict continue throughout the rest of that year, when the offences charged in the indictment are alleged to have been committed"[75]. The Chamber held that an international armed conflict existed in Bosnia – Herzegovina at the date of its recognition as an independent state on 6 April 1992 and the parties were Bosnia-Herzegovina and the FRY. Further, there was no general cessation of hostilities in Bosnia-Herzegovina until the signing of the Dayton Peace Agreement in November 1995. The Chamber went on to consider whether the

nature of the conflict changed after the purported withdrawal of FRY forces in May 1992. It concluded:

> **"234. The trial chamber is in no doubt that the international armed conflict occurring in Bosnia and Herzegovina, at least from April 1992, continued throughout that year and did not alter fundamentally in its nature. The withdrawal of JNA (FRY army) troops who were not of Bosnian citizenship, and the creation of the VRS and VJ (FRY army) constituted a deliberate attempt to mark the continued involvement of the FRY in the conflict while its government remained in fact the controlling force behind the Bosnia Serbs. From the level of strategy to that of personnel and logistics the operations of the armed forces of the JNA persisted in all but name. It would be wholly artificial to sever the period before May 19 1992, from the period thereafter in considering the nature of the conflict and applying international humanitarian law".**

Having reached this conclusion, the chamber went on to consider whether the victims of the alleged acts were persons protected under the Geneva Conventions. It held that none of the victims, all Bosnian Serbs, appeared to meet the criteria to be regarded as prisoners of war under the Third Geneva Convention. On the other hand, at the instance of the prosecution, the chamber adopted a very progressive approach towards identifying persons protected under the Fourth Geneva Convention. Civilians protected under that convention must be "in the hand of" a party to the conflict of which they are not nationals. It would be recollected that in the Tadic case, the trial chamber held that the victim group (Bosnia Muslim and Bosnia Croats) were not persons protected under the Fourth Convention because they were in the hands of Bosnian Serbs, a group which shared their Bosnian nationality. In the Celebici case the Trial Chamber held that the victims group (Bosnian Serbs) should be regarded as protected persons and therefore should not be regarded as sharing the nationality of their Bosnian Muslim and Bosnian Croat captors. Instead of taking for granted that the Bosnia Serbs automatically assumed Bosnian nationality when Bosnia and Herzegovina became an independent state, the chamber adopted a more flexible approach, relying in particular on the ICJ decision in the Nottebohm case 76 and its requirement for an effective link, but also on the emerging right under international law to the nationality of one's choosing in cases of state succession:

> **"264. The law must be applied to the reality of the situation**
>
> **before us thus, to reiterate, the relevant facts are as follows:**
>
> - **Upon the dissolution of SFRY, an international armed conflict between, at least, the FRY and its forces and the authorities of the independent state of Bosnia Herzegovina took place;**
> - **A segment of the population of Bosnia and Herzegovina, the Bosnia Serbs, declared their independence from the state and**

purported to establish their own republic which would form part of the FRY;

- **The FRY armed and equipped the Bosnia Serb population and created its army, the VRS;**
- **In the course of military operations in Konjic municipality, being part of this international armed conflict, the Bosnian government forces detained Bosnian Serb men and women in the Celebici prison camp.**

"265. Without yet entering the discussion whether or not their detention was unlawful, it is clear that victims of the acts alleged in the indictment were arrested and detained mainly on the basis of their Serb identity. As such, and in so far as they were not protected by any of the other Geneva Conventions, they must be considered to have been

> **"protected persons", within the meaning of the Fourth Geneva Convention, as they were clearly regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict and as posing a threat to the Bosnian state".**

Despite difficulties encountered and the weaknesses and flaws inherent in the Hague tribunal, a noteworthy contribution of the contribution of the ICTY is the breakdown of barriers between international and non-international conflicts. International and internal aspect intermingled in the conflicts in former Yugoslavia and it would therefore be arbitrary to attempt to separate the two types of conflict, although international humanitarian law have established different rules pertaining to each category. The problem has been approached from the point of view of competence, particularly in the Tadic case (decisions of the Appeal Chamber of 10 October 1995). The Hague Tribunal has also narrowed the gap between international and internal situations in connection with the obligation to cooperate that is incumbent not only on states but also on non-state entities, although this is not mentioned in the statute or in the Rules of Evidence and Procedure. President Cassese in his decision on the *Blaskic case*[77], did not hesitate to declare that the obligation was incumbent upon any state, and was upon "every other de facto government".

3.5.2 INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

The International Criminal Tribunal for Rwanda (ICTR) was established by the United Nations Security Council Resolution 955 of 8 November 1994. The purpose was 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 1 January

and 31 December 1994. At the same time, the Security Council adopted the Statute of the tribunal and requested the Secretary General to make arrangement for its effective functioning.

On 22 February 1995, the security council passed resolution 977 designating the town of Arusha in the United Republic of Tanzania as the seat of the tribunal. Agreement between the United Nations and Tanzania concerning the tribunals headquarters was signed on 31 August 1995.

The tribunal which has a relatively wide jurisdiction, is mandated to prosecute persons responsible for genocide and other serious violations of international humanitarian law. The statute of the tribunal more or less follows the Genocide Convention of 1948 in defining genocide as any act committed with intent to destroy, in whole or in part; a national, ethnic, racial or religious group. Such act include: 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 to prevent births within the group; and forcibly transferring children of the group to another group. According to the statute, genocide itself, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide are all punishable.[78]

In addition, the tribunal has power to prosecute persons charged with crimes against humanity, which include: murder; extermination enslavement; deportation; imprisonment; torture; rape; persecution on political, racial or religious grounds; and other inhuman acts[79]. Since such crimes can be committed in various circumstances, the statute specifies that they only fall within the purview of the tribunal when committed as a widespread or systematic attack against any civilian population on national, political, ethnic or religious grounds.

Opening a completely new area for tribunals of this nature, Article 4 of the statute empowers the tribunal to prosecute persons who commit or order to be committed serious violations of Article 3 common to the Geneva Conventions of 1949 for the protection of war victims and of 1977 Additional Protocol II relating to the protection of victims of non international armed conflicts. Such violations include: violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment such as torture, mutilation or any form of corporal punishments; the taking of hostages; acts of terrorism, outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; and threats to commit any of the foregoing acts.

To date, the tribunal issued several indictments and arrest warrants for persons

suspected of having been involved in masterminding the genocide in Rwanda in 1994. Some of these persons have been arrested in various states and brought to Arusha, where some trials are underway. First of all there is the case of Clement Kayishema, the former prefect (Governor) of Kibuye, who is facing 25 charges related to massacres committed at various places. He is being tried jointly with Obed Ruzindana, a businessman accused of having organized massacres in Western Rwanda. Then, there is the case of Georges Rutaganda, from Gitarama, a senior official in the party of assassinated President Juvenal Habyarimana. As vice president of the Interahmwe militia, Rutaganda is alleged to have helped arm the militia in Kigali, placed road-blocks and ordered the militia to kill Tutsis. He is also alleged to be a shareholder in Radio Television Libre des mille collines which made regular broadcasts inciting its listeners to genocide. Finally, there is the case of Jean-Paul Akeyesu, the former mayor of Taba, near Gitarania, who is charged on 12 courts, including genocide and crimes against humanity.

Also indited by the tribunal is Colonel Theoneste Bagosora who appeared before the tribunal on 23 January 1997, charged with genocide and crimes against humanity and on two counts of violation of Article 3 common to the Geneva Conventions. He pleaded not guilty of all counts.

The Rwandan Tribunal has been the object of criticism, the Rwandan government opposed the creation of the tribunal in the first place citing two main reasons. To begin with, the most severe punishment to be meted out by the tribunal would be imprisonment and not death (for the government those proved to have been involved in the genocide deserved the death penalty, which still exists in Rwanda). Secondly, the Rwandan government argued, it was unrealistic to limit the tribunal's jurisdiction to the period 1 January to 31 December 1994 since equally serious crimes had been committed before then and these crimes were related to the ones perpetrated in 1994. Other reasons included the likelihood that judges from countries which had been in one way or another involved in the war would show bias; and the fact that those found guilty would serve their sentences in countries offering prison facilities and not in Rwandan jails[80]. In the eye of the Rwandan government, therefore the tribunal would be ineffective; moreover, it would serve no useful purpose since it would not meet the expectations of the Rwandan people: at most, it would be useful to appease the conscience of the international community; which had stood by while the genocide took place and made no effort to stop it. The government has continued to take a very hostile attitude towards the Tribunal whose personnel in Kigali have reportedly been subject to harassment and even man handled in the course of their work[81].

Despite the initial criticism and seemingly lack of cooperation with the tribunal, acting on the request by the tribunals president before the Seminar on the International Criminal Tribunal and the enforcement of the International

Humanitarian Law, jointly, organized by the OAU and the ICRC, the OAU secretary General recommended in his report of 25 May 1997 that African Heads of State discuss the difficulties encountered by the tribunal in carrying out its mandate and give it their full cooperation[82].

For the first time in history, the OAU raised the issue of penal sanctions for war crimes and serious violations of international humanitarian law committed within the context of international conflicts in Africa. The Heads of state agreed to cooperate with the tribunal. The United Nations Secretary General was called upon to provide greater financial and materials support for the tribunal.

The Heads of State undertook to cooperate with the tribunal, particularly in arresting the suspected culprits and extraditing them to the tribunal. Lastly, the OAU Secretary General was invited within the framework of the OAU/ICRC cooperation agreements[83], to disseminate and encouraged respect for international humanitarian law, particularly among local communities.

That meaningful political support was subsequently matched by deeds when some states namely (Cameron, Gabon, Kenya) decided to transfer some criminals sought by the tribunal to Arusaha.
In the final analysis, it is clear that the significance of tribunal like the International Criminal Tribunal for Rwanda does not lie in the number of persons who appear before them, but in the signals sent out by their creation. As Meron says:

"No matter how many atrocities cases these international tribunals may eventually try, their very existent sends a powerful message. Their statutes rules of procedure and evidence and practice stimulate the development of the law. The possible fear by the states that the activities of such tribunal might pre-empt national prosecutions could also have the beneficial effect of spurring prosecutions before the national courts for serious violations of humanitarian law. [84].

The creation of the international criminal tribunal for Rwanda marks a refusal to accept impunity. It also signals the international communities commitment to ensuring respect for international humanitarian law and trying those responsible for seriously violating it.

It is interesting to note that despite the political and legal controversy surrounding the discussions at the United Nations when the tribunal was created, the African states now broadly supports it.
It must be emphasized that if the tribunal is to live up to its mandate of promoting national reconciliation in Rwanda and in the rest of Africa, the international community must be able to provide it with the human and material resources required for the proper accomplishment of its mission.

3.6 PERMANENT INTERNATIONAL CRIMINAL COURT AND

THE PROSCUTION OF WAR CRIMES

The adoption of the statute of an international criminal court has been widely welcomed as an important building block in ensuring international accountability. Now that the statute has received the necessary 60 ratification for its entry into force, it is the first time the world has a permanent mechanism for prosecuting genocide, crimes against humanitarian and war crimes[85]. Past attempts to deal with international atrocities have been ad-hoc in nature. The international Military tribunal for Nuremberg and the Far East, and the recent international criminal tribunal for the former Yugoslavia and Rwanda have temporal and territorial restrictions on jurisdiction[86]. The ICC will not face these limits. The ICC will be a permanent institution, with automatic jurisdiction over the core crimes of genocide, crimes against humanity, war crimes and aggression (once it is defined)[87] Once a state ratifies the ICC treaty[88] or consents to jurisdiction on ad hoc basis[89], it automatically recognizes the court's jurisdiction over all core crimes committed by its nationals or on its territory[90].

The principle of complementarity establishes the boundaries of the court's jurisdiction. Unlike the ad hoc tribunal which take primacy over the national courts the ICC proceed on the opposite assumption. Complementarity, as established in the statute's preamble and in Articles 1 and 17 to 20 assumes that national courts will assume jurisdiction[91]. These provisions create a presumption in favour of action at the level of states. In other words, the ICC does not enjoy primacy over national courts but should only step in when the competent domestics prosecutor or courts fails, or are unwilling or unable to act. The Rome statute makes it clear that states judicial authorities have the primary responsibility of prosecuting and punishing international crimes. This should be their normal task, and the ICC can only deal with cases where national judicial system do not prove to be up to the assignment.

This provision is a positive step in many respects. Clearly, it falls primarily on national prosecutors and courts to investigate, prosecute and try the numerous international crimes being perpetrated in many parts of the world. First of all, those national institutions are in the best position to do justice, for they normally constitute the forum a convenient a convenient one for that matter, where both the evidence and the alleged culprit are to be found. Secondly, under international law, national or territorial states have the right to prosecute and try international crimes, and often even has a duty to do so. Thirdly, national jurisdiction over those crimes are normally very broad, and embrace even lesser international crimes, such as sporadic and isolated crimes, which do not make up, nor are part of a pattern of criminal behaviour[92]. Were the ICC also to deal with all sorts of international crimes, including those of lesser gravity, it would soon be flooded with lost of cases and become ineffective as a result of excessive and disproportionate workload. To an extent, this has already occurred at the ICTY and has necessitated the withdrawal of indictment of minor individuals in the political - military hierarchy[93].

Another important achievement of the Rome statute is the trigger mechanism which provides for a three pronged system. The power to initiate proceedings or investigation was conferred both on the prosecutor (Subject to judicial scrutiny) and on states as well as the Security Council. In short a three pronged system is envisaged.

a. Investigation may be initiated at the request of a state, but

then the prosecutor must immediately notify all other states, so as to enable those, who intend to exercise their jurisdiction to rely upon the principle of complementarity.

b. Investigation may be initiated at the request of the Security Council, and is this case the intervention of the Pre-trial chamber is not required, nor is notification to all states.

c. Investigation may be initiated by the prosecutor, but subject to two conditions (I) a pre-trial chamber must authorize them and (ii) All states must be notified. Clearly this is a balanced system, which takes into account both the interest of the states and the demand of international justice.

Safeguard for proper administration of international justice can be seen in a key provision of the statues: Article 53(2). On the strength of this provision, the prosecutor enjoys broad powers in sifting through cases initiated either by the entities that may be politically motivated (state) or by a political organ (the Security Council). By virtue of Article 53 (2), the prosecutor may decide that there is not a sufficient basis for a prosecution even when the case has been initiated by a state or the Security Council. It is clear that under these provisions the prosecutor may conclude that a prosecution is not warranted not only because (1) there is no legal or factual basis for a warrant of arrest or a summon to issue, but also (ii) the case is inadmissible under Article 17, as a state which has jurisdiction over the crimes is investigating or prosecuting it, and – what is even more important, if (iii) a prosecution is not in the interest of justice, taking into account all the circumstance including the gravity of the crime, the interest of the victims and the age and infirmity of the alleged perpetrator, and his or her role in the alleged crimes".

This rule is of crucial importance as it assigns to the prosecutor the role of an independent and impartial organ responsible for seeing that the interest of justice and rule of law prevail. The prosecutor may thus bar any initiative of states or even any deferral by the Security Council which may be politically motivated and contrary to the interest of justice.

It is my submission that with these laudable achievements of the adoption of the Rome statute and its coming into effect with the ratification of 60 signatory

states on 1st July 2002 the landmark provisions and machinery to halt the culture of impunity and exact compliance with the laws and customs of wars to bring the violations of international humanitarian law to justice will be achieved.

Having undertaken a historical excursion of the efforts of the world community to see that violations of the laws and customs of war do no go unpunished, from the Nuremberg Charter the Control Council No. 10 statute, the Geneva Conventions with the Additional Protocol, the establishment of the two ad hoc International Criminal Tribunal for the former Yugoslavia and Rwanda culminating in the millennial event of framing a treaty for a permanent international criminal court in Rome in July 17, 1998, one can conclude without fear of contradiction that the impunity with which the violations of international humanitarian law and the laws and customs of war go unpunished is not due to dearth of appropriate penal machinery and sanctions for breaches but the lack of political and moral will on the part of states parties to give effect to these provisions.
One only hope that the coming into effect of the Rome statue state will be a turning point from the established status quo and a watershed into a new philosophy of the prosecution and punishment of international criminal.

CHAPTER THREE
NOTES AND REFERENCES

1. **Maria Teresa Dutli and Cristina Pellandini "The International Committee of the Red cross and the implementation of a system to repress breaches of international humanitarian law" published in IRRC, May – June, 1994 P. 240**
2. **2. See, inter alia, Yves Sandoz "Mise en aeuvre du driot international humanitaire in les dimensions internatiomales du droit humanitaire, IHL – UNESCO, Paris, Pedone, 1986, pp. 229-326. By the same author: "Penal Aspects of International Humanitarian Law" in Cherif Bassiouni (ed); International criminal law, Vol. 1, New York, 11986. Also Richeard Barter, "The Municipal and International Law Basis of Jurisprudence over war crimes" in the British Year book of International law, 101 25, 1951.**
3. **As was stated in Article 851 of the Spanish Field Service Regulation of 5 January, 1882**
4. **Articles 227 to 229 of the Treaty of Versailles arraigned Kaiser for a supreme offence against international morality and the sanctity of treaty"**
5. **Some of the accused were tried by German Courts, which awarded only light sentence. Others were not handed over to foreign courts for trial. This contravened the spirit of the treaty.**
6. **On 13 January, 1942, the government of the Allied countries occupied by Germany drew up the "Declaration of St. Jamas Palace" for the punishment of war criminals, and on November 1, 1943 the Allied published the "Moscow Declaration" to same effect. See Ladan, M.T "Introduction to International Human Rights and Humanitarian law" 1999, Published by A. B. U press Zaria P. 282.**

7. **These tribunals were Standardized by Kontroll ratsgesetz No 10 of 20 December 1945, which followed the principles of the international military tribunal.**
8. **Although the war crimes commission was set up in London to order the hand over of accused person, there is no doubt that each country followed its own procedure: Belgium on 20 July, 1947, Holland on 10 July, 1947, Norway on 4 May 1945, the UK on 14 June 1945, and France on 28 August.**
9. **This tribunal followed the London Charter, with a few amendments, thus the penal concept for "Conspiracy" was dropped, the number of members of the tribunal was increased and its jurisdiction was extended to other individuals and territories.**
10. **Dr. Ladan M.T op. cit. P. 283 see (note 6)**
11. **See the fourth convention, Articles 1,2,4, and 146**
12. **Harris D. J. Cases and Materials on International law, London Sweet and Maxwell 1998, P. 484.**
13. **ibid.**
14. **Article 1 of international law commission draft articles on state responsibility (ILC) ILC's 1996 report, G.A.O.R; 51st session; supp. 10, P. 125.**
15. **ibid. Article 2.**
16. **ibid. Article 31**
17. **See Brownlie international law and the use of force by state (1963), P.154, cited in Harris D.J. Op. Cit,**
18. **Article 5 of I.L.C. Draft articles on state responsibility**
19. **ibid. article 6**
20. **ibid. article 10**
21. **U.K.T.S. 4 (1954), Cmd. 6671; 5 U.K.T.S 251; (1945) 39 A.J.I.L Spp. 257**
22. **ibid. article 2.**
23. **Harris, D.J; Op. cit (note 1) P.741**

24. **(1942) 317 U.S.I**

25. **See Harhoff, Frederik; "the Rwandam Tribunal, A presentation of some legal Aspects" published in international review of the Red cross IRRC 1997. PP 2-3**

26. **Gaeta, Paola; "The Defence of superior Orders. The statute of international criminal court versus customary international law" published in European Journal of International law Vol. 10 (1999) No. 1;P 173.**

27. **See trials of war criminal before the Nuremberg tribunal under control council law no. 10, x1, at 507 – 506 and the Einsatzgruppen case, (Ibid; iv, at 470).**

28. **22 U.S.C.M.A; at 534**

29. **Article 158 of the 1855 military penal code of the Austro – Hungarian Monarchy provided "A subordinate who does not carry out an order is not guilty of a violation of his duty of subordination if (a) the order is obviously contrary to loyalty due to the prince of the land; (b) if the order pertains to an act or omission in which evidently a crime or an offence is to be recognized"**

30. **See judgment of the supreme court of Leipzig of 4 June 1921 and 16 July 1921, In 16 AJIL (1922), at 706 – 708 and 721 – 723 respectively.**

31. **See Article 9 of the Danish Military Discipline Act "who by obeying the order of a superior has committed a punishable act, is not liable to punishment unless he know that the order was given with malicious intent or if it was immediately obvious".**

32. **Article 16 of this law (Wet Militair Tuchtrecht) provides. The previous article (Article 15, He who does not obey a duty order acts in violation of military discipline) does not apply if the action ordered is unlawful or was in good faith considered to be unlawful by the soldier".**

33. Para. 144 of the manual (Humanitarian law in Armed conflicts – Manual, Dsk VV 20732006) provides: A plea of superior orders shall not be acknowledged if the subordinate realized or, according to the circumstance known to him, plainly could have realized that the action ordered was a crime".

34. See Article 10 of the manual.

35. See Article 25, Para. 2, whereby "The Soldier to whom an order is given which in manifestly against the state institutions or the execution of which at any rate manifestly constitute a criminal offence, is duty bound not to execute such order and to report thereon as soon as possible to his superior".

36. Rub 201, para. 2 of the 1962 manuel des lois et coutumes de la gerra.

37. See the United States Department of the Army Field manual (the 1956 the law of land and warfare), Para. 509 (a).

38. See "Record of Proceedings and Evidence for the Trial of Robert Hoelze et al, vol. 1, at 344.

39. (Still unpublished).

40. In Nederlands Jurisprudence (1950), nos; 9, 30 et seq.' At 3, unofficial translation.

41. See the instructions given by the law officer to the court martial as well as the decision of the Board of Review of 2 July 1968, 39 CMR, 586ff, at 587.

42. Articles 8 provided that: "The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the tribunal determines that justice so required.

43. Article 6 of the 1946 charter of the international military tribunal for the Far East provided that: Neither the official position, at any time, nor the fault that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime which he is charged, but

such circumstance's may be considered in mitigation of punishment if the tribunal determines that justice so requires".

44. Article 7, para. 4 of the statute of international criminal tribunal for the former Yugoslavia (ICTY) provides that: the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the international tribunal determines that justice so requires". Almost identically, Article 6, para. 4, of the statute of the international criminal tribunal for Rwanda establishes: "That the fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her from responsibility, but may be considered in mitigation of punishment if the international tribunal for Rwanda determines that justice so requires".

45. Article 11; para 4 (5) provided that: "The fact that any person acted pursuant to the order of his Government or of a superior order does not free him for a crime, but may be considered in mitigation"

46. Gaeta, Paola; op cit (footnote 24) at P. 188.

47. Cassese, Antonio; The Statute of International Criminal Court: some preliminary Reflections" published in European Journal of international law, vol. 10 (1999) No 1. P. 156.

48. Dutli, Maria Teresa and Pellandin, Cristina; "The International Committee of the Red cross and the implementation of a system to repress breaches of international humanitarian law" Published in IRRC May – June 1994, No. 300 P. 241.

49. Articles 49, 50 129 and 146 common to the Geneva Conventions.

50. Articles 50,51 130 and 147 common to the Geneva Conventions.

51. Article 11 Paragraph 4 and 85 paras 3 and 4.

52. Article 85 para. 5.

53. See (footnote 47)

54. Articles 51,52,50 129 and 146 common to the Geneva Conventions.

55. See footnote 47

56. Article 49, 50, 129 and 146 common to the Geneva Conventions

57. Plattner, Denise, "The penal repression of violations of international humanitarian law applicable in non – international armed conflicts IRRC, No 278, September – October 1990 P. 419

58. See Article 3 Common to the Geneva conventions and Article 4 of protocol 11.

59. The question of compensation for injury suffered in international conflicts is dearth with in Articles 51,52, 131 and 148 common to the Geneva conventions and in Articles 91 of protocol 1.

60. See mainly article 75 of protocol 1 and Article 6 of protocol 11.

61. Convention on t he prevention and punishment of the crime of Genocide, Article VI, and the convention on t he suppression and punishment of the crime of apartheid, Article v.

62. Security Council resolution 808 (1993) and 827 (1993).

63. Tavernier, Paul "The experience of the international criminal tribunal for the former Yugoslavia and Rwanda" published in http://www.icrc.org/ccrceng.nsf/c12.

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65. Ibid, para.77, P. 57

66. Ibid; Para 84 P. 60

67. Separate opinion of judge Abi – Saa6, Ibid, P. 6 not reprinted in ILM

68. Prosecutor V. Dusko Tadic, opinion and judgement ICTY NO. IT-94-1-T (7 May 197) Paras 118 & 120, 569

69. Ibid, para, 584

70. **Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America Judgment, ICJ report 1986, P. 14**
71. **Note 67, Ibid, Para 589**
72. **OP cit (note 67) Separate opinion of judge McDonald, Paras 7,8.**
73. **Prosecutor V. Delalic, Mulic and Landzo, Judgment ICTY No. IT – 96-21-T (16 November 1998) Para. 209**
74. **Ibid para. 211**
75. **Lichenstein vs Guatemala, ICJ report 1955, O.4**
76. **See decision of President Antonio Cassese handed down in Blaskic case on 3 April 1996**
77. **Article 2 of the statute**
78. **Article 3 of the statute**
79. **At present six countries have indicated their willingness to provide prison facilities for person convicted by Rwanda tribunal Austria, Belgium, Denmark, Norway, Sweden and Switzerland.**
80. **See prosecuting Genocide in Rwanda: The ICTR and national trials lawyers committee for Human rights Washington DC July 1977, P. 4.**
81. **Introductory note to the report by the OAU secretary – General to the thirty third ordinary session of the conference of Heads of states and Government and to the sixty –sixth ordinary session of the council of ministers, Harare, Zimbabwe 26 May – 4 June 1997, P. 56**
82. **Cooperation agreement between the OAU and the ICRC, 4 May 1992 (not published).**
83. **Mean, Theodor, "The International Criminalization of International Law, vol. 89, 1985, P.555. it came into force on 1st July 2002.**
    Zwanenburg, Marten; "The statute of an international criminal court and the United States: Peace keepers under fire:" Published in European Journal of international law, vol. 10 No. 1. P 141 (1999)
84. **Hafner, Gerhard; Boon, Kvisten; Rubesane, Anne, and Huston Jonathan; "A Response to American view as presentation by Ruth**

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85. **See Rome statute, Article 5**
86. **See Ibid Article 12(1)**
87. **See Ibid, Article 12 (3)**
88. **With the exception of an optional seven – year opt-out provision for war crimes. See ibid, article 124,**
89. **See Article 1, 17 and 19**
90. **See Cassese, Antonio "The Statute of international criminal court: Some Preliminary Reflection" published in European Journal of International Law, 1999 No. 10 No 1, P. 158.**
91. **See, for example, the order granting leave for withdrawal of charges against Gavedavia, Gruban, Janjic, Kostis Paspal, Pavlic, Popovic, Predojevic, Savic, Babi and Spanoja issued by judge Riad on 8 May 1998.**

CHAPTER FOUR

4.0 PENAL SANCTIONS FOR BREACHES OF INTERNATIONAL HUMANITARIAN LAW

4.1 Every law implies penalties for violations of its values. International humanitarian law indeed provides for penalties, putting, them into effect is unquestionably a serious matter.

A careful look at the penal regime of the humanitarian Conventions and the Additional protocol, however, shows that their substance remain valid on the whole and that the difficulties encountered nowadays arise mainly from the fact that the means and the will to implement these instruments are lacking. The problem is therefore more political than legal.

This major issue must be tackled primarily at the national level by states insisting on the responsibility for introducing adequate measures in its national legislation and resolutely prosecuting those responsible for violations. The reluctance often evinced by belligerents to prosecute those responsible for violations and punish offenders within their own ranks must, however, be taken into account, particularly if the violations stem from decisions taken at the highest military or political level.

It is against this background that this research propose to examine the elaborate penal regime and the concomitant sanctions in the Geneva convention and its Additional Protocol. The mandate given to the High contracting parties to enact any legislation necessary to provide effective penal sanctions for person committing, or ordering to be committed, any of the grave breaches of the conventions. To what extent the states parties have fulfilled their obligation under the treaty to repress violations by imposing sanctions. The jurisdiction of the ad-hoc International Criminal Court in this respect and their success or otherwise, and finally an examination of the future International Criminal Court, coming after the ad hoc Tribunals for

the former Yugoslavia and Rwanda, as a complement to the modality set up by the Geneva conventions.

4.2 SCOPE OF SANCTIONS

International humanitarian law, has played a vital role in developing concepts for penal sanctions for grave breaches of basic obligations under the Geneva conventions and their Additional Protocols. The regime of imposing sanctions is left for the states parties. States are obliged to "enact any legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed" such acts; they are also "under the obligation to search for persons alleged to have committed, or to have ordered to be committed such grave breaches and to bring such persons, regardless of their nationality, before its own courts" if these persons are not extradited to another state party.

Article 49 of the First Geneva Convention and corresponding articles in the second, third and fourth conventions, and Articles 85 and 86 of protocol 1 states the scope of the sanctions.
Article 49 of the first Geneva convention provides.

" The high Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present convention defined in the following Article.
Each High contracting party shall be under the obligation to search for persons alleged to have committed, such grave breaches, and shall bring such persons, regardless of their nationality before its own courts. It may also, if it prefers and in accordance with the provision of its own legislation, hand such persons over for trial to another High Contracting party concerned, provided such High contracting party has made out a prima facie case.
Each High contracting party shall take measures necessary for the

suppression of all acts contrary to the provisions of the present convention other than the grave breaches defined in the following Article."

Article 86 paragraph 1 of the additional protocol 1, adds a reference to breaches consisting in failure to act. Paragraph 1 states that:

"The High contracting parties and the parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the conventions or of this protocol which result from a failure to act when under a duty to do so"

Articles 85 of 1977 additional protocol merely expands the scope of sanctions for the breaches it codified

As argued by a jurist[1], it follows that:-

1. International law requires states to impose sanctions for the breaches described as grave breaches in the Convention and Protocol.

2. As for breaches not expressly described as grave, i.e. other acts contrary to international law, the only obligation required of states is to repress them. States are not obliged to fix penalties, but there is nothing to prevent them from doing so if they wish"

3. The penal sanctions to be fixed by states for grave breaches have to be proportionate or adequate to the gravity of the breach. This means that states have to establish a scale of penalties of various degrees of severity and perhaps even of different kinds, following their usual internal method.

4. These principles are applicable both to penalties for grave breaches specified in the convention and to penalties for the grave breaches specified in protocol 1, since as stated above, the system is the same for the Conventions and the Protocol.

It should be noted that this complete delegation of power by the international legislation to municipal legislation or courts for the penal regime and enforcement of sanctions has not been effective well for the enforcement of the law against violations and hence the disobedience to the norms of international humanitarian law.

SANCTIONS FOR GRAVE BREACHES BY STATE.

The Geneva conventions specifically lay down the obligation to prescribe effective penal sanctions under national legislation[2], but did not determine the nature of sanctions to be imposed for the breaches. Research has shown that the sanctions, can either be in form of reparation, extradition and trial and punishment of violations.

4.3.1 REPARATIONS FOR STATES

International humanitarian law addresses the question of reparation for states. Article 3 of the Hague convention regarding the laws and customs of war on land, 18 October 1907 provides for reparation. Again the four Geneva conventions all provide that parties cannot absolve themselves of liability in respect of grave breaches, and protocol 1, in Article 91, stipulates that parties to a conflict shall be "liable to pay compensation" for violation of provision of the conventions or of the protocol. In this regard, the Iraqi occupation of Kuwait present an interesting case, as the Security Council in Resolution (687) 1991 decided that Iraq was obliged to pay reparations through a compensation fund for the resulting injuries. The UN commission decided to grant payments of fixed amount[3], to persons who "as a result of Iraqi" unlawful invasion and occupation of Kuwait . . . suffered serious personal injury" [4], including torture. It remain to be seen whether this will serve as a model for future cases of grave breaches of international humanitarian law.

4.3.2 EXTRADITION

Articles 49 of the first Geneva Convention, Article 50 of the second Geneva Convention, Articles 129 and Article 146 of the third and fourth Geneva Conventions allows for extradition. Article 49 of the first Geneva Convention states.

". . . It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such person, over for trial to another High contracting party concerned, provided such High contracting party has made out a prima facie case".[5]

To this end the extradition case[6] in England involving Chile's one time strong man General Pinochet, though not strictly conducted within the precint of the Geneva conventions or the Additional protocol but the fundamental principles

enunciated therein is that immunity is not absolute. That crimes against humanity such as torture transcends any definition of official function. That there could be no immunity for such acts; thus enshrined the universality of criminal jurisdiction for crimes against humanity. It is acknowledged that the pursuit and prosecutions of dictators, former or present, and all those who perpetrate serious crimes against humanity has never and will never be easy. One stumbling block is that process in that such perpetrators always hide under the cloak of state or sovereign immunity. But this sovereignty should be weighed against the obligations of states under international or multilateral treaties.

Facts: Senator Pinochet was the leader of the military regime that overthrew the regime of President Allende in Chile in 1973 in a bloody coup. He was Chile's head of state from then until his resignation in 1990, and was subsequently, appointed a senator for life. In October 1998, Spanish magistrates issued two international warrants for his arrest for various crimes committed while he was Chile's head of state. At that time he was visiting the UK for private medical treatment. Acting on those warrants, an English magistrate issued a warrant for his arrest, which was effected on 17 October at a London hospital. A second warrant was issued in England the next day.

The arrest of General Pinochet triggered of a chain of events unprecedented either in English or any other extradition law in modern history.
The former Chilean head of state was thus compelled to remain under house arrest while a series of hearing at the courts tested the limits of the law on state or sovereign immunity.

The result of the legal battles seem to be the historic judgement that immunity was not absolute and that crimes against humanity transcends any definition of official function and, therefore there could be no immunity for such acts.

Senator Pinochet, immediately after his arrest, in UK started proceedings to challenge the arrest. He argued that some of the crimes he was accused of were not 'extradition crimes' under English law and, in any event, he claimed immunity in respect of all the alleged crimes. The High court agreed and quashed both warrants of arrest. However the Crown Prosecution Service (acting on behalf of the Government of Spain) appealed to the House of Lords.

Before the hearing of the appeal, the Spanish Government submitted a formal request for extradition which expanded the list of alleged crimes committed by senator Pinochet. It in effect alleged that he was guilty of embarking on a widespread and systematic reign of terror including committing genocide, murder, torture and hostage taking, in order to obtain power and to maintain it.

The appeal was heard by a panel of five law Lords in November 1998, who also listened to submission from Amnesty international, who had taken an active

interest in the case. The Law Lords allowed the appeal by the Spanish Government by a majority of three to one. However, a month later, in a unique step, that judgment was set aside by the House of Lords itself, on the ground that one of the Law Lords had failed to dislodge that he was a member of Amnesty International. Whilst not accepting that there was actual bias on the part of that law Lord, the House of Lords were aware of the potential for bias which could undermine the integrity of its judgment. Thus the appeal was heard again before a new panel of Law Lords.

The rehearing took place in January 1999 before seven Law Lords. By this time, the Republic of Chile had intervened in the appeal proceedings to argue that Senator Pinochet was entitled to protection under the Immunity granted to the Republic of Chile (he was travelling with a diplomatic passport). The British Home secretary had already taken the decision to extradite him for all the charges except for that of genocide (which was dropped). Senator Pinochet, faced 31 alleged charges of crimes committed between 1972 and 1990 including, conspiracy to torture and torture itself, and conspiracy to torture in furtherance of which murder was committed.
The House of Lords delivered judgment on 24 March 1999, without delving into the ethics or moral of whether or not to extradite him and decided on two distinct points of law, namely:
" Where the 31 alleged charges "extradition crimes" under the extradition Act 1989 for which senator Pinochet could be extradited.
If so, did senator Pinochet enjoy immunity from being prosecuted for those alleged crimes".

The power to arrest and extradite a person from UK derives from the Extradition Act 1989. The Act defines what is an "extradition crime". The most important requirement (as applied in this case) being that the conduct complained of, must constitute a crime under the law both in Spain and U.K. This is known as the *"double criminality rule".*

The bulk of the Charges related to torture. The crime of torture is regulated by the International Convention Against Torture and other Cruel, Inhuman or Degrading treatment or punishment 1984. (the torture convention"). Though the U. K ratified it on 8 December 1988, it was incorporated into UK law by the criminal justice act 1988 which came into force on 29 September 1988 and which created the crime of "torture" which had not existed in the U.K. The House of Lords was therefore satisfied that torture was a crime in both the UK and Spain from that date onwards thereby satisfying the double criminality rule. In relation to other charges that did not constitute criminal offences under English law, the double criminality test could not be satisfied and so they could not be extradition crimes. This left charges of torture, a charge of conspiracy to murder in Spain as being extradition crimes for which Senator Pinochet could be extradited. The House of Lords, then had to consider whether Senator Pinochet was immune from prosecution for those charges. Looking at the history of the

crime of torture, the House of Lords saw that even before the torture convention, torture was an international crime of the highest order. 110 states, including UK, Chile and Spain, had signed the Torture Convention, which has the effect of making torture an extraditable offence and there is no express provision dealing with immunity of heads of states, ambassadors or other officials under the Convention.

The issue was, therefore whether international law grant state immunity in relation to the international crime of torture and if so whether the Republic of Chile, was entitled to claim such immunity even though Chile, Spain and the UK are all parties to the torture convention and therefore bound to respect provisions.

The House of Lords, recognized that the issue was of a wider international importance because, as far as they were aware, a local domestic court had not previously refused to grant immunity to a former head of state on the ground that there can be no immunity against persecution for certain international crimes.

This is a key impact of their Lordships monumental ruling, notes Jonathan Lux[7], and summarized in the observation by Lord Browne Wilkinson"

> **"This (state immunity) is the point around which most of the argument turned, it is of considerable general importance internationally, since, if Senator Pinochet is not entitled to immunity in relation to the act of torture alleged to have occurred after 29 September 1988, it will be the first time so far as counsel have discovered when a local domestic court has refused to afford immunity to a Head of State or a former Head of state on the grounds that there can be no immunity against prosecution for certain international crimes".**

The court then had to consider whether the alleged organization of state torture, an international crime against humanity, is one of which Senator Pinochet Conto claim immunity in accordance with the principle of state or sovereign immunity.

And their Lordships (by a majority of 6:1) went on to make history and ruled "no immunity".

The ruling of the House of Lords have raised some vital issues of great importance to international law and human rights. One such issue is the question of the extent of state or sovereign immunity available to perpetrators of crimes against humanity. The question is, is there now a new concept of international accountability and justice overriding state or sovereign immunity?[8]

An acceptable, almost ancient rule of international law is that courts should recognize the immunity of a foreign sovereign who in every sense personified the state. The continued relevance of the rule may be found in the observation of Lord Esher M. R, in the Old English case of Mighell Vs. Sultan of Jehore[9]**, thus**

" The principle . . . is that as a consequence of the absolute independence and dignity of every sovereign authority and of the international community which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its court any of its territorial jurisdiction over the person of any sovereign, Ambassador or any other state. . . though such sovereign, Ambassador . . be within its territory, and therefore, but for the common agreement subject to its jurisdiction"

General Pinochet was quoted as saying during the hearing of his case, through his counsel, Oliver Nichols Q.C;
"Spain does not have jurisdiction to try me. It acts in violation of the sovereignty of Chile. The events in Chile has nothing to do with Spain. It has long been clear that my extradition is politically motivated and being pursued clearly for political purposes"[10].

The concept of national sovereignty upon which immunity is conferred and claimed by Pinochet queries the claim of Spain to try General Pinochet. The concept finds support in Article 2, Paragraph 4 of t he United National Charter which stipulate that:
"All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state".

It was equally argued that the claims of Spain for the trial of General Pinochet can hardly be justified when viewed against the backdrop of the UN General Assembly Resolution of October 24, 1970 entitled "Declaration on principles of international law concerning Friendly Relations and co-operation among states in accordance with the charter of the UN" stating *inter alia***, that countries have a duty not to intervene in matters within the jurisdiction of any state.**

Indeed the House of Lords considered this basic principle of international law that one sovereign state does not adjudicate on the conduct of another.

The foreign state is therefore entitled to immunity from both criminal and civil liability in that other state. The head of state in power, and an ambassador at post enjoys the same immunity rendering him immune from all actions of prosecutions whether or not they relate to matters done for the benefit of the state. Such immunity is said to be granted "ratione personae"
It was argued that Senator Pinochet, though lost his immunity "ratione personae" **when he ceased to be head of state, he could not be held liable in respect of acts performed as part of his official function when he was head of state.**

Much as there was no precedent before the Pinochet case, the claim of state immunity or sovereignty based on territorial integrity and independence cannot be absolute. The claim must be subject to other developments in international law, especially the concept of international justice and globalization of human rights.

Of course, there are equally binding international obligations relating to human rights and crimes against humanity and deserving enforcement that can be juxtaposed with the covenants and agreement on sovereign immunity.

The United National Universal Declaration of Human Right proclaims in Article 5, that, "No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment" in Article 9, it, provides that "No one shall be subject to arbitrary arrest detention or exile" Coupled with the torture convention.

In the absence of international court to enforce the obligations, what happens when dictators flout the obligations, or other persons who perpetuate crimes against humanity. Is the international community to stand while a criminal government or dictator wrecks destruction on its people in utter violation of international treaty? At what point does the international community or individual nations, have the right or duty to intervene? And how do they intervene? Must an international court be established before an effective intervention and enforcement can take place?"

A guide towards a judicial approach to the above issues appears to have been resolved by the House of Lords ruling in the Pinochet's case introducing a new rule of international accountability which overrides, and places a limitation on the concepts of sovereignty or state immunity.

Lord Brown – Wilkinson in the judgement of 24 March 1999 put it beyond doubt that "torture is an international crimes over which international law and the parties to the torture convention have given universal jurisdiction to all courts wherever the torture occurs"[12].

What the court found persuasive was the fact that the torture convention had provided a world – wide universal jurisdiction for the prosecution of the crime of torture and required all member states to ban and outlaw torture. Therefore to give immunity for something which international law prohibited and criminalised would produce a bizarre result.

This is an acknowledgement that there are crimes against humanity, which the

international community recognized. It transcends the narrow requirements of sovereign jurisdiction. For such crimes, foreign sovereigns like former Heads of states are not entitled to immunity.

In the second ruling the House confirmed her earlier ruling of 25 November 1998, that Immunity was not absolute, that crimes against humanity such as torture transcends any definition of official function, therefore there could not be immunity for such acts.

It is interesting to note that the Spanish court from where the request for extradition of Pinochet originated arrived at the same conclusion as the House of Lords.

The decision of the Spanish court was based on international declarations in which different crimes against mankind are described, such as the Moscow Declaration of 1943 on crimes against mankind; the Nuremberg court statute of 1945; the United Nations convention on Genocide of 9 December 1948; the Resolution of the General Assembly of the United Nations of December 1973 on prosecution of crimes against mankind, et cetera.

None of the crimes referred to in these statutory instruments are subject to limitation and the individual responsible for such crimes cannot have diplomatic immunity. The signatories are countries in the world compelled to prosecute, and cooperate in the prosecution of those crimes[13].

It is therefore submitted that the House of Lords ruling in the Pinochet case are important to students of international law for two reasons, namely; the settled position that the international community categorises certain crimes as crimes against humanity which transcends sovereignty jurisdiction, and the fresh lead the House has given as to how perpetrators of such crimes against humanity might be brought to justice. There has always been a necessity to develop an international position to curtain an erring Head of State vis-à-vis humanitarian law violations.
It is now a settled matter that diplomatic immunity would not work. This is a positive development.

There is now a precedent on the principle of universal jurisdiction that past rulers and dictators may no longer hide under the cloak of state or sovereign immunity to escape prosecution or arrest and extradition to any state that may wish to prosecute them for certain crimes.

Hopefully domestic courts in other jurisdictions might find persuasive, the House of Lords decision that the concept of international accountability for crimes against humanity has been entrenched as an accepted rule of international law.

INTERNATIONAL ACCOUNTABILITY VERSUS SOVEREIGN IMMUNITY: THE POSITION OF SITTING HEAD OF STATE

The principle of absolute independence and dignity of every sovereign authority and the international community induces every sovereign state to respect the independence and dignity of other sovereign states. Each and ever y one declines to exercise by means of courts within its territorial jurisdiction over the person of any sovereign, ambassador of any other state, though such sovereign, ambassador be within its territory and therefore, but for the common agreement subject to its jurisdiction was long decided in the English case of Mighell V. Sultan of Jehore[13a]

This principle has been shattered in the celebrated case of ***R.V Bow Street Metropolitan stipendiary magistrate and Ex Parte Pinochet Ugarte***[13b] by the landmark decision of the English House of Lords that the international community recognizes certain crimes as crimes against humanity which transcends sovereignty jurisdiction and laid down a precedent on the principle of universal jurisdiction that past rulers and dictators may no longer hide under the cloak of state or sovereign immunity to escape prosecution or arrest and extradition to any state that may wish to prosecute them for certain crimes.

The decision of the court did not deliberate on the fine line between a sitting head of state and a former head of state, but laid down a fundamental principle that immunity is not absolute, and crimes against humanity such as torture, transcends any definition of official function, that there could be no immunity for such acts, thus

enshrined the universality of criminal jurisdiction for crimes against humanity

The political question that may arise if the international community request that a sitting head of state of a sovereign state be extradited to a state or forum that wants to prosecute such head of state for violations of international humanitarian law or war crimes or crimes against humanity has been resolved by the provision of Article 27 of the Statute of International Criminal Court, which provides:

> **1**. "*This statute shall apply equally to all persons without any distinction based on official capacity. In particular official capacity as a Head of State or government, or Member of Parliament or government, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this statute, nor shall it, in and of itself constitute a ground for reduction of sentence"*
>
> **2.***'Immunity or special procedural rules which may attach to the official capacity of a person whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person"*

It is therefore submitted that the position of a sitting head of state or government or a former head of state or government or any other person with respect to criminal responsibility for war crimes, crimes against humanity, genocide or the crime of aggression as defined by Article 5 of the Rome Statute is not different. That is to say there are no immunities or special procedural rules which may attach to the official capacity of a person who commits an

international crime, once that state becomes a party to the statute or accepts the jurisdiction of the court by declaration under article 12(3) of the statute.

Municipal constitutions may provide for restrictions on legal proceedings against a person holding the office of president or vice President, Governor or Deputy Governor as provided in section 308 of the constitution of the Federal Republic of Nigeria 1999.This provision is in conflict with article 27 of the statute of international criminal court and necessitates a constitutional amendment providing an exception to this absolute immunity of head state or other officials, should they commit any of the crimes listed in the statute.

In the light of the provisions of Article 27 of the Statute, the only option open to a state, unwilling to surrender its sitting head of state, who is indicted by the international court, is to invoke the principle of complementarily which is enshrined in the preamble to the statute thus:

"…Emphasizing that the International Criminal Court established under this statute shall be complementary to National criminal jurisdiction…."

This means a State party can prosecute its Head of State or any state official for commission of crimes within the jurisdiction of ICC in its own court, and the ICC can only assume jurisdiction when the state refuses or is unwilling to prosecute such person. Whether the

State surrenders the sitting Head of State or Government or prosecute him in it's courts, it is well settled that immunity should no longer be absolute and should not prevent the ICC from prosecuting the perpetrators of international crime listed under the statute[13c]

4.3.3 PROSECUTION/TRIALS BY INTERNATIONAL CRIMINAL TRIBUNALS

The two ad hoc international criminal tribunals for the former Yugoslavia and Rwanda were put in place to end the serious violation of international humanitarian law and contribute towards the restoration and maintenance of peace in both places.

The tribunals are mandated to prosecute those responsible for the crimes of genocide, crimes against humanity, war crimes and violation of the law and customs of war under Article 3 of the ICTY and recognized by Article 3 of the Geneva Convention. It is against this background that we propose to examine the success or otherwise of the tribunal in prosecuting and sentencing accused persons.

In the Prosecutor Vs: Tihomir Blaskic[14]**. General Tihomir Blaskic was initially indicted along with five other accused persons in a single indictment. The** *Prosecutor V. Dario Kordic et al*[15]**. The indictment charged the accused alone with 13 counts. An order of judge McDonald dated 22 November 1996 authorised a new indictment to be filed, in the** *prosecutor vs. Tihomir Blaskic*[16] **which incorporated seven new counts.**

Further to the amendments, the Defence filed four preliminary motions all relating to the amended indictment. The first requested the portion of the indictment alleging "failure to punish" liability be struck out, on the ground that it did not constitute an offence falling under the jurisdiction of the Tribunal. The trial chamber rejected the request of the Defence Since it seemed, in most cases, such failure also constitute failure to prevent other crimes from being committed.

The Defence submitted a second preliminary motion so as to receive a more detailed explanation of the criteria for the intent required for the charges alleging command responsibility. The trial chamber did not grant the motion on the ground that it related to the subject matter of the prosecution and was premature at that stage of the proceedings.

In a third preliminary motion, the Defence also requested the trial chamber to reject those counts under Article 2 of the Tribunal's Statute based on a failure to prove adequately the existence of an international armed conflict. The motion

was rejected because the trial chamber considered that the prosecutors did not have to present proof at this stage, of the proceedings that such a conflict did not occur and that the formal validity of the indictment was in no manner undermined thereby.

This judgment responds to the indictment, the *prosecutor vs. Tihomir Blaskic* **as amended for the second time on 25 April 1997. Further to the Decision of the trial chamber on the fourth and last preliminary motion tendered by the Defence for the dismissal of the indictment based upon defects in the form thereof, the trial chamber had granted the Defence motion in part and ordered the prosecutor to add details relating to the times and places of the facts characterized, the role of the accused and the type of responsibility alleged, pursuant to the criteria set down by Articles 18 (A) of the statute and sub-rule 47 (B) of the Rules of Procedure and Evidence (hereinafter "the Rules"). Following a fresh Defence motion, the trial chamber deemed that some of the amendments to the indictment did not comply with its previous Decision. The prosecutor ultimately withdraws count 2 of the indictments.**

The indictment of 25 April 1997 (herein after "the indictment") contains twenty counts including six grave breaches of the Geneva Conventions, eleven violations of the laws and customs of war, and three crimes against humanity under Articles 2, 3 and 5 of the tribunal statue respectively. The crimes alleged in the indictment were purportedly committed in the context of "serious violations of international humanitarian law against Bosnian Muslims"; by member of the armed forces of the Croatian Defence Council (hereinafter "the HVO) between May 1992 and January 1994; in the municipalities of:

> **Vitez, Busovaca, Kiseljak, vares, zepce, zenica, Duvno, Stolac, Mostar, Jablanica, Prozor, Capljina Vakuf, Novi Travnik, Travnik, Kresevo and Fojnica, all in the territory of the republic of Bosnia and Herzegorina.**

However, it emerged from the specific counts that the particular municipalities mentioned as the setting for the crimes with which the accused in charged are vitez, Busovaca, Kiseljak, and Zenica.

The indictment stated that, throughout the period under consideration, a state of international armed conflict and partial occupation existed in the territory of the Republic of Bosnia and Hevzgovina. Tihomir Blaskic was appointed commander of the HVO armed forces headquarters in central Bosnia on 27 June 1992 and occupied the position throughout. In this position and pursuant to Article 7(1) of the statute, he was accused of having in concerts with members of HVO, planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of each of the crimes alleged. In addition or in the alternative, Tihomir Blaskic was accused of having known or having had reason to know that his subordinates were preparing to commit those crimes or that they had done so and that he had not taken the necessary and reasonable

measures to prevent the said crimes from being committed or to punish the perpetrators.

The crimes charged: The indictment brought by the prosecutor groups the facts imputed to General Blaskic into six distinct categories:
(a) Persecution: under count 1, Tihimor Blaskic is accused of

> **Crime against humanity for prosecution of the Muslim Civilian Population of Bosinia through out the municipalities of Vitex, Busovac, Kiseljak and Zenica on political, racial or religious grounds from May 1992 to January 1994. The persecution was allegedly implemented through a wide spread, large-scale and systematic attack, upon towns, villages and hamlets inhabited by Bosnian Muslims. During and after the attack, Bosnian Muslim Civilians were allegedly murdered and subjected to serious bodily harm whilst dwellings, buildings private properties, live-stocks and businesses belonging to Bosnian Muslims as well as their institutions dedicated to religion or education were all allegedly plundered and wilfully destroyed. Furthermore, the prosecutor alleged that hundreds of Bosnian Muslim civilian were systematically arrested, interned, treated inhumanely, intimidated and coerced to leave their home or forcibly transferred by the HVO to zones outside the municipalities of Vitez, Busovaca, and Kiseljak. The forcible transfer of civilians was allegedly described by HVO representatives as a voluntary or humanitarian transfer of civilians. . .” The persecutions allegedly resulted in a considerable reduction of the Bosnian Muslim Civilian population within the three municipalities.**

4.3 Unlawful attacks upon civilian and civilian objects: Under counts 2 to 4, Tihornir Blaskic was accused of three violations of the laws or customs of war for the unlawful attacks upon civilian and civilian object and for the destruction, not justified by military necessity, which were allegedly perpetrated in the towns and villages of Ahmici Nadioci, Pirici, Santici, Ochenici, Vitex Stari, Rotelji and Zenica.

4.4 Wilful killings and serious bodily injury: Under counts 5 to 10, Tihomir Blaskic was prosecuted for wilful killing and serious physical and mental injury to civilian, allegedly committed from January 1993 to January 1994 in the municipalities of vitez, Busovaca, Kiseljak, and Zenica. The crimes thus alleged were prosecuted as two serious breaches of the Geneva Conventions,

two violations of the laws or customs of wars and two crimes against humanity.

4.5 Destruction and plunder of property: Under counts 11 to 13, Tihomir Blaskic was accused of a serious breach of the Geneva conventions and two violations of the laws or customs of war for the large-scale plunder and destruction of Bosnian Muslim dwellings, businesses, private properties and live-stocks between January 1993 and September 1993, and more specifically in Ahmici, Nodioci, Pirici, Santici, Oohnici, Vitex, Stari Vitez, and Donja Veceriska, Gacice, Loncari, Behrici, Svinjarevo, Gomionica, Gromiljak, Pole Visnjica and Rotilji, in April 1993, in Tulica and Ham Ploca' Grahovci in June 1993, again in stari Vitez in August 1993 and in Grbavica in September 1993.

4.6 Destruction of institutions dedicated to religion or education: under count 14, Tihomir Blaskic was accused of a violation of the laws or customs of war for the destruction or wilful damage done to Bosnia Muslim institutions dedicated to religion or education between August 1992 and June 1993 – in Duhri in August 1992 Busovaca, stari Vitez and Svinjaravo in 1993, Ahmici, Kiseljak and Kazagici in April 1993, Hercezi, Han Ploca and Tulica in June 1993 and in Grbavica in September 1993.

4.7 Inhuman treatment, taking of hostages and use of human shields: Under counts 15 to 20 concerning the cruel and inhumane treatment inflicted from January 1993 to January 1994 on Bosnian Muslims detained at facilities controlled by the HVO, the taking of Bosnian Muslim civilian as hostages between January 1993 and January 1994 to obtain prisoner exchanges and the Cessation of Bosnian military operation against the HVO and, lastly, the use of Bosnian Muslim civilians as hostages between January 1993 and April 1993 as human shield, to protect the HVO position. In this respect, the persecutor charged the accused with three grave breaches of the Geneva Conventions and three violations of the laws or customs of war.

Following Judge Mc Donald's Confirmation of the initial indictment on 10 November, 1995, the warrants of arrest ordering the transfer of the accused were sent to the authorities of the Federation of Bosnia – Herzegovina and to the authorities of Croatia. Copies of the indictment and warrants of arrest were subsequently sent to IFOR upon an order of judge Jorda. Lastly, Judge Vohrah issued a warrant of arrest ordering the transfer of Tihomir Blaskic to the Kingdom of the Netherlands on 27 March 1996.

Tihomir Blaskic voluntarily gave up himself up to the International tribunal on 3 April 1996 before Trial Chamber I composed of Judge Jorda, Presiding, Judge Deschenes and Judge Riad. The accused pleaded "not guilty" to all the counts brought against him in the initial indictment on 4 December 1996, Tihomir Blaskic pleaded not guilty" to the new counts confirmed against him following the first amendment of the indictment on 22 November 1996. The second amendment of the indictment on 25 April 1997 did not bring any new counts against the accused, who for that reason, did not have to enter a new plea.

The proceedings against Tihomir Blaskic before the tribunal were complex and at each stage gave rise to many questions, often without precedent. Accordingly, during the fourteen month pre- trial phase, the tribunal rendered eighty-two interlocutory decisions. The trial proper commenced on 24 June 1997 and lasted a little over two years, closing on 30 July 1999. During this stage of the proceedings seventy- eight interlocutory decisions were rendered, 158 witness heard, and more than one thousand three hundred exhibits filed. The French version of the transcript runs to more than 18, 300 pages.

On the same day as Tihomir Blaskic's surrender to the tribunal, Defence counsel submitted to the president of the tribunal pursuant to Rule 64 of the Rules a motion for modification to the conditions of detention of the accused. The president authorised that the accused be detained under strict conditions outside the United Nations Detention unit facilities "within the confines of a residence designated by the Netherlands authorities". The detention conditions were later modified in particular as regards family visits and movement of the accused outside.
Nonetheless, following serious threat to the security of General Blaskic, these detention conditions were abandoned in a decision of the tribunal and the accused was transferred to the United Nations Detention Unit.

Defence counsel to Tihomir Blaskic twice presented a motion for provisional release pursuant to Rule 65 of the rules. The first gave rise to a Decision dated 25 April 1996 and the second to a Decision dated 20 December 1996. In both instances the trial chamber rejected the motion upon reviewing all the elements to be taken into consideration.

At the close of Defence, the trial chamber concluded that the acts ascribed to Tihomir Blaskic occurred as part of an international armed conflict because the Republic of Croatia exercised total control over the Croatian community of Herceg – Bosna had the HVO and exercised general control over the Croatian political and military authorities in central Bosnia.

The accused was appointed by the Croatian Military authorities. Following his arrival in Keseljak in April 1992, he was designated Chief of the Central Bosnia Operative zone on 27 June 1992 and remained there until the end of the period covered by the indictment,

From the outset, he shared the policy of the local Croatian authorities. For example he outlawed the Muslim Territorial Defence Forces in the municipality of Kiseljak.

From May 1992 to January, 1993, tensions between Croats and Muslims continued to rise. At the same time, General Blaskic reinforced the structure of the HVO armed forces with the agreement of the Croatian Political authorities.

In January 1993, the Croatian Political authorities sent an ultimatum to the Muslims, inter alia, so as to force them to surrender their weapons. They sought to gain control of all the territories considered historically Croatian, in particular the Lasva Valley. Serious incidents then broke out in Bosovaca and Muslim houses were destroyed. After being detained, many Muslim civilians were forced to leave the territory of the municipality.

Despite the efforts of international organisation especially the European Commission Monitoring Mission and United Nations protection Force, the atmosphere between the communities remained extremely tense.

On 15 April 1993, the Croatian military authorities, including the accused issued a fresh ultimatum General Blaskic met with the HVO, military police and Vitezovc commanders and gave them orders. On 16 April 1993, the Croatain forces, commanded by general Blaskic, attacked the municipalities of Vitez and Busovaca.

The Croatian forces, both the HVO and Independent units, plundered and burned to the ground houses and stables, killed civilians regardless of age of gender, slaughtered the live-stock and destroyed or damaged mosques. Furthermore, they arrested some civilians and transferred them to detention camps or centres where living conditions were appalling and forced them to dig trenches, sometimes also using them as hostages or human shields. The accused himself stated that twenty or so villages were attacked according to a pattern, which never changed. The village was firstly "sealed off", artillery fire opened the attack and assault and search forces organised into groups of five or ten soldiers then, "cleansed" the village. The same scenario was repeated in the municipality of Kiseljak several

days later. The Croatian forces acted in perfect co-ordination. The scale and uniformity of the crimes committed against the Muslim population over such a short period of time enabled the conclusion that the operation was, beyond all reasonable doubt, planned and that its objective was to get the Muslim population destroyed.
The attacks were, thus, widespread, systematic and violent and formed part of a policy to persecute the Muslim populations.

To achieve the political objectives to which he subscribed, General Blaskic used all the Military forces he could rally whatever the legal nexus that made them subordinate to him.
He issued the orders sometimes, employing national discourse and with no concern for possible consequences. In addition, being aware of the crimes the forces had committed, he redeployed them for other attacks.

At no time did he take the necessary measure, which any commander is expected to take when he becomes aware that crimes are about to be or have actually been committed. The result of such attitude was not the scale of the crime only, which the Trial Chamber explained, but also the awareness of the Croatian nationalists goal, the forced departure of the majority of the Muslim population in the Lasva valley after the death and wounding of its members, the destruction of its dwellings, the plunder of its property and the cruel and inhuman treatment meted out to many.

Neither the Statute nor the Rules laid down expressly the sentences applicable to the crimes under the jurisdiction of the tribunal. Article 24(2) of the statute drew no distinction between crimes in determination of sentence.

The trial chamber passes only prison sentence, the maximum being life imprisonment pursuant to sub-rule 101 (A) of the Rules.
In conclusion, the trial chamber held that in this case, the aggravating circumstance unarguably outweigh the mitigating circumstance and that the sentence pronounced accurately reflects the degree of seriousness of the crimes perpetrated and the faults of the accused, given his character, the violence done to the victims, the circumstance at the time and the need to provide the punishment commensurate with the serious violations of international humanitarian law which the Tribunal was set up to punish according to the level of responsibility of the accused.

For the foregoing reasons, the trial chamber, in a unanimous ruling of its members, finds Tihomir Blaskic guilty of having ordered a crime against humanity, namely persecutions against the Muslim civilians of Bosnia between I may 1992 and 31 January 1994 for the following acts; attacks on towns and villages; murder and serious bodily injury; the destruction and plunder of property and in particular, of institutions dedicated to religion or education; inhuman or cruel treatment of civilians and in particular, their being taking

hostages and used as human shields; and the forcible transfer of civilians. In fact General Tihomir Blaskic was found guilty of 18 out of the 20 counts charges, not guilty of counts 3 and 4 in relation to the shelling of the town of Zenica; and therefore sentences, Tihomir Blaskic, to forty–five years in prison.

Again in *Prosecutor vs. Tadic*[17]
The trial chamber examined the responsibility of the accused with respect to allegations of crimes against humanity. In this case, 10 out of the 34 counts of the indictment related to such crimes which consisted of acts of rape,[18] murder, persecution and other inhumane acts. The chamber found the accused guilty on all counts alleging acts of persecution and other inhuman acts but did not agree that those relating to murder had been proved beyond reasonable doubt.

The Chamber considered that for the accused to be found guilty of crimes against humanity there had to be "some form of a governmental, organizational or group policy" and that "the perpetrator must know of the context within which his actions are taken"[19].
In other words, the act of the charge had to be deliberately directed against a civilian population. The existence of such a policy could nevertheless be presumed by reason of the systematic nature of the violations in question. With regard to the defendant's criminal intent the Chamber reasoned that "the mental element required to be proved to constitute a crime against humanity is that the accused was aware of or wilfully blind to facts or circumstances which would bring his or her acts within the definition of a crime against humanity. Hence the mere evidence of a policy directed against a civilian population will not suffice. It must be shown that the accused himself is aware that his act was consistent with the policy. The Chamber summarized in the preliminary sections of the judgement the historical, geographical, administrative and military context in which the acts of the defendant was accused, was committed. It specified that it had referred solely to the evidence submitted by the parties to that end. It described in detail the pursuit of a policy of Greater Serbia and the consequence, which that policy held for non-Serbs, particularity in terms of ethnic cleansing. It subsequently declared itself satisfied with the evidence presented to show that such a policy was prevalent in the region and at the time when the crimes were committed. It ensured that there was a link between that policy and the accused and that the latter was aware of the policy and even supported it. It regarded as probative the fact that the accused defended the cause of Greater Serbia, had been involved in the nationalist policy and had become a political leader in Kozarac after ethnic cleansing had been completed in that town. The chamber concluded that the accused had been aware of the broader context in which the crimes with which he was charged had been perpetrated. Dusko Tadic was therefore sentenced to a term of imprisonment. The Appeal chamber found that a prison sentence above twenty years would be excessive given the relatively low rank of Dasko Tadic within the command structure.

The International Criminal Tribunal for Rwanda has been alive to its mandate to

help restore and maintain peace and bring about national reconciliation by trying persons responsible for acts of genocide and other grave breaches of international humanitarian law committed in Rwanda and Rwandan citizens suspected of committing such acts and violations in the territory of neighbouring states between 1 January and 31 December 1994[20]. This tribunal has to its credit the first conviction on genocide by an international court; and equally the first time an international court found the crimes of rape to be an act of genocide; thus in the case of *Prosecutor vs. Jean Paul Akayesu*[21], the conviction by the Rwandan tribunal of a former Mayor, Jean Paul Akeyesu, on 2 September 1998, of nine counts of genocide, crimes against humanity and war crimes, is one that could allay any fears regarding the ability of the tribunal to deliver. This was the first judgement to be handed down by the Tribunal, the first conviction on genocide[22] by an international court, and the first time an international court found the crimes of rape to be an act of genocide.

From the foregoing analysis of the penal sanctions for breaches of international humanitarian law, the most effective unarguably is the prosecution and trial of the accused persons and the attendant conviction in appropriate cases to stem the tide of the culture of impunity with which perpetrators evade justice and put in place an international criminal justice machinery to prosecute violations of international humanitarian law. To this end the work of the two ad hoc international tribunals for the formers Yugoslavia and Rwanda, is a welcome development; which has convinced the international community on the need to establish a Permanent international criminal court, which is now a reality with the signing of the Rome Statute of the International Criminal Courts on 17 July 1998, and its coming into force on 1st July 2002.

CHAPTER FOUR, NOTES AND REFERENCE

1. **Ladam, M.T. "Introduction to International Human Rights and Humanitarian laws" published by Ahmadu Bello University Press, Zaria (1999) P. 347,**
2. **Articles 49, 50, 129 and 146 common to the Geneva conventions.**
3. **According to Decision 1 of the governing council of the compensation commission paras 11- 13 (30 ILM. 1713) 1991) the amounts were set at between 2,500 and 10,000 US $. These amounts were later raised to 30,000 US $ per claimant and 60, 000 US $ per family unit (Governing Council Decision 8 para 3 and 4, 31 ILM 1036 (1992)**
4. **UN compensation commission, Governing Council Decision 1, Para 10, 30 ILM 1713 (1991).**

5. **UN Compensation commission, Governing Council Decision 3, defining the terms "personal injuring and mental pain and anguish" as consequence inter alia arising from torture.**
6. *R. V. Bow Street Metropolitan Stipendiary Magistrate & ors. Ex. Parte Pinochet Ugarte* **(No. 3) (1999) 2 W. L .R. 827 facts culled from international litigation news, July, 1999 PP. 37-38.**
7. **HRI News, vol. 4, No 1, May 1999 at P. 3**
8. **See Erugo, Sam, "The Pinochet case towards International law of accountability for crimes against Humanity" Published in modern practice Journal of Finance and Investment law, Vol, 4 No. 3 (2000) P. 198**
9. **L. R (1894) 1. Q.B.D 149**
10. **See Fennel, Edward; The Guardian, Tuesday, October 25 1999, P. 76.**
11. **Erugo Sam; Op cit P. 202**
12. **See Rapheal, Monty; and Delahunty, Louise, HRI News, op. Cit P.**
13. **See Angell, Jorge; International Litigation News, op. Cit. P. 46**

13a. See footnote 9 (supra).

13b. See footnote 6 (supra).

13c See M. T. Ladan, Issues in domestic implementation of the Rome Statue of the International Criminal Court in Nigeria" being a paper presented at a roundtable session with Parliamentarians/Implementation Strategy workshop, organized by Nigeria coalition on ICC in collaboration with Human Rights watch, Canadian Department of Foreign Affairs and International Trade (DFAIT) and Coalition for International Criminal Court (CICC) on 14 November, 2002 at National Assembly Complex Abuja, Nigeria.

14. **Decision of ICTY, trial chamber 1 of: 3 March 2000.**
15. **Confirmed on 10 November 1995**
16. **See note (14) supra**
17. **Prosecutor V. Tadic, opinion and judgment case No IT-94-1-T, PP. 17687 – 17338 (7 May 1997)**

18. This count was dropped

19. Prosecutor V. Tadic op cit (note 17) P. 17439.

20. See Preamble to the statute of International tribunal for Rwanda, attached to security council Resolution 955, 8 November 1994. Doc S/Res/955 (1994)

21. **Rwanda tribunal case No. ICTR –96-4-T**

"African tribunal convicts Rwandan Genocide suspect" BBC online Network 2 September 1998.

CHAPTER FIVE

5.0 CRIMINAL JURISDICTION AND JUDICIAL MECHANISM OF ENFORCEMENT OF GRAVE BREACHES.

This segment of the research addresses the fundamental issue of what courts have jurisdiction to prosecute the breaches of international humanitarian law, the competence of the courts and the procedural mechanism put in place by the instrumentality of the Conventions and the Additional Protocol and those evolved by the international criminal jurisprudence of the two ad hoc Tribunals of former Yugoslavia and Rwanda taking into consideration the fact that they are in the Vanguard of international repression of serious violations of humanitarian law. Their activities serve as a basis for the work of the Permanent International Court. The credibility of such international tribunal will nevertheless depend on the decisions made to determine the guilt or innocence of accused persons, while ensuring that all the judicial guarantees designed to secure respect for the individual are provided. Despite all the indignation aroused by the crimes the international criminal tribunals are called upon to prosecute, the accused must be accorded the right to a fair hearing or trial.

Effective repression of serious violations of international humanitarian law and respect for human rights are complementary and indispensable of one another, since they both contribute to upholding the rule of law.
To this end, the courts with jurisdiction coupled with their competence will be examined within the context of the provisions of the Conventions and the Additional Protocol. The procedural guarantees to ensure fair trail by both national and international courts and finally preliminary reflections on the procedural rules of the statute of the international criminal court adopted in Rome on 17th July 1998 conclude the chapter.

5.1 COURTS WITH JURISDICTION

The provisions of the Geneva Conventions and the Additional protocol dealing with grave breaches of international humanitarian law assign the jurisdiction to persecute such persons to the High Contracting Parties. That is to say the Convention and the Additional Protocol did not establish any court to prosecute those responsible for the violations of its provision but the national courts of the state parties shall assume jurisdiction or rather the High Contracting Parties should bring such persons regardless of their nationality, before, its own courts". The High contracting party "may also, if it prefers, and in accordance with the provision of its own legislations hand such persons over for trails to another High Contracting Party concerned, provided such High contracting party has made out *prima facie case"*.[1] **This is further clarified by the provisions of the Statute which expressly provide that the national courts that would exercise jurisdiction shall be military courts, civil courts can only assume jurisdiction if the existing law of the detaining power has the power to try members of its**

armed forces.

Thus article 84 of the third Geneva Convention of 1949 provides

> **"A prisoner of war shall only be tried by a military court, unless the existing law of the detaining power expressly permit the Civil courts to try a member of the armed forces of the Detaining power in respect of the particular offence alleged to have been committed by the prisoner of war".**

Any court trying a prisoner of war must offer the prisoner of war the essential guarantees of independence and impartiality as generally enshrined in Article 105 of this convention.

And, "no sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court[2]"

Thus the jurisdiction for the prosecution of those who violate the provisions of international humanitarian law is imposed on the state parties who are to use their national legal machinery to effect the prosecution, but they must comply with the procedural guarantees of fair trail enshrined in the statute

5.2 PROCEDURAL GUARANTEES UNDER INTERNATIONAL LAW

The last paragraphs of Articles 49, 50, 129, 146 of the first, second, third, forth Geneva Conventions provides for procedural guarantees of fair trail and defence of accused persons, thus:

> **"In all circumstances, the accused person shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the treatment of prisoners of war of August 12, 1949".**

Article 105 of the third Geneva Convention deals with Rights and means of defence of the accused person; thus.

> **`"The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling, of witnesses and if he deems necessary, to the services of a competent interpreter. He shall be advised of these rights by the Detaining Power in due time before the trial . . ."**

Again Article 106 provides for the right of every prisoner of war to appeal or petition from any sentence pronounced upon him, with a view to quashing or revising of the sentence or to re-open the trial.
While Article 107 provides for the right of a prisoner of war to be notified of findings and sentence and to be reported to the protecting power and communicated to the prisoners representative concerned. Article 108 provides that sentences pronounced on prisoners of war after a conviction has become duly enforceable, shall be served in the same manner or conditions as in the case of the armed forces of the Detaining power, which must conform to the requirements of health and humanity.

The provision dealing with procedure in the Conventions is further enhanced by the provisions of protocol 1, Additional to the Geneva Conventions. It provides that[3].

3. Any person arrested detained or interned for actions related to the armed conflict shall be informed promptly in a language he understands, of the reasons why these measures have been taken against him. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence many be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflicts except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedures, which include the following:

(a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence

(b) No one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) No person shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a

criminal offence under the national or international law to which he was subject at the time when it was committed, nor shall heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed, if after the commission of the offence, provision is made by law for the imposition of a lighter penalty, offender shall benefit thereby:

(d) **Anyone charged with an offence is presumed innocent until proved guilty according to law;**

(e) **Anyone charged with an offence shall have the right to be tried in his presence.**

(f) **No one shall be compelled to testify against himself or to confess guilt;**

(g) **Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;**

(h) **No one shall be prosecuted or punished by the same party for an offence in respect of which a final judgment acquitting or convicting that person has been previously pronounced under the same law and judicial procedure,**

(i) **Anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly, and**

(j) **A convicted person shall be advised on conviction of his judicial and other remedies and of the time limits within which they may be exercised.**

(5) **Women who are arrested, detained or interned for reasons related to the armed conflict shall be held in quarters separated from men's quarters.**

They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they

shall, where ever possible, be held in the same place and accommodated as family units.

(6) Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by the Article under final release, repatriation, or re-establishment, even after the end of the armed conflict.

(7) In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

(a) Persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

(b) Any such persons who do not benefit from more favourable treatment under the conventions or this protocol shall be accorded the treatment provided by the Articles, whether, or not the crimes of which they are accused constitute grave breaches of the conventions or this protocol.

(8) No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1".

Paragraph I is germane to the treatment of persons who though in the power of a party to the conflict do not benefit from more favourable treatment.
Equally relevant are the provisions of Article 88 of protocol 1, Additional to the Geneva Conventions, which deals with the issue of mutual assistance in criminal matters between the High Contracting Parties, it provides:

1. "The High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceeding brought in respect of grave breaches of the conventions or this protocol.

2. Subject to the rights and obligations established in the conventions and in Article 85, paragraph 1, of this protocol, and when circumstances permits, the High Contracting parties shall co-operate

on the matter of extradition. They shall give due consideration to the request of the state in whose territory the alleged offence has occurred.

3. **The Law of the High contracting party requested shall apply in all cases the provisions of the preceding paragraphs shall not, however, affect the obligation of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters".**

The international community did not establish any procedural mechanism to enforce penal responsibility for commission of grave breaches of international humanitarians law prior to 1993 when the International Criminal Tribunal for the former Yugoslavia[8] was established by the Security Council of the United Nations in response to the shock of the tragic events that followed the disintegration of the former Yugoslavia. The international Community, finally became aware of the atrocities committed and alerted by the courageous reports of *Tadeusz Mazowiecki***. A second tribunal was subsequently set up to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and of Rwandan citizens responsible for such acts committed in the territory of neighbouring states; by the Security Council in 1994. It is therefore, evident that the applicable procedure for the prosecution of persons accused of breaches of international humanitarian law were those evolved by the courts of the states parties which deals with these breaches prior to 1993.**

The totality of the provision of Article 75 of Additional Protocol 1 of 1977 provides for fair hearing in criminal matters.

Paragraph 4, guarantees the accused right to be informed without delay the particulars of the offence alleged against him. Conviction shall be on the basis of individual penal responsibility; the rules against retroactive matter is equally enshrined. The presumption of innocence is accorded the accused until he is proved guilty. This is a fundamental principles of the accusatorial system of criminal justice. It equally rules out the possibility of trial in absentia as it expressly provide that the accused has the right to be tried in his own presence or to be present at his own trial.

Immunity from self incrimination is provided in paragraph (4f) i.e. accused shall not be compelled to testify against himself or to confess guilt. The object of this immunity is to prevent a person from being coerced to admit the commission of the offence and reinforced the principle of criminal law that a person shall be presumed innocent in a trial until proved guilty.

He shall be accorded the right to examine, or have examined the witnesses against him and to obtain the attendance and examination of witness on his behalf under the same conditions as witnesses against him.

The rule prohibiting double jeopardy should be observed i.e. once a person has been prosecuted or punished by the one party for an offence in respect of which a final judgment acquitting or convicting was given, the person cannot be charged under the same law and judicial procedure. This guards against putting the life and limbs of person to test twice.

And finally the proceedings should be conducted in public and the sentence pronounced in public

These are all statutory checks and balances to ensure that an accused person is accorded a fair trial. That effective repression of serious violations of international humanitarian law and respect for human rights are complementary and indispensable to one another since they both contribute upholding the rule of law

5.3 JURISDICTION OF INTERNATIONAL CRIMINAL TRIBUNALS FOR FORMER YUGOSLAVIA AND RWANDA

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were established on 11th February 1993 and 8 November 1994 respectively by the Security Council to prosecute persons responsible for flagrant violations of international humanitarian law.

The aim of the Security Council was to put an end to such violations and to contribute to the restoration and maintenance of peace.

The ICTY has jurisdiction over the following crimes; grave breaches of the Geneva Conventions of 1949; violations of the laws or customs of war; genocide, and crimes against humanity.

The ICTR on the other hand, has the mandate 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. On 22 February 1995, the Security Council passed resolution 977 designating the town of Arusha in the United Republic of Tanzania as the seat of the tribunal. An agreement between

the United Nations and Tanzania concerning the Tribunals headquarters was signed on 31st August 1995.

The tribunal has a relatively wide jurisdiction to prosecute persons responsible for genocide and other serious violations of humanitarian law.

The statute of the tribunal more or less follows the Genocide convention of 1948 in defining genocide as any act committed with an intent to destroy, in whole or in part; a national ethnic racial or religious group. Such acts include: 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 to prevent births within the group and forcibly transferring children of the group to another group. The statute provides that, genocide itself, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide are all punishable[9].

In addition persons charged with crimes against humanity, which include: murder; extermination; enslavement, deportation; imprisonment; torture; rape; persecutions on political, racial or religious grounds and other inhumane acts[6]. Since such crimes could be committed in various circumstance, the statute specifies that they only falls within the purview of the tribunal when committed as part of a widespread or systematic attack against my civilian population on national, political ethnic, racial or religious grounds.

Articles 4 of the statute empowers the tribunal to prosecute persons committing or ordering to be committed serious violations of Articles 3 common to the 1949 Geneva Conventions for the protection of war victims and of 1977. Additional protocol 11 relating to the protection of victims of non-international armed conflicts. Such violations include violence to life, health and physical or mental well – being of persons in particular murder and cruel treatment such as torture, mutilation or any form of corporal punishment, collective punishments, the taking of hostages, acts of terrorism, outrages upon personal dignity in particular degrading and humiliating treatment, rape, enforced prostitution, and any form of indecent assault, pillage; the passing of sentence and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; and threat to commit any of the foregoing acts.

Whether the tribunal have succeeded or will succeed in fulfilling their mandate is for posterity to judge but it can be said with certainty that the judicial activities of the tribunals which consists of over 20 public indictment,

confirmations, five Rule 61 proceedings, completed trials and sentencing procedures (Tadic, Erdemovic, Celebici, Blaskic Dokmanonic, Koracevic and Aleksovski) has generated much comment on its indictments, decision and judgments, and kindled an enormous interest in international humanitarian law and international criminal law. The Rwandan tribunal on the other hand has issued several indictments and arrests warrants for persons suspected of having been involved in masterminding the genocide in Rwanda in 1994.

Some of these persons have been arrested in various states and brought to Arusha, where they are undergoing trials. There is the case of clement kayishema the former prefect (Governor) of Kibuye, facing 25 changes related to massacres committed at various places, tried jointly with Obed Ruzindana, a business man accused of having organized massacres in western Rwanda, Georges Rutaganda, and Jean-Paul Akayesu, the former mayor of Taba, who is charged on 12 counts, including genocide and crimes against humanity.

The Rwandan tribunal convicted Jean Paul Akayesu on 2 September 1998, on nine counts of genocide[7], Crimes against humanity and war crimes. This development allays any fear regarding the tribunals ability to deliver. This was the first judgement to be handed down by the tribunal, the first conviction of genocide by an international court, and the first time an international court found the crime of rape to be an act of genocide[8].

It should be noted that the establishment of the two tribunals and their mandate to monitor respect for the rules of international humanitarian law and to prosecute persons responsible for serious violations, has several major implication for the evolution of this body of law.

Primarily, the judgment handed down by the two chambers of the Tribunals will represent a substantial addition to existing case law relating to certain crimes, particularly genocide9.

Secondly, the principle of direct individual criminal responsibility is now established in international law. Hence forth international courts will be able to prosecute private individuals for violations of international law, even if these violations are committed within the internal framework of a particular state.

Again, the establishment of the two tribunals has certainly given fresh impetus to the debate on the possibility of setting up a permanent International Criminal Court – which has now become a reality with the signing of the Rome statute of International Criminal Court on 17 July 1998, and its coming into force on 1st July 2002

Finally, these tribunals will make a contribution to the development not only of international humanitarian law but also of international justice, by recognizing the need for justice in international relations.

5.4 PROCEDURAL RULES OF INTERNATIONAL CRIMINAL TRIBUNALS FOR FORMER YUGOSLAVIA AND RWANDA AND GUARANTEE OF FAIR TRIAL

The two International Criminal Tribunals set up by the United Nations Security Council in 1993[10] and 1994[11] are in the process of demonstrating that international repression of serious violations of international humanitarian law is no longer a purely theoretical concept[12]. The two tribunals are competent to hear cases against person allegedly responsible for violations of international humanitarian law but in so doing, they are also required, under their respective statutes, to ensure that the internationally recognized rules relating to the rights of the accused are fully respected at all stages of the proceedings. Article 21 of the Statute of the Tribunal for the former Yugoslavia, modelled on Article 14 of the International Covenant on Civil and Political Right, which is also reproduced in Article 20 of the Statute of the Tribunal for Rwanda. These Articles enumerate in detail the rights that can be accorded to every accused person, thus:

Article 21 – Rights of the accused[13].

1. **All persons shall be equal before the International Tribunal**
2. **In the determination of charges against him, the accused shall**

   be entitled to a fair and public hearing, subject to Article 22 of the statute.

3. **The accused shall be presumed innocent until proved guilty according to the provisions of the present statute.**
4. **In determining a charge against the accused pursuant to the present statute, the accused shall be entitled to the following minimum guarantees, in full equality.**

   (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

   (b) To have adequate time and facilities for the preparation of his defence and to communication with counsel of his own choice.

(c) To be tried without undue delay.

(d) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witness against him.

(e) To be tried in his presence, and to defend himself in person or through legal assistance of his own choice; to be informed if he do not have legal assistance, of his right and to have legal assistance assigned to him, in any case where the interest of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal.

(g) Not to be compelled to testify against himself or to confess guilt.

Reconciliation of the requirement of international humanitarian law with those of fair trial cannot be based on past practice14. The procedure adopted by the International Military Tribunal for Nuremberg and Tokyo and by the Tribunals set up by the Occupying Powers after the Second World War are not very detailed. At that time the only recognized principle of international criminal law was the vaguely defined principle of the right to a fair trial in the German Italy Command case. The tribunal in question ruled that:

> **"In the exercise of its sovereignty, the state has a right to set up a tribunal at any time it sees fit and confer jurisdiction on it to try violators of one of its criminal laws. The only obligation a sovereign state owes to the violator of one of its laws is to give him a fair trial in a forum where he may have counsel to represent him where he may produce witnesses in his behalf and where he may speak in his own defence. Similarly a defendant charged with a violation of international law is in no sense done an injustice if he is accorded the same rights and priviledges[15]"**

The rules of procedure adopted by the post-war military tribunals proved to be more flexible than those of national criminal courts. It is understandable that procedural questions should at no time enable a guilty person to escape justice. In particular, evidence by declaration under oath (affidavit), which does not permit cross-examination and is generally inadvisable under common law, was

widely used. In addition, the rules listed in the 1929 Geneva Convention relative to the treatment of prisoners of war, 16 were considered to be inapplicable to war criminals, even though they are the minimum generally recognized rules of justice.[17] Moreover the trial were held before the adoption of international declaration specifying more rights of every accused person. Whether humanitarian law, with the Geneva conventions and their Additional Protocols, or human rights law, with the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. And finally, at that time the right to fair trial had not been made subject to monitoring by competent international bodies with either regional or universal jurisdiction.

The judges of the tribunals are often left entirely free to adopt the interpretation which they consider to be most suitable, most effective and most useful. Apart from that, the judges were assigned an important role in drawing up "rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate mattes" Articles 15 of the statute for the tribunal for the former Yugoslavia[18], they adopted very detailed rules of procedure and evidence which settle important issues and have been hailed as constituting a veritable international code of criminal procedure.

The code in not subject to any monitoring on the Part of the Security Council and has been amended on several occasions, which makes an allowance for discretion.

The repression of serious violation of humanitarian law while respecting the basic rules of fair trials, as defined and specified over the past 50 years, presents a challenge for the international criminal tribunals. It is indeed essential to bear in mind the gravity of the crimes in question. The rules guaranteeing fair trail were developed with a view to their national application to all kinds of offences, and are not necessarily adapted to repression at the international level. This segment considers the possibility of reconciling the repression of serious violations of humanitarian law with full observance of the rights of the accused.

Four questions are examined in this connection. The first relates to the evidence and the scope of its admissibility, of the consistent pattern of conduct relevant to serious violations of humanitarian law, as provided for in Rule 93 of the Rules of procedure and evidence of the criminal tribunal for the former Yugoslavia[19].

The second concerns the right to provisional release until the defendant is acquitted or found guilty. Thirdly, the issue of anonymity of witness and trial in absentia, which we regard as particularly significant, without claiming to offer an exhaustive analysis. In each case, we shall highlight the points of friction that arise between guaranteeing full respect for the rights of the accused person and the requirement inherent in the prosecution of crimes under international law. Evidence of a consistent pattern of conduct – Rule 93 of the Rules of Procedure

and Evidence.

Crimes falling under jurisdiction of the International Criminal Tribunal for the former Yugoslavia require proof of a specific intent or design. The grave breach of the Geneva conventions consists the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, is one such example[23]. Genocide also requires, in addition to evidence of a moral element inherent in the crimes concerned, proof of intent to destroy, in whole or in part, a national, ethical, racial or religious group, as such. Finally it may also include, crimes against humanity, provided that they have been committed on a large scale or in a systematic manner.

There is no denying the complexity of prove beyond reasonable doubts to evidence to convict persons accused of violating international humanitarian law. This may entail producing evidence of facts, which are a priori unrelated to the questions at issue, or are not directly connected with them. As a general rule, such evidence may be excluded on the grounds that it may unduly prolong the debates in court or may take the accused by surprise and cause him prejudice far in excess of their probative value. Yet Rule 98 of the Rules of Procedure and Evidence seems to sanction the admissibility of such evidence in the following terms.

EVIDENCE OF CONSISTENT PATTERN OF CONDUCT

(a) Evidence of a consistent pattern of conduct relevant to serious

violations of international humanitarian law under statute may be admissible in the interest of justice.

(b) The prosecutor not the defence, pursuance to Rule 66 shall disclose

Acts tending to show such a pattern of conduct.

This provision calls to mind the concept of "Similar facts" under common law, except for the fact that it makes mention of "consistent pattern of conduct relevant to serious violations of international humanitarian law". Why should a provision be made for the admission of such evidence when a chamber may under Rule 89(c) of the Rules of procedure and Evidences, admit any relevant fact which it deems to have probative value? It is a presumption that the raison d'être of Rule 93 of the Rules of Procedure and Evidence is to forestall any discussion about the relevance and probative value of the evidence required to demonstrate the consistent elements of certain crimes falling within the competence of the Tribunal[20]. The scope of the provision should be specified so as to ensure that the rights of the accused are fully respected. Evidence of similar facts is an exception to the rule of common law providing for the inadmissibility of the evidence put forth to prove the guilt of the accused on the grounds that he is the kind of person who could have committed the offence[21]. Excluding this evidence of character is particularly warranted in the case of trial by jury, since

it is likely to create a priori attitude appreciably unfavourable to the accused.

Since its probative value overweighs the requirements of fair trail, which presupposes full respect for the presumption of innocence, this type of evidence is generally not admissible.
Nevertheless, evidence of similar facts is admissible to the extent that it is relevant to the matter in hand and that it outweighs the prejudice caused to the person who may contest its admissibility.

The admissibility of evidence seeking to determine similar facts nevertheless raises some concerns. If interpreted too liberally this exception to the exclusion of character evidence runs the risk of introducing evidence which has negligible probative value but is liable to cause serious prejudice to the accused. Moreover, if this exception admits, evidence of judicial antecedents, the accused runs the risk of being tried again for the same crime, in contravention of the principle non bis in idem. The Chambers of the International Criminal Tribunals, which are called upon to apply the above provision, must specify its scope and limit the admissible evidence to that which shows real similarity to the crime of which the defendant stands accused and is concomitant to it under rule 89 (D) of Rules of Procedure and Evidence, all evidence having the sole purpose of demonstrating the accused person's natural propensity for committing the crime in question and generally evidence, the probative value of which is substantially outweighed by the need to ensure a fair trail, must be excluded.

To what extent does reference to a consistent pattern of conduct relevant to serious violations of international humanitarian law modify the theory of similar facts? This leads us to question the nature of this constant pattern of conduct. Is it that of the accused or some other individuals? [22]. In cases where evidence of a consistent pattern of conduct which is not that of the accused is admissible, Rule 93 of the Rules of Procedure and evidence considerably widens the scope of evidence admissible as similar facts; these are no longer connected to the conduct of the individual prosecuted, but rather that of other persons who are not the subject of the indictment. Furthermore, must it be proved that the accused knew or was aware of the fact that the violation of humanitarian law with which he is charged falls within the more general context? If specific knowledge on the part of t he accused is not required, proof of a general policy which translates into a consistent pattern of conduct would then be admitted, even if it has no connection with the accused. In such circumstances, it is only reasonable to wonder what kind of defence the accused could present in this regard. How could he refute the manifestation of a policy, which is totally foreign to him or detach his crime from that extended context? Such an interpretation is liable to prejudice the rights of the accused in contravention of the actual provisions of the statute. An interpretation must therefore, be devised whereby rules 93 of Rules of Procedure and Evidence admits evidence of a consistent pattern of conduct linked to the accused, either because it is his own conduct that is concerned or because it involves a broader context of which he is

aware or which he cannot ignore and which encompasses the crime with which he is charged. In such cases it is for the prosecution to establish and demonstrate this link. The necessary evidence must be transmitted to the Defence in advance in accordance with Rule 93, Paragraph (B) of the Rules of Procedure and Evidence.

The question of the admissibility of evidence seeking to establish a consistent pattern of conduct, that is Rule 93 of the Rules of Procedure and Evidence was dealt incidentally in connection with the *Tadic Case*[23], where the Trial Chamber examined the responsibility of the accused with respect to the allegation of crimes against humanity. In this case, 10 of the 34 counts of the indictment related to such crimes, which consisted of, acts of rape[24], murder, persecution and other inhumane acts. The chamber found the accused guilty of all counts alleging acts of persecution and other inhumane acts but did not deem that those relating to murder had been proved beyond all reasonable doubt.

For the accused to be found guilty of crimes against humanity, the chamber considered that there had to be "some from of a governmental, or organizational or group policy" and that "the perpetrator must know of the context within which his actions are taken" [25]. In other words, the act of the charge had to be deliberately directed against any civilian population.

The existence of such a policy could nevertheless be presumed by reason of the systematic nature of the violations in question[26] Regarding the defendants criminal intents, the Chamber took as a basis the majority opinion of the Canadian Supreme Court in the *Finta case.* Its conclusion being that "the mental elements required to to constitute a crime against humanity is that the accused was aware of or wilfully blind to facts or circumstances which would bring his or her acts within the definition of a crime against humanity[27]. Hence the mere evidence of a policy directed against a civilian population will not suffice, it must be shown that the accused himself is aware that his act was consistent with this policy and that is indeed the evidence admitted by Rule 93 of the Rules of Procedure and Evidence.

In this connection, the chamber summarized, in the preliminary sections of the judgment, the historical, geographical, administrative and military context in the acts that constitutes an offence. It specified that it had referred solely to the evidence submitted by the parties to that end.

It described in detail the pursuit of a policy of Greater Serbia and the consequence, of that policy for non Serbs, particularly in terms of ethnic cleansing. It subsequently declared itself satisfied with the evidence presented to show that such a policy was prevalent in the region at the time when the crimes were committed. It also ensured that there was a link between that policy and the accused and that the latter was aware of the policy and even supported it. It regarded as probative the fact that the accused defended the cause of Greater

Serbia, had been involved in the nationalist policy and had become a political leader in Kozeral after ethnic cleansing had been completed in that town. The chamber concluded that the accused had been aware of the broader context in which the crimes with which he was charged had been perpetrated.

Pre-trial detention – rule 65 of Rules of Procedure and Evidence
Detention of the accused during the period of investigation and trial is an institution generally recognized in penal systems. All the accused who appeared before the Nuremberg and Tokyo International Military Tribunals were kept in detention until their sentence were pronounced.

Nevertheless, international instruments generally ascribe an exceptional character to pre-trial detention and recognizes that, in view of the presumption of innocence, liberty should be the rule. Regarding international humanitarian law, the 1929 Geneva Convention relative to the Treatment of Prisoners of war already stipulated that pre-trial detention of prisoners of war should be as short as possible[28]. The third Geneva Convention of 1949 relative to the treatment of prisoners of war,[29] restricts pre-trail detention exclusively to cases where the same measure is applicable to members of the armed forces of Detaining Power, or if such confinement is essential in the interest of national security[30].

International human rights instruments whether regional or universal, follow the same trend. The international Covenant on Civil and Political Rights provides that "It shall not be the general rule that person awaiting trail shall be detained in custody" 31 while the European Convention on Human rights recognizes that everyone has the right to liberty[32].

Pre-trial detention is regarded as a measure of last resort[33] it should not be ordered unless it is authorized by law, unless there is reasonable suspicious that the persons concerned are implicated in the offences that have been notified and unless it may be feared that they will abscond or escape, commit other serious offences or seriously obstruct the normal course of justice if they are left at liberty[34].

Despite this convergence of rules relating to pre-trial detention the letter and spirit of the Statute and the Rules of Procedure and Evidence makes detention the rule of law and liberty the rule of exception. The Rules of Procedure and Evidence expressly provide that the accused shall be detained[35], and he may not be released except by order of a Trial Chamber[36]. This contradiction between the international texts and the Rules of procedure and evidence is only apparent, since under the provisions of the Statute a person cannot be the subject of an official indictment unless such an indictments is confirmed by a judge of the Tribunal[37].

Now such confirmation cannot take place unless there is sufficient evidence reasonably to maintain that a suspect has committed a crime. In other words,

this relates to evidence in which the prosecutor raises "a clear suspicion of the suspect being guilty of the crime" [38]. This test is analogous to that of "reasonable suspicion that the accused has committed the crime" in respect of which the international instruments authorize pre-trial detention.

In addition, the gravity of the crimes which the persons brought before the Tribunal are accused of and the unique circumstance in which the Tribunal has to operate – absence of a police force and of territorial control are such that the other conditions warranting pre-trial detention are fulfilled[39]. It is nonetheless interesting to note that the International Criminal Court did not see it fit proper to depart from the principle that liberty should be the rule, despite the gravity of the crimes falling within the competence of the future court[40]. The International Law Commission was nevertheless aware that "charges under the statute are by definition brought only in the most serious cases, and it will usually be necessary to detain an accused who is not already in secure custody in a state[41].
Regarding to the Rules of Procedure and Evidence provisional release may be ordered only in "exceptional circumstances" and only if the trial chamber is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other persons[42]. In addition the host country must be heard[43] . These conditions constitute a rule in that they are cumulative and their proof is incumbent on the defence. The Chamber of the Tribunals have interpreted these conditions strictly and except for one case in which the accused, was suffering from an incurable disease, in its terminal stages, was provisionally released[44], all requests filled in this regard have been rejected[45].

What are the "exceptional circumstances" mentioned here? Neither the Statute nor the Rules of Procedures and Evidence provide any indications in this regard, but it would be reasonable to assume that these are extremely rare cases, that apart from proof that the accused will appear, and does not constitute a danger to public safety, an additional element is to be taken into consideration[46]. it has been settled on three criteria, namely reasonable grounds for suspecting that the applicant for provisional release has committed the crime or crimes with which he is charged, his presumed role in the perpetration of the crimes and the length of time spent in detention. They were greatly influenced by the decisions handed down by the judicial bodies of the Council of Europe, which, (it would be recalled), worked on the basis of a treaty under which liberty is the rule. The reasoning followed by the Chambers calls for several observations.

As observed earlier, the reasonable grounds for suspecting that the applicant for provisional release has committed the crime or crimes with which he is charged are analogous to those justifying the confirmations of the indictment. If these are lacking or insufficient, the accused may request not only his provisional release, but also the rejection of his indictment on the grounds of procedural defect or manifest lack of foundation.

A similar problem arises with regarding the presumed role of the accused in the

alleged crime or crimes. The chambers consider that the difficulty of determining the right to provisional release are directly connected with the significance of the role played by the accused[47]. Now the tribunals jurisdiction covers only serious violations of international humanitarian law involving the criminal responsibility of their violators, by reason of their participation in the perpetration of such breaches or by reason of their position of authority. In either case, the presumed role of the accused is necessarily important.

Finally, it is surprising that the chambers refer to the duration of pre-trail detention in determining whether provisional release is warranted by exceptional circumstance. The right to liberty during investigation and trial and the reasonable duration of pre-trial detentions are two separate questions. The European Convention on Human Rights provides in particular that any person detained during his trial has the "right to be tried within a reasonable time or be released during the proceedings" [48]. In the context of the International Criminal Tribunal, it is essential to preserve the right of an indicted detainee to contest the duration of his custody as unreasonable. Indeed any accused person must be presumed innocent until the sentence is pronounced, and the main purpose of monitoring the duration of pre-trial confinement is to order provisional release as soon as maintenance in detention ceases to be necessary[49].

Regarding the actual duration of Pre-trial detention, no Provision of the Statute or the Rules of Procedure and Evidence stipulates a specific time limit beyond which provisional release becomes a right. The chambers concluded that the period upon which detention ceases to be lawful depends on the circumstances of each case, but nevertheless observed that detention, cannot continue beyond a reasonable period.

The issue of respect for the rights of the defence and the right to a fair trial was at the heart of numerous debates before the tribunal for the former Yugoslavia and had been underscored during the drafting of the Statues of the two Tribunals. Articles 21 of the Statutes of the Hague Tribunal and Articles 20 of the statute of the Rwanda tribunal essentially restate the guarantees set out in Article 14 of the International Covenant on Civil and Political Rights; as we have observed earlier. Special attention was paid to the question of trial in absentia and to that of anonymity of witnesses.

The absence of provision for trial in absentia in the Statute of either Tribunal reflects the wishes of countries of the common law tradition, which refuse, on account of their requirement in this regard (fair trial, due process of law), to allow a trial to be held in the absence of the accused. The omission has on the other hand disappointed civil law experts (trial in absentia having been provided for in the French draft).50 The possibility of holding this type of trial would have guaranteed the Tribunal a certain degree of efficiency, even in the event of lack of cooperation on the part of the states, a problem that was foreseeable at the

time and unfortunately came to pass.
The procedure set out in Rule 61 of the Rules of Procedure and Evidence appears as a kind of hybrid, a legal aberration and a substitute that satisfies no one[51]. The rule 61 procedure is intended to rectify failure to execute a warrant of arrest signed by a judge of the Tribunal and the absence of any reference to trial in absentia in the Statute. It provides for a public hearing and for the appearance of witnesses before a trial chamber, which may confirm the indictment, supplement it or modify it and issue an international arrest warrant in respect of the accused, which shall be transmitted to all states. The accused will thus become a pariah in all countries.
It should be emphasized that with all it faults and limitations, however, practice has shown that it is useful, since it has made it possible to maintain and even intensify pressure on the accused, with the help of the Security Council at times, depending on political situation but at least it allows for their arrest and thus prevent accused persons escaping justice.

The procedure of trial in absentia was excluded in the interest of fair Trails, although the Committee on Human Rights considered that it was not contrary to the Covenant, under specific conditions[52]. But the procedure set out in Rule 61 of the Rules of Procedure and Evidence can be faulted on the grounds that it prejudices the rights of the accused, particularly in the event of a subsequent trial if the accused is finally brought before one of the Tribunals.

The question of calling anonymous witnesses is also a highly sensitive matter[53]. Common law experts are against the procedure, invoking the requirements of fair trial, yet Article 22 of the Statute of the tribunal for the former Yugoslavian and Article 22 of the Statute of the Tribunal for Rwanda, concerning the protection of victim's and witnesses provides for the possibility of "in camera proceedings and the protection of the victim's identity". Rules 69 and 75 of the Rules of Procedure and Evidence set out the details of such protection, including non - disclosure of the identity of a victim or witness. These measures indeed seem to be indispensable, as the witnesses who are often victims, runs the risk of being in danger when they leave the court and return to their countries. The tribunal for the former Yugoslavia took a protective measure in the Tadic case (Decision of 10 August 1995) [54]. In any event case law has brought to light the importance of fair trial not only with respect to the accused, but also to the victims or witnesses, who are vulnerable and are entitled to assistance and protection.

In the final count, it is emphasized that, although, the International Criminal Tribunals are in the vanguard of international repression of serious violation of humanitarian law, their activities may serve as basis for the International Criminal Court when it becomes operational. The credibility of such international actions will nevertheless depend on decisions made to determine the guilt or innocence of accused persons, while ensuring that all the judicial guarantees designed to secure respect for the individual are provided. In spite of

all the indignation aroused by the crimes the International Criminal Tribunal are called upon to prosecute, the accused must be accorded the right to fair trial. Effective repression of serious violations of international humanitarian law and respect for human rights are complementary and indispensable to each other since they both contribute to upholding the rule of law.

5.5 THE STATUTES OF THE INTERNATIONAL CRIMINAL COURT: PROCEDURAL RULES

Some of the procedural rules enshrined in the Statute of International Criminal Court will be discussed here without any claim to be exhaustive. Issues such as the jurisdiction of the court, the rules of complementarity, the mode of initiating proceedings in the court; the roles of the judges in procedural matters; the principle of cooperation of states with the court and the role assigned to the victim shall be discussed.

JURISDICTION: **The jurisdiction of the court shall be limited to the serious crimes which are of concern to the international community. In the whole, the court has jurisdiction in accordance with this Statute with respect to the following crimes, crimes of genocide, crimes against humanity, was crimes; the crimes of aggression[55]. The court shall exercise jurisdiction over the crimes of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the court shall exercise jurisdiction in respect of this crime[56].**

This jurisdiction of the court over these four crimes can only be exercised when some condition precedent has been fulfilled.

Article 12 of the statute provides.
"1. A state which becomes a party to this statute thereby accepts

the jurisdiction of the court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the court may exercise its jurisdiction if one or more of the following states are parties to this Statute or have accepted the jurisdiction of the court in accordance with paragraph 3.

(a) The state on the territory of which the conduct in

question occurred or, if the crime was committed on board a vessel or air craft, the state of the registration of that vessel or air craft;

(b) The state of which the person accused of the crime is a national.

(3) If the acceptance of a state which is not a party to this

Statute is required under paragraph 2, that state may, by a declaration lodged with the Registrar, accept the exercise of jurisdiction by the court with respect to crimes in question. The accepting state shall cooperate with the court without any delay or exception in accordance with part [9]".

This article is a welcome development for it provides that nationals of a state which did not sign the treaty may be internationally prosecuted for crimes committed on foreign soil. Example of this class of person would be soldiers serving abroad i.e. troops of one country committing atrocities in another country; the Statute has jurisdiction over such nationals. But it would be erroneous to argue that the Statute imposes obligation upon states that are not parties to the treaty. Nationals of third states perpetrating crimes at home are, of course not subject to the ICC's jurisdiction[57]. But if they commit crimes abroad, they may become amenable to the court's jurisdiction.

Articles 12 (2) poses another problem with respect to the pre-conditions to the exercise of jurisdiction. The major weakness of this provision appears whenever one is faced with crimes such as genocide, war crimes in civil war, or crimes against humanity, that are normally committed at the instigation or with the support or acquiescence of the national authorities. If a state on whose territory such crimes are perpetrated by its own nationals have not accepted the courts jurisdiction at the time the crimes are committed, the ICC will be handicapped to act. There is an exception to this. This arises when the Security Council decides to refer the situation to the prosecutor pursuant to Article 13(b), in which case the states acceptance of the courts jurisdiction is not required. This is what a jurist referred to as the "sledgehammer" of the ICC58. This mechanism may be most effective to seize the court whenever situations similar to those in former Yugoslavia and Rwanda occur.

THE PRINCIPLE OF COMPLEMENTARITY

The preamble to the statute states that the court shall be complementary to national criminal jurisdictions[59]. Complementarity is a fundamental philosophy underlying the creation of the court. It is the recognition that the primary responsibility for investigating, prosecuting, and trying International Crimes lies with national authorities. The International Criminal Court only act as a complement to national courts and comes into operation when domestic prosecutors or courts fail to act. If national authorities of a state adequately investigates or prosecutes, or if they decide on solid grounds not to prosecute, the case will be inadmissible before the court. The principle of complementarity constitute a deference to national sovereignty which is contrary to a new

development of international law, where it has been held that "It would be a travesty of law and a betrayal of the universal need for justice, should the concept of state sovereignty be allowed to be raised successfully, against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity" [60].

This is a sharp contrast to ICTY and ICTR which have supremacy over national courts. The ICTY and ICTR statutes provide that those tribunals may formerly request national courts to defer to the competence of International Tribunals[61]. In the case of International Criminal Court, the primacy has almost been reversed in favour of national courts.
However, this complementarity may be subject to abuse. It might be used as a shield by states to frustrate international justice. This is particularly so with regard to crimes such as genocide, crimes against humanity which are normally perpetrated with the help and assistance, or the connivance or acquiescence of national authorities. In such cases, state authorities may pretend to investigate and try crimes, and may even conduct proceedings, but only for the purpose of actually protecting the allegedly responsible persons.

THE TRIGGER MECHANISM: *The role of the prosecutor*.
At the Rome conference the argument was to either grant the power to set investigation and prosecutions in motion to states and Security Councils only,[62] or the institution of an independent prosecutor capable of initiating *proprio motu* **investigations and prosecutions. This argument was between sovereignty oriented countries and states eager to implement the rules of law in the world community. A position of an independent and impartial body was adopted. As an independent and impartial body, the prosecutor was granted the power to investigate and prosecute ex-officio, although subject to some significant restrictions.**

Secondly, the power to initiate investigations was conferred both on the prosecutor (subject to judicial scrutiny) and on states as well as the security council. A three pronged system was envisaged.

a. Investigation may be initiated at the request of a state, but

then the prosecutor must immediately notify all other states so as to enable those who intend to exercise their jurisdiction to rely upon the principle of complementarity.

b. Investigation may be initiated by the prosecutor, but subject to two conditions (I) a pre-trial chamber may authorized them, and (ii) they must be notified to all states.

c. Investigations may be initiated at the request of the Security

Council and in this case the intervention of the pre-trial is not required, nor is notification to all states.

Clearly this is a balanced system, which takes into account both the interests of states and the demands of international justice. The safeguard for the proper administration of international justice can be seen in a key provision of the statute, Article 53(2). For it assigns to the prosecutor the important role of an independent and impartial organ responsible for seeing to it that the interest of justice and the rule of law prevail. The persecutor may thus bar any initiative of states or even any deferral by the Security Council which may prove politically motivated and contrary to the interest of justice.

Though by Article 16 of the Rome Statute, the Security Council may request the prosecutor to defer any investigation or prosecution for a period of 12 months. This power of the Security Council it should be noted is not unfettered, as it is exercisable under chapter VII of the United nations charter dealing with threat to world peace.

THE ROLE OF THE JUDGES

The Rome Statute adopted a system that ensures that the 18 judges making up the court be and remain independent of any state. Under Article 36 (9) (a) they are elected for nine years and may not be re-elected.

The Rules of Procedure and Evidence may only be proposed by judges and must be adopted by the Assembly of States Parties, (Article 51). This may be a reaction against the ICTY and ICTR precedents, where the judges were both rule makers and decision makers. Vesting both powers to make Rules of procedure and evidence on the courts by the Statutes of the two hoc Tribunals for the former Yugoslavia and Rwanda is because international criminal procedure prior to the creation of the tribunals were non-existent and the power to amend was granted the judges to enable them deal with myraid of contingencies which were not anticipated during the drafting of the Statute. Such judicial rule making is only marginally possible under Article 57(3).

COOPERATION OF STATES

The International Criminal Court as in that of ICTY and ICTR makes state cooperation crucial to its effectiveness. This is because the decisions, orders and requests of International Criminal Courts can only be enforced by others like national authorities or international organisations. As contra-distinguished from national criminal courts, international tribunals have no enforcement agencies at their disposal. They are rendered impotent without the intermediary of national authorities for they cannot execute warrants of arrest, they cannot seize evidentiary material, cannot compel witnesses to give testimony, nor search the scenes where crimes have allegedly been committed. For all these reasons, international courts must look to state authorities and request them to take action to assist the courts' officers and investigators.

In deciding upon regulating the cooperation of states with an international criminal court, the statute adopted mostly a state –oriented approach. Which Antonio Cassese[64] argued is not without some ambiguities.

First, the Statute does not specify whether the taking of evidence, execution of summons and warrants, etc, is to be undertaken by the officials of the prosecutor with the assistance, when needed, of state authorities, or whether instead it will be for state enforcement or judicial authorities to execute those acts at the request of the prosecutor.

Secondly, in the event of failure of states to cooperate, Articles 87 (7) provides for the means substantially enunciated by the ICTY in the Appeals Chambers decision in Blaskic (Subponea) stating that "the Court may make a finding to that effect and refer the matter to the Assembly of State Parties or, where necessary the Security Council" He argued further that, the ICC could have gone further and articulated the consequences of a court's finding of non-cooperation by a state. That the statute could have specified that the Assembly of States Parties might agree upon countermeasures, or authorize contracting states to adopt such countermeasures, or in the event of disagreement that each contracting state might take such countermeasures. In addition it would have been appropriate to provide for the possibility of the Security Council stepping in and adopting sanctions, even where the matter had not been previously referred by this body to the court. One fails to see why the Security Council should not act upon chapter vii of the UN Charter if a state refuse to cooperate and such refusal amount to threat to peace, even in cases previously referred to the court by the state or initiated by the persecutor *proprio motu***.**

Thirdly, in case of competing request for surrender or extradition, that is a request for arrest and surrender of a person, emanating from the court, and a request for extradition from a state not a party, the request from the court does not prevail automatically. Under Article 90(6) and (7), a state party may decide between compliance with the request from the court and compliance with the request from a non-state party with which the state party is bound by an extradition treaty. This seems odd, for one would have thought that the obligation stemming from the Rome Statute should have taken precedence over those flowing from other treaties. Arguably, this priority would follow both from the primacy of a Statute establishing a Universal Criminal Court over bilateral treaties and from the very purpose of the statute to administer international justice in the interest of peace.

Fourthly, regarding the protecting of national security information, the Statute substantially caters to the state concern by creating a national security exception to request for assistance in Article 93 (4). Thus "a state party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security".

In Blaskic decision of the ICTY Appeals Chamber, the emphasis was on the obligation of states to disclose information. It was only in exceptional circumstances were states allowed to resort to special steps for the purpose of shielding the information from undue disclosure to entities other than the court. But in Article 72 of the Rome statute emphasis is instead laid on the right of states to deny the courts request for assistance.

THE ROLE ASSIGNED TO THE VICTIM

The ICC statute assigned role to the victims of atrocities. Article 15(3) allows the "victims to make representations to the Pre-trial Chambers, in accordance with the Rules of Procedure and Evidence" Regarding the reasonableness or otherwise of proceeding with an investigation. Under Article 19, victims may do so in two ways.

First of all, they may set out, in court their "views" and "concerns" on matters of facts and law. Pursuant to Article 68(3):

> **"When the personal interest of the victims are affected, the court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the court and in a manner which is not prejudicial to, or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the court considers appropriate, in accordance with the Rules of Procedure and evidence".**

The significance of this provision is that it is the first time in international criminal proceedings that victims are allowed to take part in such proceeding by expounding in court their "views and concerns" either in person or through their legal counsel, on matters relevant to the proceedings.

The second modality of victims participation in the trial proceedings concerns the possibility for the victims to seek reparation, restitution, compensation or rehabilitation. This possibility is envisaged in Article 75 (1) and (3) albeit in a rather inelegant manner.

These provisions allowing victims to have a role in the administration of justice before the court are highly innovative in the context of international tribunals. No such allowance was made at Nuremberg, Tokyo, the ICTY or the ICTR. This ICC contrast may be informed by the fact that "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity". (preamble) The victims of these atrocities are thus of major relevance to the notion of international criminal justice. It is therefore not out of place that their needs and demands be given voice in the ICC statute.

It is my submission that from the foregoing analysis of the procedural mechanism employed by the national and international tribunals called upon to prosecute grave breaches of international humanitarians law, that the accused should and must and indeed have been accorded the right of fair trial, and the tribunals especially the two ad hoc Tribunals for former Yugoslavia and Rwanda, have deliberately balanced the two competing interest of assuaging the yearnings of the international community to prosecute those responsible for breaches and perpetrators of genocide, crimes against humanity or war crimes and the equally competing interest to determine the guilt or innocence of the accused person, while ensuring that all the judicial guarantees designed to secure respect for the individual are provided. Taking into cognizance the fact that effective repression of serious violations of international law and respect for human rights are complementary and indispensable to each other as they both contribute to upholding the rule of law.

NOTES TO CHAPTER FIVE

1. **See the provision of Articles 49, 50, 129 and 146 of the first, second, third and fourth Geneva Convention respectively**
2. **Section 75, paragraph 4 of Protocol 1 additional to the Geneva Conventions.**
3. **See Article 75 of the Additional Protocol of 8 June 1977.**
5. **See Resolution 827 (1993) 3217th meeting, 25 May 1993.**
6. **See Preamble to the statute of the International Criminal Tribunal for Rwanda (hereinafter referred to as the "statute") attached to security council resolution 955, 8 November 1994, Doc. S/Res/955 (1994).**
7. **See Article 2 of the Statute.**
8. **Article 3 of the Statute**
9. **"African Tribunal convicts Rwanda Genocide suspect" BBC online Network, 2 September 1998.**
10. **See (note 11) Supra.**
11. **See forward by Kama, Laity, President International Criminal Tribunal for Rwanda in IRRC 1997**
12. **Resolution 827 (1993), 3217th Meeting, 25 May 1993.**
13. **Resolution 955 (1994), 3453rd Meeting, 8 November 1994.**
14. **See la Rosa, Anne Marie, "A tremendous Challenge for the international criminal tribunals: reconciling the requirements of international humanitarian law with those of fair trial" published by international review of the red cross. Accessible in htp://www.icre.org/icrc eng.nst/c155..**
15. **See statute of the international criminal tribunal for the former Yugoslavia.**
16. **See la Rosa, Anne – Marie op. cit. (note 16) P. 1**
17. **1949 Law reports of War criminals (hereinafter L.R.T.N.C), vol xii, pp 62 and 63.**
18. **Geneva Convention of July 27, 1929, relative to the treatment of prisoners of war in particular Articles 45 – 67.**

19. **"It is a recognized rule that a person accused of having committed war crimes is not entitled to the rights in connection with his trial laid down for the benefit of prisoners of war by the Geneva Prisoners of war Convention of 1929". Trial of General Tomoyuki Yamashuta in Trial of war criminal Reports, Vol. II PP. 105 and 1949 L.R.T.W.C, Vol. Iv Pp 1 ; Trial of Robert Wagner, Commentary in 1949 L.R.T. W.C Vol III at P. 50 Trial of Hans Albin Rauter, Commentary on 1949 L.R.T.W.C, Vol. Xiv, PP.114 – 118.**

20. **The powers of the tribunal for Rwanda are more limited, as Articles 14 of its statute provides that It is to apply the Rules of procedure and evidence of the International Tribunal for former Yugoslavia and to the decision handed down by this tribunal.**

21. **See Article 2 (d) of the statute**

22. **See Report of the International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, Yearbook of the International Criminal Tribunal for the former Yugoslavia, 1994, P. 101.**

23. **In this connection, see Sopinka, J; the law of evidence in Canada, Markharm, Butterworth's, 1992, PP 431 – 522. Bekemare, J; Vian, L; Droit de la Preure Penab, Themis, montreal; 1991, PP. 109 – 151.**

24. **Nothing in specified in Rule 93 itself**

25. **Prosecutor Vs. Tadic, opinion and Judgment, case No 17 – 94 – 1-T, PP. 17687 – 17338 (7May 1997)**

26. **This count was dropped**

27. *Prosecutor Vs. Tadic ibid*. **(note 16) P. 17439**

28. **The element of predetermined plan or of an "administrative practice" have been examined by the judicial bodies of the council of Europe with regard to Article 3 of the European Convention on Human Rights, which prohibits torture (see in particular Ireland vs. United Kingdom, 18 January 1978, Services A, No: 25; France Norway,**

Denmark Sweden and the Netherlands Vs Turkey, Decision of the commission of 6 December 1983, Decision and reports 35, P. 143) and by the inter-American court of Human rights (velasquez Rodriguez vs. Honduras, 29 July 1988, 1989 International Legal Materials, P. 294). Repetition of the acts and the tolerance of the authorities proved to be determining.

29. *R. vs. Finta, (1994) (S.C.R) P*. **701 in this case, three judges entered a dissenting opinion in which they concluded that only the moral element included in the underlining offence was to be proved, without any need to establish a link between the accused and the pattern of conduct or general context of the offence with which the accused was charged.**

30. Article 4, paragraph 2: the judicial proceeding against a prisoner shall be conducted as quickly as circumstance will allow. The period during which prisoners shall be detained in custody shall be as short as possible.

31. Geneva conventions of August 12, 1949, relative to the treatment of prisoners of war, in particular Articles 82-88 and 99 – 108.

32. Article 103 paragraph 1: "Judicial investigation relating to prisoners of war shall be conducted as rapidly as circumstance permit and so that the trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interest of national security. In no circumstance shall this confinement exceed three months".

33. International Covenant on Civil and Political Rights, Article 9 Para. 3

34. European Convention on Human Right, Article 5 paragraph 1.

35. United Nations standard minimum rules for non- custodial measures, UN Resolution A/45/110, 14 December 1990, para 6.1 in this connection, see also Body of principle for the protection of all persons

under any form of detention or imprisonment, UN resolution A/43/173 (9 December 1988) Principle 39.

36. **Eight United Nations Congress on the Prevention of Crimes and the Treatment of offenders, Havana, 27 August – September 1990; Report prepared by the secretarit, Chapter 1, section C resolution 17 para 2. The European convention refers to "reasonable suspicion" that the person arrested has committed an offence and to the case where, it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so" (Article 5 paragraph 1(C)**

37. **Rule 64 of the Rules of procedure and evidence**

38. **Rule 65 (A) of the Rule of Procedure and evidence**

39. **Article 19 of the statute**

40. *Prosecutor vs Mucic, case No.* **IT-96 –21 –7, Decision on motion for provisional release filed by the accused Zejnil Delalic, PP 1523 – 1504)1 October 1996) at P. 1510.**

41. **In particular, risk of flight or destruction of evidence**

42. **Draft Statute of an International Criminal Court, report of the international law commission on the work of its forty-sixth session (1994), General Assembly official records, supple No.10 (A/49/10) paras. 23 – 209.**

43. **Ibid. comment on Article 29**

44. **The rules further provide that the chamber may impose such condition upon the provisional release of the accused as it may determine appropriate including the execution of a bail bond (Rule 65 (C) and, if necessary may issue an international warrant of arrest to secure the presence of an accused who has been provisionally released (Rule 65(D).**

45. **Rule 65 (B) of the rules of procedure and evidence**

46. *Prosecutor vs. Djukic, case No.* **IT – 96 – 20 T, Decision rejecting the application to withdraw the indictment and order for provisionl release, PP. 5/220615 – 1/2205is (24 April 1996).**

47. *Prosecutor vs. Blaskic, case No.* **IT – 95-14 T, Decision rejecting a request for provisional release (25 April 1996); Blaskic case No. IT-95-14-T, order denying a motion for provisional release of the accused PP. 8/3046's – 11/3046's (24 December, 1996) Prosecutor Vs Mucic , case No. 17 – 96-21-7, Decision on motion for provisional release filed by the accused Zejnil Delalic, loc. cit. (note 42); mucic, case No IT –96 – 21 – T, Decision on motion for provisional release filed by the accused Land Zo (16 January 1997).**

48. See La Rose, Anne Marie, op. cit. at (Note 16) P.6

49. Prosecutor vs. Mucic, case No. IT-96-21T, decision on motion for provisional release filed by the accused zejil Delalic, loc. Cit (note 42) at P. 1509).

50. European Convention on Human Right Article 5 paragraph 3.

51. *Neumeister Vs Austria***, 27 June 1968, service A, No 8. The committee on Human Rights considers that maintenance of pre-trial detention should not be only lawful but also reasonable in all respects (No. 305/1988, van Alpen Vs. Netherlands, Decision of 23 July 1980, UN Doc. A/45/0, Vol 11)**

52. S/25266 of 10 February 1993, Article xv, para. 2. On the regrettable rejection of the proposal of trial in absentia, see Pellet, Alain "Revue generale de driot international public, 1994, PP. 7 – 66 in particular P. 48 and Tavernier, Paul; "Vers UNE jurisdiction Penale International?" in Caa Huy Thuan and Alain Feneh, Mutations internationals et evolutions doe normes, PUF, Paris, 1994, PP. 137 – 154.

53. See Tavernier, Paul, "Le driot a un Proles equitable dans la jurisprudence du comite" dies droit de I'homme des Natoions Unies" Revue trimestrielle des driot de I'homme, No. 25 1996, PP. 3 – 22, in particular pp. 13 and 14.

54. According to Ascension, H and Pellet; A; "L'activete du tribunal penal international pour L'ex Yugoslavie (1993 – 1995)" Annuarie

Frances de driot internatinal, 1995, P. 110, Ru le 61 is "an imperfect substitute for trial in absentia. King, patel F; and La Rose, A. M. stressed the legal problem raised by this procedure in "the Jurisprudence of the Yugoslavia tribunal 1994 – 1996 "European Journal of International 1997. P. 142.

55. **Klip Andre, Severely criticizes the rule 61 procedure both from the point of view of accused and from that of the witness on his article tilted "Witness before the international criminal tribunal for the former Yugoslavia" Revue international de driot penal vol. 67,1996, pp.267 –295, se also Leigh, Unnamed witness against accused" American Journal of International law, vol.90, April 1996, PP. 235 – 238.**
56. **The tribunal seek to strike a balance between the interest of the accused and those of the witnesses, setting five stringent conditions for the admissibility of anonymity. The tribunal's decision is accompanied by the well – structured dissenting opinion of judge Stephen, based on a strict concept of fair trial close to the common law concept.**
57. **See Article 5(1) of the Rome statute of international criminal court.**
58. **Ibid Article 5(2) of the statute**
59. **See cassese, Antonio; "The Statute of International criminal court some preliminary reflections". Published in European Journal of International law vol. 10 no. 1 (1999) p. 160.**
60. **Cassese, Antonio op. cit at p. 161**
61. **See paragraph 10 of the preamble to the statute and Article 1, 17 and 18 of the statute.**
62. **See e.g Prosecutor vs. Tadic, decision on the defence motion on jurisdiction, case No IT – 94 I- AR 72, A. CR, 2 October 1995. Para 58.**
63. **See Un Doc. S/25704/ (3 May 1993) reproduced in 32 ILM (1993) 1159 Art. 9(2) and statute for the international tribunal for Rwanda, Annex**

to SCRES. 955 of 8 November 1994, UN Doc. S/RES/955 (1994) Annex, Art. 8 (2).

64. **At Rome conference some states (including United State, China and Others) Canvassed this view while other states (the group of so – called like mended countries) were bent on advocating the institution initiating proprio motu investigation and prosecutions**

65. **Cassese, Antonio; op. cit. at PP. 164 – 166.**

CHAPTER SIX

6.0 CONCLUSION AND RECOMMENDATIONS

The concluding part of this work focuses on the International Committee of the Red Cross being a model private mononational humanitarian organization mandated by the states party to the Geneva convention of 1949 to provide protection and assistance to the military and civilian victims of armed conflicts. This mandate is expressly codified in the Statute of the International Red Cross and Red Crescent Movement and equally extends to situation of internal conflicts as well. To this end, Article 4 of the statute provides.
"1. The role of the ICRC shall be in particular:

c. To undertake the task incumbent upon it under the Geneva conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law;

d. To endeavour at all times as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results.

e. To ensure the operation of the Central Tracing Agency as provided in the Geneva Conventions.

f. ….

g. To work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof:

It is against this background that we propose to examine the role of the international committee of the Red Cross in International humanitarian law monitoring and implementation and ultimately, make findings on the subject under discussion and recommend the way forward in ensuring more respect for international humanitarian law.

6.1 INTERNATIONAL COMMITTEE OF THE RED CROSS AND INTERNATIONAL HUMANITARIAN LAW MONITORING AND IMPLEMENTATION

Since the adoption of the original Geneva Convention in August 1864, the international committee of the Red cross (hereinafter referred to as the ICRC) have had a historical moral and legal responsibility to work for the development of and respect for international humanitarian law.

The ICRC, primary function is to protect and assist the victims of armed conflict, reaffirms its willingness to contribute in agreement with the parties concerned, and as far as its means allow, to the implementation of humanitarian rules and to perform the task entrusted to it by international humanitarian law.

As we observed earlier, the ICRC have been mandated by the states party to the Geneva Conventions of 1949 to provide protection and assistance to the military and civilian victims of armed conflicts. This mandate is confirmed in the Statute of International Committee of the Red cross and Red crescent movement and hence extends to situation of internal unrest as well[2]. These instruments assign a number of powers and functions to the ICRC, such as visiting prisoners[3], or assuming the duties incumbent on a protecting power when none has been designated[4]. Under the terms of these instruments, the ICRC may also take humanitarian initiatives[5]. The specific role of the ICRC as a neutral and independent intermediary between belligerent very often has a distinctly operational character, its primary mission is for consideration of humanity, to protect victims during hostilities and to improve their circumstance as far as possible[6].

Taking into cognizance that the entire body of international humanitarian law in intended, in times of armed conflicts to restrict the use of violence to the lowest level compatible with military imperatives (proportionate use of force and a prohibition on indiscriminate attacks) in addition, it stipulates that respect for the dignity of the individual, even an enemy must be preserved in all circumstance.

The application of humanitarian law involves four types of complementary action:
Preventive action to develop the law and ensure that combatant complies with it by spreading knowledge of its provisions.
Remedial action among victims to limit the consequence of any violations
Reactive actions to put a stop to ongoing violations by making immediate representations to the authorities;
Punitive action to prosecute violations already committed and punish the culprits.

Dissemination of international humanitarian law: In recent years the ICRC have made considerable effort to make international humanitarian law better known. The main objective of these efforts is naturally to spread knowledge of the law among those who are primarily required to comply with its provisions, namely members of the armed forces. Teaching of the law has often been

neglected or taken lightly. If it is to be done efficiently, it must become an integral part of military instruction and be taken seriously by military hierarchy from top to bottom.

The hierarchy must be convinced that compliance with international humanitarian law by the armed forces is not only a humanitarian imperative but also help to enhance military efficiency, because the ethics and discipline inherent in respect for the law are positive in this regard. A dialogue with the senior military authorities of states, and in particular with those in charge of training, is therefore a priority. The ICRC is also helping, in states which so desire, to introduce and follow up teaching programmes in international humanitarian law and to organize international seminar to help train senior army officers for the task awaiting them in that area.

In addition, in recent years it has responded to an increasing number of request for definition and teaching of the humanitarian precepts that armed forces and police must comply with in situations of internal strife which are below the threshold of armed conflict and are therefore not covered by international humanitarian law.

The ICRC's primary objective has been to develop and disseminate rules. In the early days the institution saw itself, as having a short term role. However, the need for an aid organization, capable of alleviating the suffering of victims, on the spot, prompted the ICRC to develop relief operation, alongside its efforts to develop the law. A century later, from 1960 onwards, a host of non-governmental humanitarian organization came into being and have backed up the ICRC's assistance work in the field.
The ICRC came to realise that the knowledge of the rules did not always guarantee that they were respected, it therefore, initiated a dialogue based on confidentiality with those in charge of regular armies and all armed groups, so as to draw their attention to offences committed by their troops. This approach to solve a number of problems, and supplemented by the activities of human rights bodies have turned the public denunciation of violations into an instrument for exerting international pressure. Striking a balance between different forms of action is not always easy. Public denuniation, for instance, may sometimes compromise the dialogue with the authorities concerned and jeopardize work for victims in the field.
As long as there are no mechanism for punishing those who flout the established rules, the system will remain weak. The humanitarian agencies can appeal to the international community to put diplomatic pressure on the authorities responsible for attrocities[8], but no legal system will function unless the guilty are punished. In the absence of an international court, such measures of repression are left at the discretion of each state, which alone is responsible for judging any of its nationals who have committed offences against international humanitarian law.

The setting up of the two ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda and the signing of the Statute of International Criminal Court in Rome on 17 July 1998 are important developments in the international criminal justice system because by increasing the means of punishing violations it gives the existing legal system its due credibility.

The tasks of preventing violations, or trying to eliminate them totally, repairing any harm done and punishing the culprits are essential for regulating the use of violence in armed conflicts Combatants caught in the heat of battle will heed humanitarian regulations only if they have been duly trained to do so before hand. While the conflict is underway, arresting, and sentencing those guilty of violations is often impossible because there is no international "police" to capture them. Only when the fighting has stopped and a political settlement has been reached can prosecution be considered. There must be a way therefore, of taking pragmatic action to try to limit the violence and relieve the suffering of victims by other means. That is what the ICRC in the field does, through its protection and assistance programmes.

During the genocide in Rwanda, the ICRC managed to provide protection for some 50,000 people [9], including many wounded and those accompanying them who had found refuge in an ICRC field hospital in Kigali where they were given medical treatment as needed.

In the camps of Bosnia Herzegovina, aid, in the form of food, blankets, helped the detainees survive the harsh winter while waiting for international action to bring about their release.

As well as taking direct action to relieve suffering the ICRC also tries to put a stop to violations, with no means other than its own powers of conviction which it deploys in a confidential dialogue with the parties to the conflict. That may not amount to much but it is often the only possible option pending the adoption of more efficient measures by the international community. By seeking direct dialogue with the combatants, the ICRC try to influence their conduct.

This approach is sometimes misunderstood and perceived as granting concessions to killers at the expense of denunciation, which is regarded as more effective. Over and above the points of such argument however, it is acceptable to state that simple denunciation does nothing to alleviate the immediate plight of the victims. Even the extensive media coverage of the civil war in El Salvador in the early 1980's and repeated denunciations of the violations regularly committed by the security forces failed to halt the conflict, which went on for another ten years and was marked by numerous abuses on both sides. Throughout those years humanitarian organisation like the ICRC were out in the field bringing aid to the civilian population, visiting political detainees and engaging in regular dialogue with the military and guerrilla leaders aimed at persuading them to limit the use of violence.

It would not be totally true to say that denunciation played no part. It helped to stir the public conscience both at the international level and within the country itself and this heightened awareness eventually led to peace. It also helped to compel all those involved in the conflict to cooperate with the humanitarian agencies. Without the pressure exerted at the international level, humanitarian organization like ICRC would certainly have had a hard time establishing constructive dialogue with combatants of all stripes.

In accordance with the role conferred upon it, the ICRC must act in response to infringements of international humanitarian law observed by its delegates and seek to induce the parties to the conflict to apply and respect the rules of the humanitarian treaties they have signed. The ICRC must also bring its influence to bear on other contracting states so as to comply with their responsibilities under Article 1 common to the Geneva Conventions and take steps vis-a-vis the parties to the conflict to ensure respect for these Conventions. ICRC delegation are in constant touch with all the parties to any given conflict in the course of their activities i.e. visits to prisoners, protection and assistance for the civilian populations affected. They protest directly to the competent authorities against any persecution they have observed, bringing to their attention any practices that are inadmissible under international humanitarian law so that they may put an end to them.

As a general rule steps taken by ICRC are confidential. ICRC promises the *de jure or de facto* **authorities allowing it to work and according its access to victims that it will not divulge publicly what its delegates hear of see in the performance of their duties, especially when visiting places of detention. This conspiratory silence by the institution is not applicable in the event of grave repeated violations and when the authorities, having been apprised of an infringement, fail to take appropriate measures of remedial action. In some cases the ICRC reserves the right to renounce its confidentiality in accordance with guidelines it has set itself and made public. The ICRC reserves the right to make public statement concerning violations of international humanitarian law if the following conditions are fulfilled.**
The violations are major and repeated;
The steps taken confidentially have not succeeded in putting an end to the violation.
Such publicity is in the interest of the persons or populations affected or threatened
The ICRC delegates have witnessed the violations with their own eyes or the existence of extent of those breaches has been established by reliable and verifiable sources[10].

The purpose of public representation is to say what the ICRC is doing in a specific situation, to raise awareness and sometimes to remind the states concerned of their responsibilities under international humanitarian law. They

may take various forms (solemn appeals, public statement, press release etc) and may be addressed to the state involved, to all parties to a conflict or to the community of states as a whole, or even to public opinion as a means of pressure that may have an effect on the state or states concerned.

The ICRC issued many appeals to belligerent parties and public declarations for example, in the context of conflict in the former Yugoslavia[11].

The interests of victims are ICRC's paramount consideration; they determine its decision to denounce publicly certain violations it has witnessed.

To carry out its mandate, the ICRC must have access to victims from the onset of hostilities. It must also receive maximum guarantees of security for its staff working in the field. The cooperation of government and parties to the conflict is therefore indispensable.

From the credibility of the ICRC and the trust placed on it, and based on the institution's independence from all political authorities, its strict adherence to the principle of humanity, neutrality and impartiality and on the discretion with which it works, the ICRC strive in particular, to establish and maintain continuous dialogue with its partners on the basis of confidentiality.

In this way the ICRC gains access to victims which the authorities and the parties to the conflict might have denied any rights, without this relationship of trust, this would have been impossible. It also means that the ICRC must keep its distance from all pressure groups, be they political, media based or any other kind.

The ICRC must do its utmost to safeguard its operational capacity. In the interest of the victims, it must refrain from taking any action or adopting any attitude that could compromise or hamper its work. Thus, the ICRC has always displayed great respect and always cooperating with inquiries or judicial proceedings instituted to repress violations of international humanitarian law; whether such procedures are initiated by a national authority or an international body[12].

It may not therefore participate in inquiries into alleged violations of international humanitarian law, considering the often-controversial nature of such allegations and its interest in remaining outside all controversy; be they political in nature or associated with the conflict[13]. Nevertheless it may intervene, if it is entrusted in advance, with such a mandate by means of an agreement, or if all the parties concerned have expressly requested it to do so. Furthermore it may not participate in setting up a commission of inquiry, except under the conditions outlined above[14]. In such a case, it will confine itself to providing its good offices so as to facilitate the choice of persons from outside its ranks qualified to serve on such a commission; it will furthermore do so only if

this entail no risk of making its activities in favour of victims more difficult, if not impossible or of jeopardizing its reputation as an impartial and neutral institution[15].

The ICRC therefore declines requests whether made directly or through one of its staff, to give evidence in court concerning facts linked to its work in the countries where it is present. This reserve is generally respected by governments.

The ICRC had furthermore set itself strict guidelines on the transmission of information regarding its activities to authorities other than those directly concerned. It agrees to supply only information that it has made public.

Inquiries and legal proceedings are aimed at establishing penal responsibility; they should logically lead to the conviction or acquittal of the accused. In either case the result will be difficult to accept for one or several of the parties involved. ICRC participation in any way could be a sensitive matter, as it could be construed as taking sides. It would also entail the risk of subsequent rejection of the ICRC[16]. Lastly, it is equally difficult to reconcile with the institutions undertaking of discretion vis-à-vis the parties to the conflict.

There is consequently a danger that the giving of evidence by the ICRC or by its delegates in inquiries or judicial proceedings might hinder the accomplishment of its mission as defined in the instruments of humanitarian law; for by so doing, the ICRC would be breaking its pledge of discretion both in respect of the parties to the conflict and to the victims themselves thereby undermining the confidence placed in it. As a result, the institution might be refused access to victims of present and future conflicts, and the safety of those it is trying to help and of the personnel working under its responsibility would obviously be compromised.

Whether it takes steps on its own initiative to put an end to confirmed breaches of international humanitarian law or its cooperation is requested in inquiries or judicial proceedings instituted to repress such breaches, the ICRC's approach will be guided by one overriding consideration, the interest of the victim[17].

That is why the ICRC asked the Presidents of the International Criminal Tribunals for the former Yugoslavia and Rwanda not to call upon its staff members to give evidence in criminal proceedings. This position would not however, prevent the ICRC from providing an international court with all the public documents in its possession, which might be useful in seeking the truth.

Statutory role of the ICRC. **The ICRC occupies a special place among humanitarian organizations because the community of states has assigned it, certain tasks relating to the application of international humanitarian law.**

One of these tasks is to "take cognizance of any complaints based on alleged breaches of international humanitarian law" [18]. An international court responsible for punishing such breaches would obviously be the most appropriate body to assume that function.

Another of ICRC's roles is to "work for the faithful application of international humanitarian law applicable in armed conflicts and to prepare any development thereof" [19]. There can be no doubt that the innovative jurisprudence emanating from an international court would do much to disseminate and also to strengthen the law.

Finally the ICRC is also required to "work for the faithful application of international humanitarian law" [20], and is expressly named in the conventions in connection with specific activities such as visiting prisoners of war, undertaking relief actions and restoring family links through its Central Tracing Agency. The work of an international court responsible for punishing violations of international humanitarian law is bound to interfere with the ICRC's operational procedures in the area of victim's protection. Indeed, in a trial the confidential reports in which ICRC informs the authorities of its findings during visits to places of detention or in connection with the conduct of hostilities might be used as evidence by the prosecution or the defence and the very people to whom they were addressed might well hand them over to the judges for that purpose.

It is our submission that humanitarian action is designed to produce an immediate result either by taking direct measures to relieve suffering or, as in the case of ICRC, by establishing a dialogue with the protagonists to convince them to sue for peace and respect international law. These efforts are geared primarily towards favouring the victims.

The judicial approach on the other hand, is set on the long term, like punishing those who violate international humanitarian law, upholds the credibility of the law, reminds the parties to conflict of their responsibilities and demonstrates the international community's determination to have the law applied. In this case the combatants are the prime targets.

In an ideal world, respect for the law should suffice and should ensure protection for people. As Henry Dunant pointed out over a century ago, moreover, our world is far from ideal and war time is a particularly good time for abandoning illusions. In the heat of the combat and the prevailing atmosphere of fear and hatred, men, women and children are subjected to inhuman acts which violates their fundamental rights. If immediate help and relief is of absolute necessity for their survival and this is far more important than even punishing the culprits after that role can only be fulfilled by humanitarian action which is independent and neutral, and acceptable by all. The warring parties must see the humanitarian agencies as being quite separate

from any penal system; otherwise they will deny these agencies access to victims. Moreover, combatants must be convinced that attacking humanitarian workers is serious crime, and that there are legal instruments to prosecute violators of such a crime.

It is around these two imperatives that the relationship between an international court and humanitarian bodies like the ICRC will be built. Thus, the ICRC should confine itself to its traditional roles of humanity, neutrality and impartially, and steer clear of political debates without taking sides. In addition, the ICRC's specific mandate as custodian of international humanitarian law, and its prevention related activities will make possible for the body to maintain a constant dialogue with all parties in any conflict. This will be possible because of its observance of confidentiality in its relationship with parties to the conflict.

Here are a few words about ICRC's legal status. It derives from the now universally recognized Geneva Conventions and from the statute of the Red Cross and Red Crescent movement. National Red Cross Societies are organization formed, and therefore based on rules of national laws and their international Federation a non – governmental organization. On the contrary the ICRC is neither an inter-governmental organization like UNICEF or the office of the United Nations High Commissioner for Refugees, nor is it a non-governmental organization like the catholic relief services or Amnesty International. At the Diplomatic Conference of 1949 and 1977 the private mononational ICRC was cited as a model humanitarian organization. It received explicitly a mandate through the Geneva Conventions. Today the ICRC's international legal status has been confirmed by the conclusion of over 51 headquarters agreements with governments. Switzerland, giving the ICRC full independence and all the immunities indispensable for its work in his home country recently signed such an agreement. In 1990 the International Community granted the ICRC observer status at the United National General Assembly, thereby providing further recognition of its special nature as a mononational private association of Swiss citizens with an international mandate and personality, which acts on behalf of war victims with due regard for the principles of neutrality, independence and impartiality. It was in the context of war between states that the work of the International Committee of the Red Cross first began to take shape. It all started in Solferino where, in the midst of fighting, local people, spontaneously, helped wounded soldiers on the battlefield under the guidance of a Geneva citizen, Henry Dunant. Later on, the ICRC broadened its activities to include assistance and protection of prisoners of war. Today delegates working in countries including all the major conflict areas of the world, pursue a great variety of activities. In certain conflicts, their work is particularly oriented towards observing the behaviour of military personnel. This enable the ICRC to submit to the authorities, any allegation it has received or observations it has made concerning violations of humanitarian law and to supervise the implementation of its recommendations. This kind of work has been carried out in Israeli occupied territories, during the Gulf war and

continues today in many conflict areas where ICRC delegates have direct access to the theatre of military operations, such as in the former Yugoslavia, Afghanistan, Rwanda, Angola, Somalia, Tajikistan, Mexico, Peru and elsewhere. ICRC also provides protection for prisoners of war and political prisoners. In almost every international conflict since the Second World War, the ICRC have been able to discharge its mandate with respect to prisoners of war. However, it has constantly had to fight serious violations of the provisions of the Geneva conventions relative to the treatment and repatriation of prisoners of war.

In various conflicts, particularly those in Africa, relief work play a primary role. Ethnic strife and power struggles regularly disrupt agricultural, economic and commercial life of many countries, leading to serious interruption in the food supply; dangerous conditions and massive population displacement. In such situations ICRC's delegates not only provide protection but also supply food and shelter. Some of these relief operations also includes measures to preserve livestock and to enable minimal agricultural subsistence.

The ICRC performs its legal work and operational activities unparallel so far. Over the years, international humanitarian law has become a complex field which has its dynamics, its own time frames, its own conference and historic commemorations. However, the ICRC continue to propose new humanitarian instruments taking accounts of its experience in the field, and current development in the means and methods of warfare. This is necessary because its delegates in the field, who are in direct contact with the evolving reality of conflicts, constantly have new legal and practical problems to solve. It is in order to respond to their requests for assistance that the ICRC strives to find new means both in emergencies and in the long term, to protect people from the effects of modern weaponry and to ensure greater respect for civilians.

Ever since the initiative was taken to adopt the original Geneva Convention in 1864, the ICRC has had an historical, moral and legal responsibility, to work for the development of and respect for international humanitarian law and its activities in this regard has been a resounding success. One only pray that the states party to the humanitarian treaties; will be alive to their obligations under international humanitarian law and accord more assistance and cooperation to the ICRC to achieve its goal of a peaceful world and individuals and states imbued with principles of humanity in their relationship with others.

6.2 SUMMARY OF THE CHAPTERS

Convinced that the immediate humanitarian response to war victims and the codification of widely accepted rules of conduct have their roots in antiquity, the philosophical literature of several culture and the statement of a few enlightened monarchs over the years shows that this is not a new problem.

However, it was with "A memory of solferino" written by Henry Dunant in 1862 and with the creation of the International Committee of the Red Cross, (ICRC)

that the modern version of these concepts came into being.

From its very inception some 139 years ago, the ICRC endeavoured to bring protection and assistance to victims of armed conflicts in two major ways. By developing and ensuring respect for international humanitarian law and by carrying out humanitarian operations in conflict cases to provide relief for the victims. It is against this background that chapter one of this research traces the historical development of humanitarian law.

The first time action was taken to assist wounded people on the battlefield was during the Italian war of independence in 1859. Five years later, an international conference attended by 16 European states adopted the Geneva Convention for the amelioration of the condition of the wounded in armies in the field, a treaty which contained the first rules for the protection of the wounded members of the armed forces and aid workers wearing white armbands marked with a red cross. It also laid down the very working principles that have guided the ICRC till date. Humanitarian law emerged from practical experience. This law was later developed and its scope of application broadened. A history of the Red Cross reveal that after every major conflict whether the world wars, or the liberation wars of the sixties and seventies – the ICRC submitted proposals for conventions to international community. History also show that the international community was only ready to examine and accept those proposals once mankind experience yet another tragic event. This was the case for example, with the proposed convention for the protection of civilian population, which the ICRC submitted for consideration to the international community gathered in 1934 in Tokyo for the international conference of the Red Cross. It was not until the end of the Second World War, against the backdrop of massive deportations and systematic extermination of population groups, that the ICRC proposal was finally discussed and adopted in 1949 as the fourth Geneva convention.

The same can be said of the process, which led to the adoption, by the Diplomatic Conference of 1977 of the Protocols Additional to the Geneva Conventions. Today a vast and sophisticated body of rules exists to limit the effects of war.

Thus, the departure from the question "why, in fact should there be legal limitations to belligerents actions aimed at destroying a foreign foe?" Hitherto asked by early lawmakers to the now prevalent question of how effectively can these restrictions be enforced and applied against the perpetrators. It is against this background that chapter two examined the definition of crimes under international law, war crimes and the prosecution of war criminals which has become so important to stem the impunity with which violation of international humanitarian law go unpunished. Thus the general scheme of repression codified in the four Geneva Convention of August 12, 1949 and in Additional Protocol 1 of 1977 is examined. The criminal jurisdictions of the International Criminal Tribunals for the former Yugoslavia and Rwanda and the Statute of

International Criminal Court were also discussed.

International humanitarian law established not only basic rights of the individual but also contains important machinery for guaranteeing observance of these rules, imposes obligation necessary to repress any act constituting a serious infringement of personal dignity or a grave threat to the security of the civilian population. The current spate of armed conflict and flagrant violations of humanitarian laws has revived interest on the sanction system to ensure greater respect for the law. This system is designed to halt violations and in particular, to repress grave breaches classified as war crimes. Chapter three espoused the theory of state and individual responsibility under international law.

Though the prosecution of war criminals after world war I was largely in effectual, it still gave the allied powers the incentive towards the end of the second world war to take steps to punish the leader of the third Reich for crimes committed during the war; and the Nuremberg trails were the culmination of these measures.

The historical impact of the Nuremberg trails with regard to the position of individual under international law has been interpreted very differently. By some, these trails, were taken to imply that individual, were unquestionably, subjects, of international law and could face international obligations. Others, however, asserted more cautiously that the trails were an expression of the victor's power or right to assume jurisdiction over the defeated enemy's territory and that the London charter as well as the Nuremberg trails represented a singular case of a supranational legal system, by which the victorious powers had pooled their respective jurisdiction and done together what each of them might have done separately. The chapter therefore established that whatever the case regarding the position of the individual under international law after the Nuremberg trials, the fact remains that, by creating the two International Criminal Tribunal for the former Yugoslavia (ICTY) and Rwanda (ICTR), the security council took a leap and established beyond any doubt that individuals may now, in respect of international humanitarian law appear as subjects bound by certain legal obligations directly under international law, and that they can be held individually responsible before an international forum for their violations of these obligations.

International humanitarian law provides for penalties, putting them into effect is unquestionably a serious issue. The penal regime of the humanitarian Conventions and the Additional Protocol, reveals that their substance remains valid on the whole and that the difficulties encountered nowadays arose from the fact that the means and will to implement these instrument are lacking. The problem is therefore more political than legal.

An examination of this elaborate penal regime and the concomitant sanctions of

the Geneva conventions and the additional protocol, the two ad hoc Criminal Tribunals for former Yugoslavia and Rwanda and finally the statute of International Criminal Court is what chapter four is all about.

Chapter five examined the fundamental issue of what court has jurisdiction to prosecute the breaches of international humanitarian law against the backdrop that all the indignation aroused by the crimes the international criminal tribunals are called upon to prosecute, the accused must be accorded the right to a fair hearing or trial. That effective repression of serious violations of international humanitarian law and respect for human rights are complementary and indispensable to each other, since they both contribute in upholding the rule of law.

The role of the International Committee of the Red Cross, (ICRC) in the development of international humanitarian law is monumental. The ICRC derives its legal status from the now universally recognized Geneva Convention and from the statutes of the Red Cross and Red Cross movement. At the Diplomatic Conferences of 1949 and 1977, the private mononational ICRC was cited as a model humanitarian organization and received explicitly a mandate through the Geneva Convention. Today the ICRC's international Legal status has been confirmed by the conclusion of 51 headquarters agreements with governments. In 1990 the international community granted the ICRC observer status at the United Nations Geneval Assembly, thereby providing further recognition of its special nature as a mononational private association of Swiss Citizens, with an international mandate and personality, which acts on behalf of war victims with regard to the principle of neutrality independence and impartiality. The penal responsibility and sanctions for breaches of international humanitarian law cannot be complete without according a of place to ICRC, informed its elaborate discussion in chapter six before concluding the research work and proffering the way forward.

6.3 CONCLUSION AND RECOMMENDATIONS

One cannot but agree that the principles underlying international law and emergency humanitarian action are still valid today as when they were first espoused. These are the principles of humanity, impartiality and neutrality.

The first principle is that of humanity. Humanitarian action in conflict situations must be motivated solely by the desire to help the victims, according to their needs and on the basis of a sound and independent evaluation. It is a question of being sensitive to the sufferings of others, discerning the essentials refusing to become trapped in routine and avoiding lowering the standard of the principle of fundamental human rights.

The second principle of humanitarian action is that of impartiality. Humanitarian action does not "sort out" victims according to any other thing

than their needs. It does not succumb to the temptation of racism nor exclusion. The principles of neutrality supplements the first two. A humanitarian operation is not a militant operation, and to attach any political objective or connotation to it would undoubtedly impair its credibility for all concerned in a conflict situation, and consequently its acceptability and efficacy. We are convinced that these principles remain valid today. They are indispensable in the long term for creating the atmosphere of trust without which humanitarian action would be impossible. A mere complacent proclamation of these principles is not enough. It is their practical application to conflict situation that yields the desired result. It is my submission that a careful look at the humanitarian conventions shows that their substance remains valid on the whole and that the difficulties encountered nowadays arise from the fact that the means and the will to implement these instruments are lacking. The problem is therefore more political than legal, and it is out of place to seek remedies through any other ways. A general revision of international humanitarian law would undoubtedly lengthy, costly and hazardous undertaking while it might provide a few useful improvements in some of the areas like collapse of the state and 'destructed' conflicts, that raises a problem which does not fit into the patterns either of international humanitarian law, or of human rights law or of the United Nations Charter, all three of which require their application of some state structure. It is equally likely that it would provide certain states with an excuse to renege on vital issues that had previously been accepted.

Moreover, the objective of universality, which has by now been virtually achieved where the Geneva conventions are concerned with the ratification of 188 states and with the Additional protocol not far behind, being binding on 154 and 146 states respectively. It is essential for rules applicable in armed conflict to be pursued for many years in regard to the new rules, with all the efforts of persuasion and the labourious procedures of ratification or accession that this would involve. In other words, the cost of any attempt to revise international humanitarian law, as compared with the effectiveness of such a move, appears far too high at present.

The acts thus designated by the protocols, together with the serious breaches listed in the conventions constitute an appropriate penal response to the most reprehensible acts committed in war time coupled with the classification of war crimes contained in the Rome Statute of International Criminal Court with jurisdiction over the crimes of genocide; crimes against humanity; war crimes and the crimes of aggression once a provision is adopted in accordance with articles 121 and 123 of the Statute defining the crimes and setting out the conditions under which the court shall exercise jurisdiction with respect to this crime of aggression. It is my submission that the impunity with which the violations of international humanitarian law and the law and customs of wars defy criminal responsibility is not predicated upon dearth of appropriate penal machinery and sanctions for breaches but as a result of lack of political and moral will on the part of the states party to give effect to these provisions and

respect their obligations under the Conventions and the Protocols to search for all persons guilty of war crimes and to bring them before the competent national courts. This state of affairs no longer hold sway with the establishment of the two ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda with mandate to prosecute and punish those guilty of the atrocities perpetrated in Rwanda and former Yugoslavia and the volume of sentencing judgments handed down by the two tribunal will certainly help to stem impunity and facilitate national reconciliation. The creation of the tribunals marks a refusal to accept impurity. It also signals the international community's commitment to ensuring respect for international humanitarian law and trying those responsible for seriously violating it.

Though their ad hoc nature fall short of the need for a universal criminal justice system; it is against this that one hails the coming into effect of the Rome Statute of International Criminal Court on 1st July, 2002 as a turning point in the established status quo, a watershed in a new philosophy of a universal criminal justice system with jurisdiction to prosecute and punish international criminals.

The international criminal tribunals are in the vanguard of international repression of serious violations of humanitarian law, and their activities may serve as reference points for the work of the permanent Criminal Court. It is imperative that the credibility of such international court will, nevertheless, depend on the decision made to determine the guilt or innocence of the accused persons, while ensuring that all the judicial guarantees, designed to secure respect for the individual are provided. Despite all the indignation, criminal tribunals are called upon to prosecute, the accused must be accorded the right to a fair trial. For an effective repression of serious violations of international humanitarian law and respect for human rights are complementary and indispensable like two legs on the same body they make many forwarding possible by taking the weight on first one, then the other as they both contribute to the upholding of the rules of law.

As a multilateral treaty, the Rome Statute of International Criminal court in spite of its unique features as well as its flaws, marks an indisputable advance in international procedural criminal law. It established a permanent and complex mechanism for international justice which by and large seems well balanced. In particular, the three pronged system set up in Rome for triggering the courts action, though somewhat cumbersome, strikes a fairly satisfactory balance between states concern, and demands of international criminal justice. The role it assigned to victims in international criminal proceedings before the court is extremely innovative.

The Rome statute appears to be less commendable as far as substantive criminal law is concerned. Many crimes have been defined with the required degree of specificity and the general principles of criminal liability have been set out in detail.

The notion of war crimes has rightly been extended to offences committed in times of internal armed conflict. In addition, progress made in the field of

penalties for capital punishments has been excluded. However, in many areas of substantive criminal law, the statute marks a retrogression with respect to existing international law, this applies in particular to war crimes.

Now that the ICC has come into effect on 1st July 2002 with the ratification of the treaty by 60 signatories one of the keys to its success, it is submitted, lies in the choice and election of highly professional and absolutely independent persons for the positions of prosecutor and judges. The election of persons of great competence and integrity may ensure that the ICC will become an efficient body, capable of administering international criminal justice in such a manner as to attract the trust and respect of states; while fully realizing the demands of justice.
It is imperative that all states, and individuals concerned strive not only to make the ICC a living reality, but also to improve its profile as much as possible. Now more than ever before is a permanent International Criminal Court needed to curb man's tendency to annihilate his neighbour, mistaking him for his own shadow[21].

Chapter Six Notes and References

1. **See Article 4 of the statute of the international committee of the Red Cross adopted on 24 June 1998.**
3. **Article 4, para. 2 (c) (d) and E, of the statute of international committee of the Red cross.**
4. **Article 126 of the third convention and Article 143 of the fourth convention**

5. **Article 10 of the first convention, 10 of second Geneva Convention, 10 of third Geneva Convention 11 of the fourth convention, Article 3 common to the conventions.**
6. **Article 9,9,9, and 10 and Article 3, para 2 common to the convention, Article 4, para 3 of the statute**
7. **See Dutli, Marie Teresa and Pellandini, Cristina "The International Committee of the Red Cross and the implication of the system to repress breaches of international law" published by IRRC, may – June 1994, PP. 248-249.**
8. **See Stroun, Jacques "International criminal jurisdiction, international humanitarian law and humanitarian action" published by IRRC. See http:/www.icre.org/icrc. eng. Nsf/c125 . . p.2**
9. **According to common Article 1, all states party to the four Geneva Conventions are jointly responsible for ensuring application of those instruments.**
10. **See Stroun, Jacques (note 7) P. 3**
11. **See "Action by the ICRC in the event of breaches of international humanitarian law" IRRC No. 221, March April 1981, PP. 76 – 83.**
12. **See Dutli, Marie Teresa and Pellandini, Cristina, op. Cit. (note 6) Footnote 22, p. 247.**
13. **Dutli, Maria Teresa and Pellandim, Cristina op cit (note 6) P. 250.**
14. **Pursuant to the principle of neutrality, the ICRC "may not take side in hostilities or engage at any time in controversies of political racial religious or ideological nature". The strict observance of this principle by the ICRC is a sine qua non for it to be able to pursue its humanitarian activities under optimum conditions in cases of armed conflict or disturbance.**
15. **See (note 10)**
16. **See (note 10)**
17. **See Gasser, Hans Peter "Respect for fundamental humanitarian guarantees in time of armed conflict the part played by ICRC delegates" IRRC, No 287, March – April 1992, PP. 121 – 142.**

18. **See (note 10)**
19. **Statute of the international committee of the Red cross, Article 4 Para. 6**
20. **Ibid para g.**
21. **Ibid, Article 4 para c.**
22. **Jung, C.G; describing a person's shadow as "his own worst danger" wrote' It is everybody's allotted fate to become conscious of and learn to deal with his shadow . . .If, for instance the French Swiss were all devils, we in Switzerland could have groundest civil war in no time . . ." "The fight with the shadow" in Essay on contemporary events (1946) at 6 – 7.**

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